No. 11-35556

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN R.G. SMITH,

Petitioner - Appellant,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION;
UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
ALAN BERSIN, Commissioner of US Customs and Border Protection;
MICHELE JAMES, Field Director of US Customs and Border Protection;
JANET NAPOLITANO, Secretary of Department of Homeland Security,

Respondents - Appellees

ON APPEAL FROM THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER'S APPEAL TO REVERSE THE DECISION OF THE DISTRICT COURT

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Canadian citizens seeking nonimmigrant admission to the U.S. are exempted from the expedited removal process by 8 C.F.R. § 235.3(b)(2)(i). Nevertheless in the case at bar, as in many others, United States Customs and Border Protection (CBP) exceeded its jurisdiction by wrongfully subjecting Petitioner, a Canadian citizen seeking nonimmigrant entry to the U.S., to expedited removal pursuant to INA § 235(b)(1), 8 U.S.C. § 1225(b)(1). The District Court found that it lacked subject matter jurisdiction to scrutinize CBP's abuse of authority.

Thus, the case at bar raises the issue of whether a Canadian citizen seeking nonimmigrant entry to the United States at a land Port of Entry who allegedly lacks proper documentation under INA § 212(a)(7), 8 U.S.C. § 1182(a)(7), is subject to expedited removal pursuant to INA § 242, 8 U.S.C. § 1252. As there is no case law on the issue as to whether nonimmigrant Canadians are subject to expedited removal, the case at bar presents a matter of first impression that is of critical concern to the USA/Canada cross-border business community.

I. Statement of Interest of Amici Curiae

This Amici Curiae brief is submitted on behalf of the following organizations ("Amici"):

Bellingham/Whatcom Chamber of Commerce
British Columbia Chamber of Commerce
Northwest Economic Council
Pacific Corridor Enterprise Council

Amici are non-profit organizations whose missions include advocating the removal of barriers that impede the legitimate flow of people, goods and services across the USA/Canada border. A more detailed description of Amici and the sources of authority to file, as well as other information as required of Amici by Rule 29(c) is included as Appendix I to this brief.

Amici are concerned that the Trial Court's decision, if upheld, will have far-reaching negative consequences, resulting in diminished trade and commerce between the United States and Canada. Applying expedited removal against Canadians seeking nonimmigrant admission to the U.S. is one of a number of U.S. government practices that create a chilling effect on cross-border trade with Canada.

II. Argument

A. Trade and Commerce Between the U.S. and Canada Is A Key Component of the U.S. Economy

Canada and the United States share the greatest bilateral trading relationship in the world. Each country is the largest trade partner of the other. In 2010 this bilateral trade approached $645 billion, with more than $1.7 billion worth of goods and services crossing the Canada-U.S. border every single day.[1]

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[1]Government of Canada, "Trade and Investment: The Canada-U.S. Trade and Investment Partnership", *available at*

Canada is the biggest export market for U.S. products, ranking first for thirty-four states as the leading export market for goods in 2008, and second for eleven others. More than 8 million U.S. jobs - 4.4% of total U.S. employment or 1 in 23 American jobs - depend on trade with Canada. [2]

Services account for the largest share of these trade-related jobs. These include high-wage occupations such as finance, insurance, legal, managerial, advertising and other professional services.[3] Service providers in these sectors who engage in cross-border trade are frequently called upon to cross the USA/Canada border in nonimmigrant status to perform their duties.

Canada ranks highest in foreign visitors to the U.S., providing nearly 20 million visitors during 2010 alone.[4] Canada is also the largest source of visitor spending in the U.S.; Canadian visitors spent $20.8 billion dollars in the U.S. in 2010.[5]

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http://www.canadainternational.gc.ca/washington/commerce_can/index.aspx?lang=eng&menu_id=45

[2] L. Baughman and J. Francois, "U.S.-Canada Trade and U.S. State-Level Production and Employment: 2008", *available at* *http://www.canadainternational.gc.ca/washington/assets/pdfs/Jobs_Study_2008_FINAL-en.pdf*

[3] Id.

[4] U.S. Department of Commerce, International Trade Administration, Office of Travel and Tourism Industries, "Canada Travel Summary STATS-AT-A-GLANCE 2011 YTD (current as of August 29, 2011)" *available at* *http://tinet.ita.doc.gov/outreachpages/download_data_table/Current_Canada_Stats-At-A-Glance_2011_YTD.pdf*

[5] Id.

Current figures aside, the USA/Canada trade relationship cannot be taken for granted. In a 2005 diplomatic cable sent to the White House, the Department of State, and the United States Trade Representative, then U.S. Ambassador to Canada Paul Cellucci stated, "The risk that business will be obstructed at the [USA/Canada] border by discretionary U.S. actions…have become major risks to the economy..."[6]

Cross-border trade groups share Cellucci's concerns. One group states bluntly that the situation has deteriorated to the point where the border "threatens to become the greatest non-tariff barrier the world has ever seen."[7]

Dr. Hart Hodges, the Director of Western Washington University's Center for Economic and Business Research, has documented the effects of increased post-9/11 border security on those seeking entry to the U.S. at Cascade Gateway border crossings[8] on the USA/Canada border.[9]

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[6] 05OTTAWA268, Ambassador Paul Cellucci, "Placing a New North American Initiative", Jan 28, 2005, *available at* *http://wikileaks.ch/cable/2005/01/05OTTAWA268.html#*

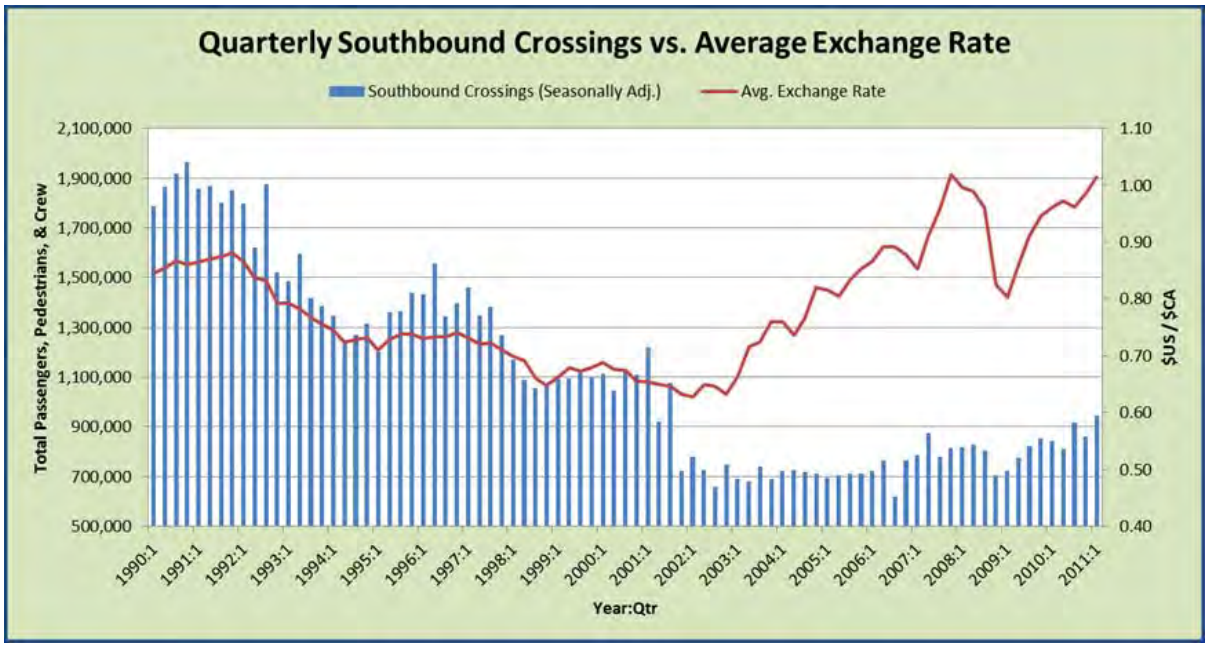
[7] Coalition for Secure and Trade-Efficient Borders, "Rethinking Our Borders: A New North American Partnership," July 2005, *available at* *http://www.cme.mec.ca/pdf/Coalition_Report0705_Final.pdf*

[8] Whatcom County, WA has 4 major land border crossing ports of entry as follows: 1)Peace Arch/Douglas, 2)Pacific Highway, 3)Lynden/Aldergrove, and 4)Sumas/Huntingdon. These crossings are collectively referred to as the Cascade Gateway. The Cascade Gateway includes the third busiest passenger vehicle crossing on the U.S.-Canada border and the fourth busiest commercial crossing.

[9] Letter from Hart Hodges to Greg Boos, November 8, 2011 (copy attached as Appendix II to this brief).

Dr. Hodges' research reveals that before 9/11, there was a direct correlation between the U.S./Canadian dollar exchange rate and the number of Canadians crossing the U.S. border. Immediately following 9/11, the number of Canadians crossing the border fell dramatically. Despite a sharp rise in the value of the Canadian dollar in the ensuing years the number of border crossers has remained low.

Thus the striking post-9/11 increase in the value of the Canadian dollar has had almost no effect on border crossings, while prior to 9/11 it had always had a strong effect. Dr. Hodges has supplied the chart below illustrating the post-9/11 disconnect between the exchange rate and Canadian border crossers.[10]



[10] For readers who print or view the chart in black and white, the average exchange rate is the jagged line running horizontally across the chart while the number of southbound border crossers are the vertical lines.

Dr. Hodges' research confirms post-9/11 border security measures are the major factor in the post-9/11 disconnect between the exchange rate and the number of Canadian border crossers. Amici submit that the indiscriminate use of expedited removal on Canadians seeking nonimmigrant admission to the U.S. constitutes one of the post-9/11 security measures contributing to the disconnect.

B. Expedited Removal Generally

Expedited removal is a procedure established as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996), 302, codified at INA §235(b)(1)(A), 8 U.S.C. §1225(b)(1)(A), authorizes CBP to deny entry to certain aliens seeking entry to the United States and to bar them from entry for a period of five years. This authority covers aliens who are inadmissible because they lack valid entry documents or because they are using counterfeit, altered, or otherwise fraudulent or improper documents. Aliens subjected to expedited removal are not referred to an immigration judge except under certain circumstances, i.e. if the alien makes a claim to legal status in the United States or demonstrates a credible fear of persecution if returned to her home country.[11]

[11] The expedited removal scheme also gives United States Immigration and Customs Enforcement (ICE) authority to place certain persons who are within the United States into expedited removal. As Petitioner was placed into expedited removal upon seeking entry to the United States at a port of entry, the case at bar does not involve such a matter.

C. Judicial Review

Generally speaking, Congress has said that an alien subjected to expedited removal is not entitled to judicial review of the order of removal. INA § 242(e), 8 U.S.C. § 1252(e). Amici assert that at least five exceptions exist to the general rule.

Three of the exceptions permitting review are set forth in INA § 242(e)(2), 8 U.S.C. § 1252(e)(2): a court may review whether: '(A) the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien admitted for permanent residence, [or is a refugee or has been granted non-terminated asylum].

Amici contend that the fourth exception is set out at INA § 235(b)(1)(A)(iii)(I), 8 U.S.C. § 1225(b)(1)(A)(iii)(I). this section gives the Attorney General the discretion to apply the expedited removal scheme as set out in INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) and INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) to "any and all aliens" with the exception of those aliens who are "native[s] or citizen[s] of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations" and who arrive "by aircraft at a port of entry." It follows that judicial review would be warranted in a case where CBP abused its authority and placed "native[s] or citizen[s] of a country in the Western Hemisphere with whose government the

United States does not have full diplomatic relations" and who arrive "by aircraft at a port of entry" into expedited removal.

Central to the issue in the case at bar, INA § 235(b)(1)(A)(iii)(I), 8 U.S.C. § 1225(b)(1)(A)(iii)(I), as implemented, also creates a fifth exception permitting judicial review. Pursuant to the authority granted by this statute to apply the expedited removal scheme to "any and all aliens" as set out in the previous paragraph, and perhaps by other authority as well, the Attorney General promulgated 8 C.F.R. § 235.3. As part of this rule, at 8 C.F.R. § 235.3(b)(2)(i), the Attorney General specifically exempted from expedited removal those " **for whom documentary requirements are waived under ... [8 C.F.R.] § 212.1**." (Emphasis added). Given this regulation, Amici assert that judicial review is available where CBP has abused its authority and placed one "for whom documentary requirements are waived under… [8 C.F.R.] 212.1" into expedited removal.

D. <u>Documentary Requirements Are Waived for Canadian Nonimmigrants Such As Petitioner</u>

INA § 212(a)(7)(B), 8 U.S.C. § 1182(a)(7)(B),sets out the documentary requirements for nonimmigrants as follows:

> In general.-Any nonimmigrant who-
>
> > (I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period

> of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or
>
> (II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission, is inadmissible.

As noted in a recent report to Congress,[12] the United States

> "… has 24 major nonimmigrant visa categories, and 87 specific types of nonimmigrant visas are issued currently. Most of these visa categories are defined in §101(a)(15) of the Immigration and Nationality Act (INA). These visa categories are commonly referred to by the letter and numeral that denotes their subsection in §101(a)(15); for example, B-2 tourists, F-1 foreign students, … H-1B temporary professional workers, J-1 cultural exchange participants, and S-4 terrorist informants."

By regulation, documentary requirements are waived for most Canadians seeking to enter the United States as nonimmigrants; 8 C.F.R. § 212.1 states "A visa is generally not required for Canadian citizens, except those Canadians that fall under nonimmigrant visa categories E, K, S, or V …" [13] Accordingly, most Canadian nonimmigrants fall squarely into that group of aliens that the Attorney

[12] Congressional Research Service, U.S. Immigration Policy on Temporary Admissions, Ruth Ellen Wasem, February 28, 2011, pp 4-5.

[13] E visas are authorized by INA § 101 (E), 8 U.S.C. § 1101 (E), for persons who are natives of countries with whom the U.S. has treaties of trade or navigation and who have made a substantial investment in a viable U.S. business or who are engaged in substantial trade with the U.S.. K visas are authorized by INA § 101(K), 8 § U.S.C. 1101(K), to facilitate the temporary entry of fiancés, fiancées or spouses of U.S. citizens. S visas are authorized by INA § 101 (S), 8 U.S.C. § 1101 (S), for persons who are informants. V visas are authorized by INA § 101(V), 8 U.S.C. § 1101(V), for certain spouses of lawful permanent residents of the U.S.

General has specifically exempted from expedited removal in 8 C.F.R. § 235.3(b)(2)(i).

In the case at bar, Petitioner is a Canadian citizen who sought to enter the United States on a temporary nonimmigrant basis. The government does not contend that he falls into nonimmigrant visa categories E, K, S or V. Accordingly, although Petitioner was placed into expedited removal and barred from the U.S., CBP did not, as a matter of law, have the authority to subject him to the expedited removal process.

Petitioner's fate is shared by untold numbers of other Canadians.

E. The Department of Homeland Security's Mission and Expedited Removal of Canadian Nonimmigrants

The exemption to expedited removal set out at 8 C.F.R. § 235.3(b)(2)(i) is in accord with the Department of Homeland Security's Congressionally defined mission. 6 U.S.C. §111 (b)(1)(A) through (H) sets forth the primary mission of the Department of Homeland Security (DHS) and its component agencies[14] as follows:

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[14] CBP is a component agency of DHS. See http://www.dhs.gov/xabout/structure/editorial_0644.shtm.

(1) In general - The primary mission of the Department is to

> (A) prevent terrorist attacks within the United States;
> (B) reduce the vulnerability of the United States to terrorism;
> (C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States;
> (D) carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning;
> (E) ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress;
> **(F) ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland;** (Emphasis added. This clause will be referred to as the "DHS Mission Statement business clause" for the balance of this brief.)
> (G) ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland; and
> (H) monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking.

Expedited removal as implemented in the case at hand is a border process that diminishes the national security goals Congress has set out as the Department of Homeland Security's primary mission. The record in the case at bar does not reveal the entire amount of time that it took CBP to complete the expedited removal process nor does it reveal the number of CBP officers that were involved in this process. However the record does reveal that the Petitioner was interrogated

for over 8 hours at the border as part of the expedited removal process.[15] See District Court Docket No. 13-2, at page 18. Accordingly, one or more CBP officers - whose primary duty is to intercept terrorists and other high-risk threats to the United States - spent more than an entire workday engaged in the execution of the expedited removal of a low-threat individual, effectively removing himself/themselves from the interception of high-risk individuals and goods.

Most certainly, expedited removal as implemented in the case at bar ignores the DHS Mission Statement business clause in that such practice creates a chilling effect on bilateral trade and commerce between the United States and Canada. [16]

[15] An arriving alien cannot be placed into expedited removal until she executes a sworn statement containing facts that make her inadmissible to the U.S. See 8 CFR § 235.3(b)(2)(i). Often the alien refuses to sign the statement, and the ensuing "interrogation" then consists of CBP's use of tactics designed to overcome the refusal to sign, including, but not limited to, threats of incarceration and/or criminal prosecution unless he signs the statement.

[16] In February 2010 the Department of Homeland Security published a document titled Quadrennial Homeland Security Review Report (available at http://www.dhs.gov/xlibrary/assets/qhsr_report.pdf) which it describes as "a forward-looking homeland security vision for the Nation and the requisite set of key mission areas, goals, objectives, and outcomes, integrated across the breadth of the homeland security landscape…" The document fails to discuss how the agency intends to ensure that the overall economic security of the United States is not diminished by its efforts, activities, and programs aimed at securing the homeland, nor does it acknowledge this part of its mission statement in any fashion in any fashion.

F. CBP Abuses of Expedited Removal Against Canadian Visitors Are Widely Known

In recent years, the Canadian press has documented numerous egregious abuses of the expedited removal process meted out against Canadian nonimmigrants applying to enter the United States as documentary-exempt visitors.[17] Such abuses have undoubtedly been a factor in decreased travel to the U.S. by Canadian citizens.

G. CBP Abuses of Expedited Removal Against Canadian Business Persons – Example 1.

That CBP habitually construes applicable law in an overly restrictive fashion when implementing expedited removal against documentary-exempt Canadian nonimmigrant business persons is indisputable. This point is illustrated through

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[17] E.g. "Five Year Ban Prompts Man to Sell U.S. Home", *The Vancouver Sun*, May 7, 2011, at A8, *available at* http://www.canada.com/vancouversun/news/westcoastnews/story.html?id=d4cd7acc-c01a-47bf-8cae-ccbd06ff11d4&k=84344; Neal Hall, "Banished at the Border: Canadians Ensnared in Customs Hassles Post 9/11", *Vancouver Sun*, May 14, 2011, at A15, *available at* http://www.menwithfoilhats.com/2011/05/dhs-bans-more-canadians-than-hispanics-from-crossing-us-borders/; "B.C. Man Barred From Visiting Own U.S. Cottage" *CTV News*, May 18, 2011, *available at* http://www.ctvbc.ctv.ca/servlet/an/local/CTVNews/20110518/bc_point_roberts_110518?hub=BritishColumbiaHome; "Dog Lover Banned from U.S. for Five Years" *CTV News*, June 13, 2011, *available at* www.ctvbc.ctv.ca/servlet/an/local/CTVNews/20110611/bc_border_ban_dog_lover_110611?hub=BritishColumbiaHome.

examination of CBP's policy towards Canadians seeking entry to the U.S. in Trade NAFTA (TN) status as Scientific Technicians/Technologists authorized by Chapter 16 of the North American Free Trade Agreement (NAFTA), INA 214(e), 8 U.S.C. § 1184(e).

TN status is a nonimmigrant status available to Canadians qualified in one of sixty-five listed occupations, ranging from accountants to vocational counselors, who desire to engage in business activities at a professional level in the U.S. 8 C.F.R. § 214.6(c). The regulation also specifies the minimum qualifications required for each of the TN professions. Like most categories of nonimmigrant visas, Canadians are visa-exempt for TN purposes. Applications for TN status for Canadian citizens are adjudicated at the border by CBP as part of the entry process.

Scientific Technicians/Technologist is one of the sixty-five listed professions for which Canadians may be granted TN status to work in the United States. The minimum qualifications for classification as Scientific Technicians/Technologist is set out at 8 C.F.R. § 214.6(c) as follows:

> Scientific Technician/Technologist
> - Possession of a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics; and b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research.

The regulation footnotes the Scientific Technician/Technologist category as follows:

> A business person in this category must be seeking temporary entry for work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.

However, CBP's requirements to grant TN Scientific Technicians/Technologist status contain constraints that go far beyond the regulatory considerations. CBP's working definition for TN Scientific Technicians/Technologist status is found in its *Inspector's Field Manual* (IFM). This procedures and guidance manual, issued by CBP as operations instructions to its inspectors at the nation's ports of entry, states at ch.15.5(f)(2)(A):

> (A) A business person in the category of "Scientific Technician/Technologist" must possess: (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics, and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research. A scientific technician/technologist does not generally have a baccalaureate degree. The following principles will be used to evaluate the admissibility of scientific technician/technologist applicants.
>
> (i) Individuals for whom scientific technicians/technologists wish to provide direct support must qualify as a professional in their own right in one of the following fields: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.
>
> (ii) A general offer of employment by such a professional is not sufficient, by itself, to qualify for admission as a Scientific Technician

> or Technologist (ST/T). The offer must demonstrate that work of the ST/T will be inter-related with that of the supervisory professional. That is, the work the ST/T must be managed, coordinated and reviewed by the professional supervisor, and must provide input to the supervisory professional's own work.
>
> (iii) The ST/T's theoretical knowledge should generally have been acquired through the completion of at least two years of training in a relevant educational program. Such training may be documented by presentation of a diploma, a certificate, or a transcript accompanied by evidence relevant work experience.
>
> (iv) U.S. authorities will rely on the Department of Labor's Occupational Outlook Handbook to establish whether proposed job functions are consistent with those of a scientific or engineering technician or technologist. ST /Ts should not be admitted to perform job functions that are associated with other job titles.
>
> (v) Not admissible as ST/Ts are persons intending to do work that is normally done by the construction trades (welders, boilermakers, carpenters, electricians, etc.), even where these trades are specialized to a particular industry (e.g., aircraft, power distribution, etc.)

CBP has clearly exceeded its authority by imposing the above requirements on Scientific Technician/Technologist adjudications. In *Kazarian v. USCIS*, 580 F.3d 1030, 3440-41 (9th Cir. 2010), a case involving the government's adjudication of a visa matter, this court, citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008), held that the government may not

"…unilaterally impose novel substantive or evidentiary requirements beyond those set forth at …[the relevant regulation]." [18]

Prior to May 25, 2001, denial of TN status for a Canadian applicant at the border was subject to review by an immigration judge. The request for a hearing was the equivalent of an appeal or a reconsideration of the adjudicating inspector's decision.[19]

However in 2001, legacy INS issued INS Headquarters Memo 70/6.2.2 (May 25, 2001) that requires placement of Canadian applicants for TN status into expedited removal in cases where the adjudicating CBP officer believes the applicant to be ineligible for the TN status sought and the applicant declines to withdraw the application for admission.[20] A copy of this memo is included as

[18] The IFM also contains restrictive requirements that go beyond the substantive or evidentiary requirements required by regulation for the following TN professions: Medical Laboratory Technologist (IFM ch.15.5(f)(2)(B)), Registered Nurse (IFM ch.15.5(f)(2)(D)), Computer Systems Analyst (IFM ch.15.5(f)(2)(H)), and Hotel Manager (IFM ch.15.5(f)(2)(I)).

[19] The version of IFM ch. 15.5 in force prior to the issuance of INS Headquarters Memo 70/6.2.2 stated "In the event a Canadian citizen applying for admission pursuant to NAFTA cannot demonstrate to the admitting officer that he or she satisfies the TN documentary requirements, the Canadian citizen should be offered a hearing before an immigration judge…The request for a hearing is equivalent to a TN appeal or reconsideration of the admitting officers decision."

[20] In practice, applicants for TN status are frequently put into expedited removal without being given the opportunity to withdraw their applications for admission. *Matter of yy*, A200 885 721 (CBP, Peace Arch Port of Entry, November 13, 2011) is one such case.

Appendix III to this brief.[21] In such cases, as in the case at bar, the inspecting officer imposes a five-year bar to admission to the United States while informing the applicant that she has no right to administrative or judicial review. This hard-line approach has become a tactic used by the government to protect defectively restrictive adjudications of TN matters from any formal review process.

H. CBP Abuses of Expedited Removal Against Canadian Business Persons – Example 2.

Another nonimmigrant category for which Canadians are documentary exempt is intracompany transferee (L-1) status. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The intracompany transferee option allows a Canadian company to temporarily transfer executives and managers ("L-1A") and technical personnel having "specialized knowledge" ("L-1B") to affiliates or subsidiaries in the United States.

In order to qualify, the Canadian transferee must establish that he or she has worked in an executive, managerial or specialized knowledge capacity abroad for a

[21] CBP has embraced the memo in full. IFM 15.5 (f)(10) reads as follows: *Denial.* In the event a Canadian citizen applying for admission pursuant to NAFTA cannot demonstrate to the admitting officer that he or she satisfies the requirements for admission …he/she should normally be offered the opportunity to withdraw his/her application for admission. If the inspector believes that the alien is inadmissible under section 212(a)(7)(A)(intending immigrant)or section 212(a)(6)(C) of the Act (seeking admission by fraud or willful and material misrepresentation) and the alien does not wish to withdraw his/her application for admission, the inspector should place the alien into an expedited removal proceeding.

minimum of one year out of the previous three year period. The Canadian must also establish that he or she is entering the United States to work for the same company or a parent, affiliate or subsidiary thereof, in an executive, managerial or specialized knowledge capacity.

CBP frequently places Canadians who hold L status into expedited removal when it believes that they are not performing executive, managerial or specialized knowledge duties in the U.S.[22] or if it believes the qualifying relationship between the Canadian and U.S. companies no longer exists. Such tactic is in direct contravention of 8 C.F.R. § 214.2(L)(9)(iii) et. seq. which reads as follows:

(iii) Revocation on notice.

(A) The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he/she finds that:

(1) One or more entities are no longer qualifying organizations;
(2) The alien is no longer eligible under section 101(a)(15)(L) of the Act;
(3) A qualifying organization(s) violated requirements of section 101(a)(15)(L) and these regulations;
(4) The statement of facts contained in the petition was not true and correct; or
(5) Approval of the petition involved gross error; or
(6) None of the qualifying organizations in a blanket petition have used the blanket petition procedure for three consecutive years.

(B) The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. Upon receipt of this notice, the petitioner may submit evidence in

[22] *Matter of xx,* A200 685 042 (CBP, Blaine Port of Entry, July 4, 2010) is one such case.

> rebuttal within 30 days of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If a blanket petition is revoked in part, the remainder of the petition shall remain approved, and a revised Form I-797 shall be sent to the petitioner with the revocation notice.
>
> (10) Appeal of denial or revocation of individual or blanket petition. (i) A petition denied in whole or in part may be appealed under 8 C.F.R. part 103. Since the determination on the Certificate of Eligibility, Form I-129S, is part of the petition process, a denial or revocation of approval of an I-129S is appealable in the same manner as the petition…
>
> (ii) A petition that has been revoked on notice in whole or in part may be appealed under part 103 of this chapter…

Similar provisions apply to many other nonimmigrant statuses for which Canadians are documentary exempt.[23]

Amici submit that subjecting a person who holds nonimmigrant status to expedited removal in cases where there is a rational well-delineated process for determining the ongoing validity of the status is glaringly inconsistent with the DHS Mission Statement business clause. When that nonimmigrant is a Canadian citizen this practice also contravenes 8 C.F.R. § 235.3(b)(2)(i).

III. Canadian Law

Canada has no analogous provisions to expedited removal to which U.S. or other foreign nationals are subjected. Canada's Immigration and Refugee

[23] Cf. 8 C.F.R. § 214.2(h)(11)(iii) [H Status]; 8 C.F.R. § 214.2(o)(8)(iii) [O status]; 8 C.F.R. § 214.2(p)(10)(iii) [P status]; 8 C.F.R. § 214.2(q)(9)(iii) [Q status]; 8 C.F.R. § 214.2(r)(18) [R status]; and 8 C.F.R. § 214.14(h)(2) [U status].

Protection Regulations provide for three types of removal orders: departure orders, exclusion orders, and deportation orders (see: R223).

The scope and authority for Canada Border Services Agency ("CBSA") officers to issue removal orders to foreign nationals at ports of entry is limited by section 44(2) of the Immigration and Refugee Protection Act ("Act") to those circumstances currently prescribed in Regulation 228. CBSA may only issue a deportation order at a port on entry where:

(a) a foreign national is inadmissible under paragraph 36(1)(a) or 36(2)(a) on grounds of serious criminality or criminality arising from (a) conviction(s) in Canada;
(b) there has been a final determination to vacate a decision of a permanent resident's or foreign national's claim for refugee protection because of misrepresentation under section 40(1)(c) of the Act; and,
(c) a previously deported foreign national has failed to obtain the authorization of an officer to return to Canada as required by section 52(1) of the Act.

These three situations all have in common the fact that there have been previous judicial proceedings held and determinations made by a Canadian court or tribunal of competent jurisdiction, with all of the procedural safeguards inherent in criminal and civil proceedings, and recourse to avenues of appeal or judicial review, as the case may be.

Canada Border Services Officers at ports of entry are authorized to issue exclusion orders to a foreign national where the foreign national is inadmissible under section 41 of the Act on grounds of:

(a) failing to appear for further examination or an admissibility hearing under Part 1 of the Act;
(b) failing to establish that they hold a visa or other document as required under section 20 of the Act;
(c) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act; and,
(d) failing to comply with subsection 29(2) of the Act to comply with any condition set out in section 184 (conditions imposed on members of a crew).

These provisions extend to issuance of removal orders to family members of inadmissible foreign nationals, other than protected persons, who are inadmissible under section 42 of the Act. All CBSA officers' decisions and removal orders made at a port of entry are subject to Judicial Review by a Federal Court judge.

Thus, the United States' largest trading partner never subjects Americans to a process similar to expedited removal.

IV. Conclusion

In recent testimony before a Senate Judiciary Subcommittee, U.S. Customs and Border Protection Commissioner Alan Bersin stated "There are a number of ways in which the northern border is operationally distinct from other environments...It delineates two friendly nations with a long history of social, cultural, and economic ties that have contributed to a high volume of cross-border trade and travel, amounting to more than a billion dollars a day."[24]

[24] Bersin, Alan, Commissioner - U.S. Customs and Border Protection. "Improving Security and Facilitating Commerce at America's Northern Border and

Amici submit that the significance of the operationally distinct character of the northern border played a crucial role in the Attorney General's decision to exempt non-immigrant Canadians from the expedited removal process via 8 C.F.R. § 235.3(b)(2)(i).

U.S. immigration law is extraordinarily complex. Canadian citizens must be able to approach the U.S. border without fear of being subjected to a five year ban for which there is no recourse. The District Court's decision denying judicial review of CBP's imposition of expedited removal on a non-immigrant Canadian not only renders 8 C.F.R. § 235.3(b)(2)(i) meaningless, it has a significant long-term chilling effect on the USA/Canada trade relationship.

Accordingly, Amici urge reversal of the decision of the District Court.

Respectfully submitted,

/s/ Greg Boos .

Greg Boos
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Attorney for Amici Curiae

Ports of Entry", testimony May 17, 2011, before the U.S. Senate, Committee on the Judiciary Subcommittee on Immigration, Refugees and Border Security: *available at* *http://www.dhs.gov/ynews/testimony/testimony_1305638642753.shtm*

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 32-1

I certify that the foregoing brief is double-spaced (excluding footnotes, quotations and headings); is printed using a proportionally spaced, 14-point Times Roman typeface; and contains not more than 7000 words (not including the table of contents, table of authorities, and relevant certificates).

/s/ Greg Boos

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2011 I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Greg Boos

Appendix I - Rule 29 (c) Disclosure Statements

Information about the Amici, their interest in the case, the officer authorizing them to file, and other information required by Rule 29(c) follows:

The Amici in this case are non-profit corporations, none of whom issue stock or otherwise have parent corporations or shareholders.

The Bellingham/Whatcom Chamber of Commerce is headquartered in Bellingham WA. Its membership is comprised of a variety of businesses, businesspersons and merchants who come together through the Chamber for the promotion of commercial interests. The Chamber is active in border issues as Whatcom County's position adjacent to the Canadian border makes trade and commerce with Canada a significant component of the Whatcom County economy.

Ken Oplinger
President / CEO
Bellingham/Whatcom Chamber of Commerce & Industry
Bellingham Towers
119 N. Commercial Street, Suite 110
Bellingham, WA 98225
(360) 734-1330

The British Columbia Chamber of Commerce represents the interests and concerns of local Chambers of Commerce and business members from across the province of British Columbia. Through the Chamber, members access benefits, partnerships, and networking opportunities. The Chamber routinely advocates to governments on behalf of its members to ensure that their concerns are being heard. Because of the importance of trade and commerce with the United States to the British Columbia economy, the British Columbia Chamber of Commerce is active in US/Canada border issues.

John Winter
President and CEO
British Columbia Chamber of Commerce
1201 - 750 West Pender Street
Vancouver, BC V6C 2T8
(604) 683-0700

The Pacific Corridor Enterprise Council was formed in 1989 to promote cross-border transactions and advocate the removal of barriers that impede the legitimate flow of people, goods and services across the Canada/USA border.

Greg Boos
President
Pacific Corridor Enterprise Council
1305 11th Street, Suite 301
Bellingham WA 98225
(360) 671-5945

The Northwest Economic Council is the state designated Associate Development Organization for Whatcom County, WA, i.e. the entity that is authorized by the State of Washington to lead the economic development efforts of the County. Because of its importance to the local economy, the NWEC is active in issues affecting trade and commerce with Canada.

Kim Loveall Price
Acting Interim Director
Northwest Economic Council
115 Unity Street, Suite 101
P.O. Box 2803
Bellingham, WA 98227
(360) 676-4255

Greg Boos, counsel for Amici, is sole author of this brief with exception of the section on Canadian law, on which Boos was assisted by Samuel D. Hyman, a Canadian Barrister and Solicitor practicing in Vancouver, BC.

There have been no contributions of money made by any party or person for the preparation or submission of this brief.

Appendix II

WESTERN
WASHINGTON UNIVERSITY

An equal opportunity university

Center for Economic and Business Research
College of Business and Economics

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Bellingham, Washington 98225-9074
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November 8, 2011

Greg Boos
Attorney at Law
Cascadia Cross-Border Law
1305 11th Street, Suite 301
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Greg,

I am following up on our discussion at the last Border Policy Research Institute lunch. As I noted briefly at the lunch the number of people crossing the border between the United States and Canada is much lower since the tightening of border security in September 2001. My research, undertaken over the last eight years as Director of Western Washington University's Center for Economic and Business Research reveals that the dynamics of how the Canadian dollar motivates people to cross the border are significantly more muted today compared to the pre-9/11 era.

US government data reveals a steady increase in the number of people traveling south at the four major Whatcom County border crossings[1] in the late 1980s and early 1990s as the Canadian dollar strengthened against the U.S. dollar. In late 1991, the Canadian dollar began to weaken and the number of people crossing the border also slowed proportionally. There appeared to be a direct correlation between the exchange rate between the Canadian and US dollars and the number of Canadians visiting the US.

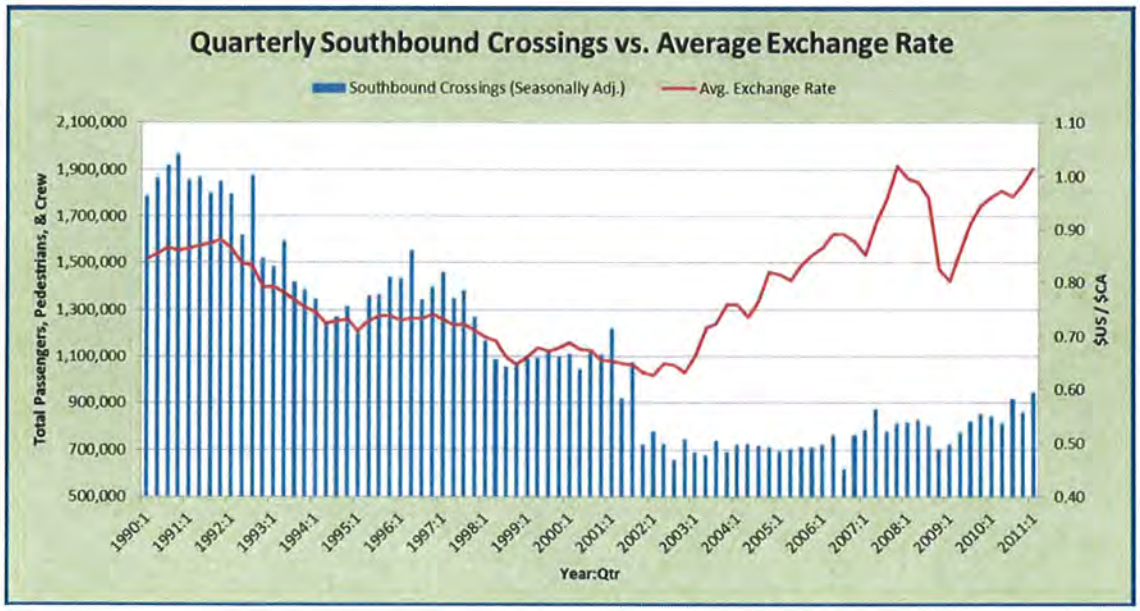
The trend decline in the Canadian dollar and border crossings was clear, but the rate of change was not terribly dramatic. For example, roughly 1 million fewer people crossed the border in the summer of 2001 than crossed the border in summer 1997. Then, border crossings fell very sharply in September 2001. In fact, one million fewer people crossed the border in summer 2002 than crossed in summer 2001. The same magnitude decline that had taken 5 years to develop previously because of a declining Canadian dollar took one year due to post 9/11 changes in border security. Moreover, the number of people crossing the border

[1] Whatcom County has 4 major land border crossing ports of entry as follows: 1)Peace Arch/Douglas, 2)Pacific Highway, 3)Lynden/Aldergrove, and 4)Sumas/Huntingdon. These crossings are collectively referred to as the Cascade Gateway. The Cascade Gateway includes the third busiest passenger vehicle crossing on the U.S.-Canada border and the fourth busiest commercial crossing. Whatcom County also has a fifth land border crossing (Point Roberts) but as this crossing does not allow access to the US mainland, Point Roberts crossings are not included in the data studied

did not increase in 2002 or 2003 even though the Canadian dollar started to strengthen relative to the US dollar.

In the following years, the Canadian dollar continued to strengthen, but border crossings remained low. In fact, the Canadian dollar was equal to the U.S. dollar in 2008, but border crossings remained below 2000 levels – when the Canadian dollar was roughly $0.65 US. The dramatic increase in the Canadian dollar over the last few years had almost no effect on border crossings, whereas prior to September 2001, it had always had a very strong effect.

A chart that illustrates the relationship between the exchange rate and the number of Canadians entering the US at local border crossings prior to 9/11 and the subsequent post 9/11 disconnect between the exchange rate and Canadian border-crossers follows:



Lower border crossings today can be explained in part to arguments based on factors such as the arrival of new stores in Canada, better customer service in its retail sector, and changes in tax structure. However, the largest factor in the disconnect between the exchange rate and the number of Canadian border crossers appears to be post-9/11 increased border security.

I hope this information is helpful.

Best regards,

Hart Hodges

Hart Hodges, Director

U.S. Department of Justice
Immigration and Naturalization Service

HQINS 70/6.2.2

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

MAY 25 2001

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Denial of Applicants for Admission under the North American Free Trade Agreement (IN 01-11)

This memorandum is being issued as a revision of Chapter 15.5 of the Inspector's Field Manual (IFM) to clarify procedures relating to the denial of applicants for admission under the provisions of the North American Free Trade Agreement (NAFTA).

There has been confusion regarding the procedure for review of the immigration officer's decision to refuse admission to a Canadian citizen applying for Trade NAFTA Professional (TN) under the NAFTA provisions. There is no petition requirement for classification of a Canadian citizen as a TN and, therefore, no appeal rights extend to the employer seeking the services of the alien. Pursuant to regulation at 8 CFR 214.6 (e)(2), the applicant must present documentation sufficient to satisfy the immigration officer at the time of application for admission that the applicant is seeking entry to engage in business activities at a professional level and that the applicant meets the criteria to perform at such a professional level. There is no appeal at the time of application for admission provided under regulation or under Chapter 16 of the NAFTA.

Chapter 15.5 of the IFM, drafted prior to the implementation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), stated: "In the event a Canadian citizen applying for admission pursuant to NAFTA cannot demonstrate to the admitting officer that he or she satisfies the TN documentary requirements, the Canadian citizen should be offered a hearing before an immigration judge provided the applicant is confident he or she, in fact, meets the requirements pursuant to the NAFTA, Appendix 1603.D.1. The request for a hearing is equivalent to a TN appeal or a reconsideration of the admitting officer's decision." Aliens who do not satisfy the requirements of the TN nonimmigrant category, or any other nonimmigrant

classification, are, therefore, presumed to be immigrants inadmissible under section 212(a)(7)(A) of the Immigration and Nationality Act. The implementation of IIRIRA replaced the hearing before an immigration judge with expedited removal for such aliens and Chapter 15.5 will be revised to reflect that change.

Accordingly Chapter 15.5 section (f) (10) of the IFM is revised to read as follows:

(f) **TN Classification as a Professional.**

(10) **Denial.** In the event a Canadian citizen applying for admission pursuant to NAFTA cannot demonstrate to the admitting officer that he or she satisfies the requirements for admission pursuant to the NAFTA, Appendix 1603.D.1, he/she should normally be offered the opportunity to withdraw his/her application for admission. If the inspector believes that the alien is inadmissible under Section 212(a)(7)(A) (intending immigrant) or 212(a)(6)(C) of the Act (seeking admission by fraud or willful and material misrepresentation) and the alien does not wish to withdraw his/her application for admission, the inspector should place the alien into an expedited removal proceeding.

These revisions to the IFM will be incorporated into future releases of the INS Easy Research and Transmittal System (INSERTS). There are no changes to the IFM concerning Mexican TN procedures.

Should you have any questions regarding this memorandum, please contact Joyce Broughman, Office of Inspections, at 202-514-5573.