NATIONAL FOREIGN TRADE COUNCIL

The Doha Development Agenda and GATS Mode 4:

Recommendations for Improved Rules on Temporary Global Mobility

March 2005

National Foreign Trade Council
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Introduction

The National Foreign Trade Council (NFTC) believes that an ambitious outcome in the Doha Development Agenda negotiations will require commitments in the area of Mode 4. The NFTC further believes that this mode of delivery is critically important for international companies doing business across international borders in the 21st century.

The World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) establishes four modes by which services may be traded. The fourth mode involves the supply of a service "through presence of natural persons of a Member (country) in the territory of any other Member." "Movement of natural persons" under Mode 4 refers only to the temporary stay of persons for the purpose of providing a service. It specifically excludes persons seeking citizenship, permanent employment or permanent residence in a country. Accordingly, these NFTC recommendations pertain only to the temporary movement of natural persons across borders for the purpose of supplying a service.

The realities of the marketplace make temporary global workforce mobility a fact and necessity in today's economy. Just as business must move other assets around the world to respond to economic dynamics and remain globally competitive, corporations must compete for and dispatch intellectual and managerial talent around the world. These temporarily dispatched workers start new enterprises, fill local skill shortages, undertake transnational joint ventures, cross-train international personnel, and the like. The resulting mobility of global intellectual capital fuels growth and benefits worldwide trade, providing economic opportunities for both international and local labor.

This temporary workforce mobility allows American business to remain competitive and innovative. In fact, barriers to workforce mobility harm US economic interest by forcing businesses to abandon business plans or to take alternative measures to stay in the marketplace. For example, a company prevented from dispatching key talent to a foreign market may instead decide that it must move resources and assets outside of the United States. Also, it has been estimated that persistent problems in government handling of visas for foreign business travelers have cost U.S. exporters more than $30 billion in revenue and indirect costs between July 2002 and March 2004.[1]

Labor mobility benefits developed countries generally because they are better able to attract investment and fill worker and skill shortages. Developing countries also benefit through higher wages, larger remittances from abroad and increased investment. In truth, movement of managerial and intellectual capital has become such an integral component of conducting business that a company's ability to move employees efficiently into another country on a temporary basis is a critical component of international competitiveness.

[1] Do Visa Delays Hurt U.S. Business?, Survey Results and Analysis of eight U.S. international business groups; by The Santangelo Group, June 2, 2004.

However, despite the increasing importance of global mobility, it remains the least-developed aspect of trade of services under the General Agreement on Trade in Services (GATS). Due to highly politicized national debates fueled by security concerns, labor protectionism, and concerns about collective identity, commitments filed by countries under GATS Mode 4 (Movement of Natural Persons) have been fewer and more limited than those under the other modes of supply.

The NFTC urges governments to take advantage of the Doha Development Agenda (DDA) to commit to and implement new rules and policies to create an improved framework that promotes the benefits of temporary global mobility while providing protection from national security threats and unfair competition to local labor. The NFTC believes that these proposals would constitute a useful contribution to the negotiations and would at the same time offer real benefits to the American economy and worldwide trade. To achieve such a framework, we make the following recommendations[2]:

Substantive Recommendations

1. Eliminate unnecessary visa delays and expand and clarify the definitions of permissible activities of **business visitors**.
2. Maintain options for companies to operate flexible **intra-company transferee** programs and continue to offer pre-certification programs.
3. Increase options for companies to retain **high-demand professionals** and ease restrictions for their dependents.

Procedural Recommendations

4. Provide adequate resources for **timely and consistent processing of applications**.
5. Develop effective and secure **electronic filing** and other technology initiatives.
6. Establish mechanisms for **transparency and communication** between the government and companies.
7. Provide adequate funding for **efficient security clearance** measures.

[2] For illustrative purposes, the text of this paper contains, in italics, an explanation of the way these proposals would affect American law and practice, as well as some reference to the practices in selected markets overseas. The NFTC envisages that these proposals would result in changes to law and practice in other countries.

Substantive Recommendations

1. Eliminate unnecessary visa delays and expand the definitions of permissible activities of business visitors.

The largest category of international business travelers is classified as business visitors who enter other countries for short terms of stay and receive no remuneration in the host country. Individuals use the business visitor classification to travel abroad for meetings, negotiations and trade shows. A common difficulty of this classification is that business visitors often experience long delays in visa issuance, especially for the initial application. While a business visitor's activities are temporary, they are often time-sensitive. Delays in visa issuance can lead to a chairman missing a board of directors meeting, a sales representative losing an opportunity to attend an international trade show, and countless other lost business opportunities that inhibit the flow of international trade.

Therefore, governments should commit to issuing business visitor visas within two weeks. To this end, governments should implement business express programs, which provide expedited visa interviews and issuance to employees of pre-certified companies. Governments should strive to develop flexible guidelines and make the programs available to a range of companies in terms of size and industry sector. In addition, governments should expand pre-clearance programs to facilitate admission procedures for frequent business travelers.

[In the United States, this proposal would require procedural and policy changes. It would also require reallocation of resources to implement such programs and ensure short timeframes for responding to applications and conducting security clearances at U.S. consulates. Practices vary overseas, but would also require similar changes.]

Governments should also improve the consistency and predictability of permissible activities for business visitors by adopting expanded and harmonized definitions of business visitor activities for which no remuneration is received within the host country, to include:

- participating in a commercial transaction, litigation, negotiation or consultation on behalf of an enterprise outside the host country (outside enterprise)
- participating in a scientific, educational, professional or business conference or conventions
- participating in a voluntary service program
- attending a meeting of a board of directors
- prospecting for an active investment
- providing after-sales service on behalf of an outside enterprise
- observing professional or business conduct
- exhibiting at international fair or trade show
- marketing goods or services to prospective clients
- purchasing goods on behalf of an outside enterprise
- conducting market or product research on behalf of an outside enterprise
- technical, scientific and statistical researchers conducting research on behalf of an outside enterprise
- management and supervisory personnel engaging in commercial transactions on behalf of an outside enterprise
- financial services personnel engaging in commercial transactions on behalf of an outside enterprise

- coordinating implementation of a global project throughout an international organization
- providing professional services (legal, consulting, auditing) in support of worldwide contract

A universally accepted visa classification, such as a GATS visa, would serve as a mechanism for establishing expanded and internationally harmonized definitions for business visitor activities.

[The first eight points above are currently identified in the Department of State's Foreign Affairs Manual as permissible business activities. Points 9-14 are from NAFTA; points 15 and 16 are additional suggestions. Practices vary in overseas markets, but as a general matter most governments permit foreign business visitors to attend business meetings and conferences, make sales calls to potential clients and attend "fact finding" meetings. However, beyond this common core of permissible activities, rules vary widely among countries on additional permissible activities. Some countries, such as India, have very broad and liberal definitions of permissible business activities. Canada permits a range of activities, including various corporate business activities, purchase and sale of goods, training at a Canadian parent or subsidiary, various corporate business activities, after sales service and personal-domestic services for employers normally stationed outside Canada. In addition, Canada designates a wide range of permissible business activities for nationals covered under NAFTA and other bilateral trade agreements, and also has established a GATS business visitor visa for citizens of signatory countries to that agreement. The United Kingdom permits business visitors to undertake a fairly wide range of activities including conducting fact-finding missions, installing products, and providing consulting and advice to U.K companies. On the other hand, many countries, including Japan, New Zealand, Switzerland and Venezuela, permit only the core business visitor activities. Most countries in the European Community, outside of the liberalized work provisions afforded to citizens of the EC, permit business visitors to perform only the core business visitor activities. Some countries permit business visitors to perform work of a technical nature, while others strictly prohibit such activities. In today's global environment, it would be a significant benefit to international commerce to establish a predictable and consistently accepted set of definitions of permissible business visitor activities so that companies can plan international business activities under a uniform set of rules.]

2. Maintain options for companies to operate flexible intra-company transferee programs and continue to offer pre-certification programs.

Many countries, including the United States, currently permit multinational companies to transfer executives, managers and essential workers from abroad. The intra-company transferee may travel abroad on a short-term project, such as training staff in a foreign office on a new product or installing specialized equipment, or on a longer-term assignment, such as managing a foreign office or developing a start-up operation. The intra-company transferee categories allow foreign companies to transfer international personnel to start up operations, generate products and create local jobs. Typically, international transfers are concerned about the ability of their families to thrive in the new environments, so dependent work authorization and educational opportunities are significant factors in a transferee's decision to accept an assignment.

We urge governments to make commitments that recognize the value and flexibility of this long-standing group of classifications. As intra-company transferees do not compete with the local labor market, governments should refrain from imposing labor market tests or wage requirements on such international personnel. Governments should expand existing definitions of intra-company transferees to include the international movement of professional trainees and transfer of employees to countries where companies do not have operations to perform services

pursuant to a contract. Also, governments should retain and expand pre-certification programs for established companies to ease visa processing for international executives, managers and executives. Family members of intra-company transferees should be permitted to work, obtain driver's licenses, and otherwise be able to further their professional and educational goals.

[Adoption of these recommendations would reflect the status quo of current U.S. law and regulation. In the last session of Congress, several narrowly defeated bills would have imposed a labor market test and prevailing wage requirement on the L-1 classification. Legislation was also introduced to eliminate the popular and extremely beneficial blanket L-1 program, which permits multinational companies to pre-certify the corporate relationship among affiliates and thereby streamline the application process by taking U.S. Citizenship and Immigration Services out of the process and allowing employees to apply for the L-1 classification directly at U.S. consulates abroad.[3] Ultimately, the only provisions pertaining to L-1 visas enacted in the 108th Congress raised the required time of work abroad for a related entity for an applicant under the L-1 program from six months to one year, eliminated the L-1B specialized knowledge category for use by contractors and "job shops," and imposed an additional $500 "fraud fee" on L-1 filings.[4] However, business advocates remain concerned about future legislative and regulatory restrictions to this program that is vital for multinational corporations.

Current law in the United States allows spouses of L-1 transferees to obtain work authorization and driver's licenses, but does not extend this entitlement to children (which would require a regulatory change). In the United States, all dependents of L-1 transferees may attend school. Although it would require potentially controversial legislative changes in the United States, we believe that our recommendations to expand the L-1 to include the transfer of professional trainees and sending transferees to a country where the company does not have operations to perform services pursuant to a contract would provide significant benefits to international commerce.]

3. Increase options for companies to retain high-demand professionals and ease restrictions for their dependents.

Most countries permit entry for professionals to fill shortages of certain skills or professions. Worker shortages hamper economic growth, and as the global economy grows more robust, it is critical that companies have ready access to professionals with important skills. High-demand professionals fill an important role in recovering economies, particularly in fields where the needs for specific skills and techniques quickly change. Similar to the international transferees, high-demand professionals are concerned about the opportunities for their family members to work and attend school in the host country. Unfortunately, rules and policies often place unrealistic restrictions on the high-demand professional classifications that significantly hamper their global mobility.

To facilitate the movement of high-demand professionals, countries should avoid the use of quantitative restrictions (quotas), or alternatively provide for mechanisms to adjust quota levels

[3] See, for example, S.1452, "The USA Jobs Protection Act of 2003" (Dodd), and H.R.4415, "The Save American Jobs Through L Visa Reform Act of 2004" (Hyde).

[4] FY 2005 Omnibus Appropriations Bill, P.L. 108 - 447 (H.R. 4 818), signed into law by the President on December 8, 2004.

in a realistic, quick-response fashion to calibrate levels to actual economic need. The vast majority of economies in today's world do not impose limits or quotas on the temporary movement of professionals into the country. On the contrary, a number of countries have established incentive programs to attract valuable professional talent to their economies, particularly in the information technology area. Countries that do impose quotas should exempt certain types of high-demand professionals, such as employees of institutions of higher learning, non-profit research institutions and government research institutions and graduates of domestic masters and other post-baccalaureate programs. With respect to families of high-demand professionals, countries should permit spouses and other dependents to work, or at a minimum to easily obtain a driver's license, which is a necessity in many areas where the professionals work.

[The prevailing practice among developed and developing countries is to refrain from imposing numerical limits on temporary movement of professionals into the economy. Countries including Canada and New Zealand have incentive programs designed to increase the numbers of temporary foreign professionals entering their countries. Notably, the United States is one of the few countries that restricts temporary entry of professionals through the annual limitation of the H-1B cap. The probability of any modification to the H-1B cap in the United States seems very low at the present time beyond the small recent legislative expansion of the current exemptions to the cap. The recent Omnibus Appropriations legislation included a provision to exempt 20,000 graduates of U.S. masters and higher programs from the H-1B cap each fiscal year, effectively increasing the number of available H-1B visas beyond the prior 65,000 limit.[5]*The proposal to delegate the mechanism for determining adjustments to any cap to a non-legislative body may have some appeal, but care must be taken to create an environment that promotes decisions based on fair, objective and non-political criteria, particularly in light of certain professional and organized labor groups' strong opposition to the H-1B program.*

With respect to spouses and other dependents, the ability to work, or at least to obtain a driver's license, is a critically important issue, just as it is for transferees. In the US, the driver's license issue is largely one of state and local law and regulation. Rules vary from state to state, with some requiring a social security number (SSN), which currently is not available to spouses and dependents of H-1B professionals. Other states accept evidence of non-immigrant status, or provide licenses for shorter set time periods or for the duration of the immigrant status. Possible solutions may be to require states to accept IRS tax identification numbers as an alternative to the SSN, or for the Social Security Administration (SSA) to issue restricted, i.e., non-work, social security cards. The SSA has experimented with the latter, but does not currently issue such cards. Naturally, any system for issuing such cards would have to be designed to prevent their misuse or compromise. It is notable that the recently enacted Intelligence Reform and Terrorism Prevention Act of 2004 includes provisions requiring states to establish uniform standards for issuing driver's licenses and identification, but does not provide any substantive guidelines.]

[5] Id.

Procedural Recommendations

The NFTC believes that the recommendations on procedural improvements should for the most part meet with broad acceptance, at least in principle. Capacity, in the form of funding and resource commitment, would seem to be the only potential point of concern.

4. Provide adequate resources for timely and consistent processing of applications.

For an international company to have confidence and security in its ability to move personnel to an office or project in another country, there needs to be predictability on timeframes and outcome of petitions, visas and work permits. Delays and unpredictability make it extremely difficult for companies to strategically plan for variances in workload, deadlines and contract obligations. Although we recognize that agencies must deal with security concerns and budget constraints, we nonetheless urge governments to commit to sufficient funding and training to adjudicate petitions in a timely and consistent manner. Increased training would avoid the wasted resources expended on correcting unnecessary administrative and legal errors.

5. Develop effective and secure electronic filing and other technology initiatives.

Similar to other government agencies, immigration authorities should make every attempt to convert their processes to accept electronic filing and otherwise take advantage of modern technology. Electronic filing alone would save companies and governments significant amounts of money in mailing and processing costs.

6. Establish mechanisms for transparency and communication between the government and companies.

International companies significantly benefit from a system in which they can communicate with the government regarding employees' cases. We urge governments to establish effective communication mechanisms so that companies have the ability to obtain forms, review the status of filings, schedule appointments and file petitions on the internet. In addition, it is important that agencies provide companies with points of contact or liaison mechanisms for resolution of errors and other problems. Government agencies should publish accurate and timely processing time reports for the various filings.

7. Provide adequate funding for efficient security clearance measures.

During this time of heightened vigilance in matters of national security, we clearly recognize and respect governments' mandates for security clearance procedures to protect national security interests. However, it is critical that increased scrutiny is conducted in a meaningful, targeted manner without unnecessarily hampering the international movement of people and trade. To accomplish this objective, many countries have begun to monitor movement of people through machine-readable documents, biometric identifiers, integrated government databases and other new technologies. While we applaud the increased emphasis on security, we urge governments to allocate sufficient funding to implement these new systems so that global mobility is not impeded by lengthy delays caused by inefficient security measures.

[The United States already has taken steps toward electronic filing and improved transparency. The Citizenship and Immigration Services (CIS) has begun to accept a limited number of filings via the internet. At this time, the process needs a number of improvements, but it should be made

more efficient over time. Once a case has been filed, simple status information is available from the CIS website. The website also has the capability to schedule walk-in appointments, but the system so far is generally overloaded and appointments are often unavailable. Point of contact is very poor with CIS, where all calls have to go through a 1-800 number that is difficult to reach and is staffed by call center employees with very little training. CIS publishes fairly helpful processing time charts. The Department of State has started to publish visa processing times, but the numbers often appear to be incorrect. Obtaining multilateral commitment to these procedural recommendations would have the benefit of providing momentum to the U.S. effort to streamline and improve transparency.]

Conclusion

In this paper, NFTC has made a number of recommendations for specific commitments to establish uniform and reasonable standards for the movement of international business visitors, intra-company transferees and high-demand professionals. The NFTC urges governments to make commitments to execute these standards by establishing effective processes supported with adequate resources and technology. Governments should provide sufficient transparency and communication mechanisms to ensure the domestic processes are effective in achieving the substantive goals.

The NFTC believes that the international mobility of temporary personnel is a critical component of the global efforts to liberalize trade. Although a number of factors have slowed the pace of the negotiations on international mobility, including concerns over national security and unfair competition with local labor, NFTC believes that a set of sensible and uniform commitments on the movement of temporary international personnel is a critical component of reducing barriers to international trade. To further the ambitious objectives of the Doha Development Agenda, governments will need to make significant commitments under Mode 4 of the General Agreement on Trade and Services to foster a fertile environment for international commerce, which in turn will bring significant benefits to developed and developing economies, companies and workers of today and tomorrow.

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