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February 3, 2005

IN-HAND DELIVERY
Citizen Trade Policy Commission
13 State House Station
Room 215, Cross State Office Building
Office Of Policy and Legal Analysis
Augusta, Maine 04333

**RE: Entry of Canadian Drivers as Business Visitors under NAFTA to Set
Modular Housing**

Dear Commission Member:

Our firm represents the Modular Manufacturers Association of the Northeast. We would like to thank the Commission for the opportunity to make a statement at the February 3, 2005 public hearing.

Pursuant to the Commission's invitation for written comment, please find enclosed a copy of a legal memorandum prepared by our office on behalf of the Association. The memorandum addresses the entry of Canadian truck drivers as business visitors to set modular housing in Maine and throughout the northeast. It is the Association's position that entry in this immigration classification for this purpose is not permitted by U.S. immigration law or NAFTA.

Should you have any questions about the Association's position, or the issues raised in the memorandum, please do not hesitate to contact me using the information appearing above.

Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew S. Raynes". The signature is written in a cursive style and is positioned above the printed name.

Matthew S. Raynes

MSR/s
Enclosure



Memorandum

To: Modular Manufacturers Association of the Northeast
From: Matthew S. Raynes, Esq.
Date: November 28, 2004
Re: **Entry of Canadian Drivers as Business Visitors to Set Modular Homes**

INTRODUCTION

This memorandum sets forth the various reasons why the entry of Canadian workers into the U.S. as business visitors to set modular homes violates the North American Free Trade Agreement ("NAFTA") and U.S. immigration law.

BACKGROUND

In the past decade following the signing of NAFTA, workers from the Canadian modular housing industry have sought to enter the United States in business visitor or "B-1" status for the purpose of delivering and "setting" modular homes. A practice of permitting such entry has developed based on INS guidance which provides that a driver may "secure" portable housing in addition to unloading it at its intended destination.¹ This same guidance recognizes and reiterates the general prohibition against those in B-1 status engaging in building or construction work or otherwise seeking to enter the local labor market.

Despite the limitations set forth in this INS guidance, Canadian workers who enter in B-1 status have been going beyond securing the portable housing which they unload and have engaged in activities which clearly constitute building and construction work, thereby violating U.S. immigration law, performing work in the domestic labor market which would otherwise be available to U.S. workers, and granting an unfair competitive advantage to Canadian firms over similarly situated U.S. firms.

"Setting" modular housing is an industry term generally referring to the process of placing a modular home on a foundation or slab, binding the structure to the foundation, and assembling the various parts of the structure. The work involved in setting or assembling a modular home clearly goes beyond securing delivered cargo. The following description of the setting process by T.R. Arnold & Associates, Inc.² details what is involved in setting a modular home.

¹ This guidance formerly appeared in the INS Inspector's Field Manual, Chapter 21.13. A telephone conference with the Customs and Border Protection office in Bangor, Maine revealed that his guidance is still in use.

² T.R. Arnold & Associates, Inc. is a Third Party Inspection Agency accredited by the International Accreditation Service for the inspection of modular housing.

The setting of a modular home requires the lifting of the individual sections through the use of a crane, spreader bars, cables and a crane with adequate lifting capacity. These are utilized to enable the proper placement of the modular sections on the foundation. These sections must be properly attached to the foundation per the "Site Reference Manual." Individual sections, after placement on the foundation, are aligned and leveled through the use of jacks, chain brackets and come-a-longs. Lally columns are installed in the basement with the sections then being bolted together per the "Site Reference Manual." Roof sections, built as a series of folds, must be extended, raised to the proper height, aligned and secured. Depending on the style and design this will include the installation of collar ties, gusset plates, knee walls and bolts. Uncompleted sections must have roof sheathing, roofing paper or ice and water shield, shingles and venting installed to create a weather-tight condition. Specific applications may also include the installation and attachment of pre-built dormers, reverse gables, wall and roof panels, modular pods and shed dormers as part of the complete house set.

See **Exhibit 1.**

As evidence that setting modular homes is building and construction work and traditionally considered such, one need look no further than the towns and cities home to Maine's major Ports-of-Entry. Both the City of Calais, Maine and the Town of Houlton, Maine require building permits to assemble modular housing. This is the case in many states. See **Exhibit 2.**

Aside from exceeding the scope of permissible B-1 activity by setting homes, Canadian laborers also enter the U.S. in B-1 status as "transportation operators," taking advantage of a NAFTA provision allowing for the entry of relief operators in B-1 status to satisfy federal maximum driving hour requirements.³ These laborers either enter with the cargo or follow to join it. However, once in the United States, these Canadian laborers also engage in the setting of modular homes. Moreover, additional company vehicles are often utilized for escort purposes as required by state law for the transport of oversized loads. However, in many cases, the personnel in these vehicles are operating not only as escorts, but as set/installation labor as well. Abuse of this NAFTA provision is more pronounced where modular homes move into the northeastern United States from bordering Canadian provinces. The limited distance such transport entails does not support the entry of numerous relief operators. Moreover, the time spent transporting the product to its intended destination in the northeastern U.S. pales in comparison to the time spent by the same personnel setting the home.

³ Federal Motor Carrier Safety Administration regulations prohibit a driver from driving more than 11 cumulative hours without 10 hours off. See 49 C.F.R. § 395.3.

ARGUMENT

I. Neither NAFTA nor U.S. immigration law permit Canadian business visitors to set manufactured housing in the United States

For a number of reasons, neither NAFTA nor U.S. immigration law permit the entry of Canadian workers in B-1 status to set manufactured housing in the U.S.

A. NAFTA limits permissible B-1 activity to distribution

NAFTA permits seven specific categories of activity in B-1 status, all of which reflect the stages of the business cycle. These activities are: research and design; growth, manufacture, and production; marketing; sales; *distribution*; after-sales service;⁴ and general service. With respect to distribution, transportation operators, as defined under NAFTA, may distribute Canadian goods (and vice versa) so long as they do not move goods from one location to another within the United States (i.e. cabotage).

1. USCIS regulations regarding distribution permit only transportation and delivery

Regarding distribution, NAFTA and USCIS regulations list only transportation and delivery as permissible B-1 activity.

(E) Distribution.

((1)) Transportation operators transporting goods or passengers to the United States from the territory of another Party or loading and transporting goods or passengers from the United States to the territory of another Party, with no unloading in the United States, to the territory of another Party. (These operators may make deliveries in the United States if all goods or passengers to be delivered were loaded in the territory of another Party. Furthermore, they may load from locations in the United States if all goods or passengers to be loaded will be delivered in the territory of another Party. Purely domestic service or solicitation, in competition with United States operators, is not permitted.)

8 C.F.R. § 214.2(b)(4)(i)(E)(1). This distribution provision was added to USCIS regulations as a clarification of existing law and did nothing to expand the scope of permissible B-1 activity. See Memorandum from Michael D. Cronin, Acting Executive Associate Commissioner, Programs to Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations entitled "Entry of Commercial Truck Drivers into the United States" IFM Update IN 00-30, 9/12/01.

⁴ Although NAFTA permits entry for purposes of after-sales service where such service is pursuant to contract or warranty, the after-sales service provision applies only to service of commercial or industrial equipment or machinery, which modular housing clearly is not. See 8 C.F.R. § 214.2(b)(4)(F).

2. **Setting a modular home is not a “necessary incident of international commerce”**

Although not part of NAFTA itself, the USCIS Inspector’s Field Manual contained guidance regarding permissible activities for transportation operators involved in the distribution of goods. This guidance explained the interplay of existing B-1 regulations and NAFTA as follows:

(b) INS Regulations and NAFTA. The INS regulations at 8 CFR 214.2(b)(4) codify the Distribution provisions found in Appendix 1603.A of the NAFTA with respect to the admission of Canadian and Mexican citizens as B-1 business visitors. The NAFTA Distribution provision is based on applicable U.S. law, precedent decisions, and INS experience with the B-1 classification at the time the trade agreement was negotiated.⁵ The contiguous nature of the United States with Canada and Mexico and the importance of cross-border transportation prompted the need to develop explicit provisions regarding distribution of goods and passengers. *Acceptable activities for B-1 nonimmigrants under the NAFTA are the same as those allowed for other B-1 nonimmigrants under current INS regulations, such as delivering or transporting products. The intent of the Distribution provision of the NAFTA Business Visitor category is to set forth transparent criteria for the admission of alien drivers transporting goods or passengers across the border, an activity that is international in scope - it is not to facilitate access to the domestic labor market.*

This Inspector’s Field Manual guidance derived from a September 12, 2001 Memorandum from Michael D. Cronin, Acting Executive Associate Commissioner, Programs to Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations entitled “Entry of Commercial Truck Drivers into the United States IFM Update IN 00-30.” Earlier in this same memorandum, INS clearly stated that: “(6) Drivers may not engage in any activity that qualifies as local labor for hire.”

Under “permissible activities,” this same guidance also stated that, consistent with existing precedent, drivers involved in the distribution of goods could engage in certain “necessary incidents of international commerce” while in B-1 status.

(7) Necessary Incidents. *Drivers* may perform activities that are “necessary incidents” of international commerce, or a necessary function of delivery, such as loading or unloading international cargo. *In addition to loading and unloading, the driver may participate in activities to secure or level the cargo, as needed.* For instance, an alien driver delivering a portable dwelling or prefabricated parts may unload the dwelling or

⁵ The manufactured housing industry has evolved substantially over the years, from the production and transportation of mobile homes at its inception, to the present, where modular units are erected on site.

prefabricated parts and any required supporting foundation shipped with the dwelling. *As part of the delivery, the driver may secure the dwelling or prefabricated parts of a building as necessary, but may not be involved in building, construction, or other activities⁶ such as clearing or leveling the site, sealing seams, installing steps, or hooking up utilities.* Drivers may not return to U. S. job sites to unload, move or affix previously delivered parts of a building.

As the italicized text of this guidance indicates, the driver may secure⁷ or level cargo (i.e. a portable dwelling) upon delivery, but may not be involved in building, construction, or other activities such as clearing or leveling the site, sealing seams, installing steps, or hooking up utilities.

Unlike delivery, the setting of modular structures by Canadian workers is neither necessary nor incident to the distribution process. It is not necessary as a building contractor and crew are generally on site (or can be) during the delivery phase. In fact, some Canadian companies have established relationships with U.S. building contractors and list them on their websites. Moreover, as the time spent setting a home often far exceeds the time spent transporting and delivering it, setting the home is not incident to the primary activity of distribution/delivery at all.

The above guidance is instructive both in terms of what it states and what it omits. First, it states only that a driver is permitted to engage in such activity. It says nothing regarding crew, helpers, or even multiple drivers. Second, it states that the driver may unload “any required supporting foundation” but does not permit securing any required supporting foundation. Perhaps more importantly, despite both common and industry use of clear terms such as “assemble,” “set,” “erect,” “install,” “put together,” etc., these terms are not used in the guidance, implying that such activity was intentionally left out.

As the sole authority for interpreting traditional B-1 activities to encompass “necessary incidents of international commerce,” INS relied on two Board of Immigration Appeals decisions, both of which were decided in 1980 (pre-NAFTA). See *Id.* citing Matter of Cote, 17 I&N Dec. 336 (BIA 1980) (unloading automobiles) and Matter of Camilleri, 17 I&N Dec. 441 (BIA 1980) (unloading agricultural equipment). The INS memorandum cites these decisions as follows.

21.13 Entry of Commercial Truck Drivers.

(a) General. The INS regulations and policies have long held that alien truck drivers may qualify for admission as B-1 visitors for business. Two

⁶ As written, “building”, “construction,” and “other activities” are all proscribed, with “clearing or leveling the site, sealing seams, installing steps, or hooking up utilities” clearly being “other activities.”

⁷ The term “secure” is defined as follows: “to relieve from exposure to danger: act to make safe against adverse contingencies; . . . : to put beyond hazard of losing or of not receiving: . . . See Merriam-Webster Online Dictionary at <http://www.m-w.com>. As the modules are shrink-wrapped for purposes of transport, they are protected from the elements and may remain so until the home is set. Moreover, they may be safely placed on temporary stansions in such condition prior to setting.

BIA precedent decisions, Matter of Cote, 17 I&N Dec. 336, (BIA 1980) and Matter of Camilleri, 17 I&N Dec. 441, (BIA 1980), support the entry of commercial truck drivers as B-1 visitors to pick up or deliver cargo traveling in the stream of international commerce. *These decisions provide that certain other activities that are "necessary incidents" of international commerce are also permissible under the B-1 classification.* Drivers must meet all general entry requirements for the B-1 classification, including any applicable documentary and admissibility requirements.

Id. at Chapter 21.13(a) (emphasis added).⁸ While these decisions support the unloading of cargo as a necessary incident of international commerce, neither supports the extension of B-1 status to include the setting of modular homes and the building/construction work involved therein.

Both Cote and Camilleri dealt with commercial truck drivers and, in part, whether unloading freight was a necessary incident of international commerce, i.e., the transportation of goods. In both cases, the BIA found that unloading goods was a permissible B-1 activity as being a necessary incident to international commerce. However, neither decision involved activity beyond actually unloading the cargo. Moreover, neither decision even remotely implicated building and construction activity; activity which is expressly prohibited in B-1 status as set forth more fully below.

B. Building and construction work in B-1 status is and has been expressly proscribed by USCIS regulation in effect prior to NAFTA

NAFTA's distribution provisions must be interpreted in light of USCIS regulation which predates NAFTA and which expressly prohibits those aliens in B-1 status from engaging in building and construction work. See 8 C.F.R. § 214(b)(5).

(5) Construction workers not admissible. Aliens seeking to enter the country to perform building or construction work, whether on-site or in-plant, are not eligible for classification or admission as B - 1 nonimmigrants under section 101(a)(15)(B) of the Act. However, alien nonimmigrants otherwise qualified as B - 1 nonimmigrants may be issued visas and may enter for the purpose of supervision or training of others engaged in building or construction work, but not for the purpose of actually performing any such building or construction work themselves.

Id. This prohibition could not be clearer. In fact, unlike other activities, on-site building and construction work has been singled out for explicit prohibition. The above regulation predates NAFTA, and nothing in NAFTA alters this express prohibition for Canadian citizens. Recognizing this, INS guidance reiterates that building, construction, and like activity remains prohibited in B-1 status.⁹

⁸See also "How Do I Enter the United States as a Commercial Truck Driver?" USCBP website at: <http://www.cbp.gov/xp/cgov/import/carriers/how.xml> at **Exhibit 3**.

⁹Regulations promulgated by the U.S. Department of State mirror INS regulations and define business as follows: "The term 'business,' . . . does not include local employment or labor for hire. For the purposes of this section

It is clear that the setting of modular homes involves building and construction work as opposed to business activity appropriate for B-1 classification. As noted earlier:

The setting of a modular home requires the lifting of the individual sections through the use of crane, spreader bars, cables and a crane with adequate lifting capacity. These are utilized to enable the proper placement of the modular sections on the foundation. These sections must be properly attached to the foundation per the "Site Reference Manual." Individual sections, after placement on the foundation, are aligned and leveled through the use of jacks, chain brackets and come-a-longs. Lally columns are installed in the basement with the sections then being bolted together per the "Site Reference Manual." Roof sections, built as a series of folds, must be extended, raised to the proper height, aligned and secured. Depending on the style and design this will include the installation of collar ties, gusset plates, knee walls and bolts. Uncompleted sections must have roof sheathing, roofing paper or ice and water shield, shingles and venting installed to create a weather-tight condition. Specific applications may also include the installation and attachment of pre-built dormers, reverse gables, wall and roof panels, modular pods and shed dormers as part of the complete house set.

See **Exhibit 1**.

As NAFTA is a reciprocal trade treaty, looking at the other side of the border can be instructive. Under NAFTA, Canadian immigration authorities interpret building and construction work to include "installing, maintaining and repairing:

- any part of the fabric of any building or structure;"

See Citizenship & Immigration Canada: Foreign Worker Manual at Appendix G, Section 2.6.4 (emphasis added). The same Canadian guidance goes on to note the following.

Building and construction work includes activities normally performed by (but not limited to):

- labourers;
- carpenters and joiners;
- roofers;

Id. Finally, the Canadian guidance specifically notes that: "Building and construction work includes work involving – overhead cranes." Id. This interpretation of NAFTA is consistent with CIC regulations prohibiting building and construction work as a business visitor and precludes the setting of modular housing by workers entering as business visitors.

building or construction work, whether on-site or in plant, shall be deemed to constitute purely local employment or labor for hire." 22 C.F.R. § 41.41(b) (emphasis added).

Moreover, for purposes of Davis-Bacon and related acts dealing with construction contracting, the U.S. Department of Labor defines “building” and “construction” in part as follows:

(i) The terms building or work generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, . . .

(j) The terms construction, prosecution, completion, or repair mean the following:

(1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of (paragraph (l) of this section by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, all work done in the construction or development of the project), including without limitation--

(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;

29 C.F.R. § 5.2 (emphasis added).

Aside from the fact that the nature of the work itself is building and construction activity, municipalities also consider setting modular homes to be building and construction work as many, including Houlton and Calais, Maine, require building permits for the process.

In fact, the Canadian manufactured housing industry recognizes that erecting modular homes involves building and construction work as evidenced by the following excerpt from the Canadian Manufactured Housing Institute:

One of the limiting factors in shipping homes into the US has been the movement of skilled Canadian labour across the border to erect and service the homes. Based on concerns raised by manufacturers, retailers and builders, CMHI undertook an investigation to determine what could be done to facilitate the movement of construction labour across the Border.

See CMHI Bulletin, “Internationally Speaking” submitted by Murray Hardie (undated) (emphasis added). See **Exhibit 4**.

C. By treaty, NAFTA prohibits workers from entering the labor force while in B-1 status

Aside from the fact that building and construction work is singled out for prohibition in

B-1 status, and that setting modular homes clearly constitutes such work, NAFTA itself explicitly prohibits workers in B-1 status from entering the labor force.¹⁰ At least in theory, this prohibition applies equally on both sides of the U.S./Canadian border.

NAFTA and USCIS guidance interpreting the treaty both clearly state that business visitors, including drivers, may not enter the local labor force. NAFTA does so as follows.

Annex 1603

Temporary Entry for Business Persons

Section A - Business Visitors

1. Each Party shall grant temporary entry to a business person seeking to engage in a business activity set out in Appendix 1603.A.1, without requiring that person to obtain an employment authorization, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry, on presentation of:

(a) proof of citizenship of a Party;

(b) documentation demonstrating that the business person will be so engaged and describing the purpose of entry; and

(c) *evidence demonstrating that the proposed business activity is international in scope and that the business person is not seeking to enter the local labor market.*

See NAFTA, Chapter 16 (emphasis added) (Sections 2-4 omitted). USCIS guidance mirrors this proscription. The building and construction work being performed by Canadian workers in B-1 status, coupled with the frequency with which they enter the U.S. to set modular housing and the duration of each visit, constitutes entry into the local labor market.

D. Canadian workers should not be allowed to circumvent the law by masquerading as “transportation operators” under NAFTA

NAFTA permits the entry of “transportation operators” and defines the term as follows.

Transportation operator means a natural person, other than a tour bus operator, *including relief personnel* accompanying or following to join, necessary for the operation of a vehicle for the duration of a trip.

¹⁰ As noted, U.S. Department of State regulations define business and note that building or construction work constitute local employment or labor for hire as follows: “The term ‘business,’ . . . does not include local employment or labor for hire. For the purposes of this section *building or construction work, whether on-site or in plant, shall be deemed to constitute purely local employment or labor for hire.*” 22 C.F.R. § 41.41(b) (emphasis added).

NAFTA Appendix 1603.A.1. Aside from the driver of the truck, the definition of “transportation operator” does not extend to crew entering for the purpose of setting modular homes as they are not entering for purposes necessary for the operation of the vehicle. The term “transportation operator” similarly does not extend to personnel in escort vehicles accompanying oversized loads who also engage in setting homes.

II. Before engaging foreign workers to set modular housing on site, U.S. and Canadian firms alike must test the U.S. labor market for available U.S. workers

Consistent with NAFTA and U.S. immigration law generally, those firms seeking to install modular housing must generally test the U.S. labor market before engaging Canadian or other foreign workers to set the housing. This labor certification mechanism, administered jointly by the federal and state departments of labor, is designed to protect the interests of U.S. workers who are able, willing and qualified to do the work in question. NAFTA did not alter this requirement with respect to B-1 status, and similarly recognizes the need to protect the domestic labor force as follows:

Article 1601: General Principles

Further to Article 102 (Objectives), this Chapter reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories.

See NAFTA at Article 1601. In general, the overall structure of U.S. immigration law gives preference to U.S. workers over foreign workers depending on the level of skill the job requires. The lower level of skill required, the higher level of preference accorded. This level of preference manifests itself in a number of ways.

First, as noted, NAFTA prohibits entry of Canadian business visitors into the labor force, especially with respect to building and construction work, industries which typically use both skilled and unskilled labor. As noted, the USCIS regulation prohibiting B-1 aliens from engaging in building and construction work allows for visa issuance to the same aliens for the purpose of supervising or training U.S. workers. See 8 C.F.R. § 214.2(b)(5). With limited exception, U.S. immigration law provides that manual labor is to be performed by U.S. workers although they may be supervised and trained by B-1 workers in appropriate circumstances. This protects the domestic labor force and, if training is required, ensures that qualified U.S. workers are available to perform the work.

Second, appropriate alternatives exist for Canadian workers to obtain authorization to work setting modular homes. H-2B status for unskilled workers may be appropriate for

temporary, seasonal work, but nonetheless requires labor certification.¹¹ As an alternative to the labor certification process, manufacturers of modular homes can easily contract with U.S. installers to have homes delivered from Canada set by U.S. workers. The reasonableness of this alternative is demonstrated by the fact that some Canadian manufacturers have established relationships with U.S. builders and list them on their websites. See **Exhibit 5**.

Finally, to demonstrate how seriously U.S. immigration and labor law view the intrusion of unauthorized workers into the U.S. labor force, USCIS regulations prohibit the engagement of unauthorized workers on even a contract basis. Serious penalties exist for knowingly hiring unauthorized workers, even pursuant to contract as opposed to employment. In other words, modular home businesses need not actually employ Canadian workers who entered in B-1 status to run afoul of the law. Under USCIS regulations, "hiring" means actual commencement of work "for wages or other remuneration" and includes the use of a contract, subcontract or exchange to obtain the labor of a person knowing that the person is not authorized to work. 8 C.F.R. § 274a.1(c) and (d).

III. Canadian and U.S. application and enforcement of NAFTA's B-1 provisions is currently not uniform, thereby defeating the bilateral benefit of NAFTA

Although NAFTA is a trilateral treaty designed to facilitate the flow of commerce among the treaty countries, disparate enforcement on the U.S./Canadian border has resulted in preferential treatment for Canadian firms entering the U.S. market. This unequal treatment has resulted in an unintended competitive advantage to Canadian firms entering the U.S.¹² This is not the level playing field which NAFTA presumes.

CONCLUSION

Neither NAFTA nor U.S. immigration law permits the entry of Canadian workers in B-1 status to set modular homes. The setting of modular homes is not a necessary incident of international commerce and clearly involves building and construction work. The nature of the work itself is building and construction work, and municipalities, state licensing boards, and the modular home industry considers it such. Moreover, even the delivery of modular units is limited under NAFTA to the driver of the truck transporting the unit. There is nothing in NAFTA enabling escort personnel or crews of workers to follow and set modular homes. The entry of Canadian workers to perform this work is to the detriment of available, qualified U.S. workers and U.S. businesses, which are placed at a competitive disadvantage with their Canadian counterparts. For these reasons, the entry of Canadian workers in B-1 status to set modular homes is not and should not be permitted under NAFTA or U.S. immigration law.

¹¹ To engage general laborers on a permanent basis, U.S. and Canadian firms must seek a waiver to pursue labor certification as the general laborer position falls on Schedule B. See 20 C.F.R. § 656.11.

¹² The cost of labor in Canada is generally lower than in the United States, and this lower labor cost component places U.S. firms at a competitive disadvantage.

T. R. ARNOLD & ASSOCIATES, INC.
industrialized housing advisors

700 E. BEARDSLEY AVENUE • P.O. BOX 1081 • ELKHART, IN 46515
(574) 264-0745 • FAX. (574) 264-0740

May 19, 2004

Mr. Dan Donahue
New England Homes
270 Ocean Road
Greenland, NH 03840

Dear Mr. Donahue:

We have reviewed your request to determine if the transportation and installation of modular buildings on foundations, etc., constitutes construction.

While the transportation of modular buildings is not classified as construction the installation and set-up of modular buildings does constitute construction for several reasons.

1. Manufacturers of modular buildings are required to provide a "Site Reference Manual" detailing the construction work necessary to properly set the building on a foundation provided by the builder or dealer purchasing the building. In cases where the manufacturer is responsible for the set of the building the manufacturer's contract with the builder or dealer will usually include the cost of the set.
2. The setting of modular homes requires the lifting of the individual sections thru the use of a crane, spreader bars, cables and a crane with adequate lifting capability. These are utilized to enable the proper placement of the modular sections upon the foundation. These sections must be properly attached to the foundation per the "Site Reference Manual" individual sections, after placement on the foundation, are aligned and leveled through the use of jacks, chain brackets and come-a-longs. Lally columns are installed in the basement with the sections then being bolted together per the "Site Reference Manual" Roof sections, built as a series of folds, must be extended, raised to proper height, aligned and secured. Depending upon style and design this will include the installation of collar ties, gusset plates, knee walls and bolts. Uncompleted sections must have roof sheathing, roofing paper or ice and water shield, shingles and venting installed to create a weather-tight condition. Specific applications may also include the installation and attachment of pre-built dormers, reverse gables, wall and roof panels, modular pods and shed dormers as a part of the complete house set.
3. In many states the individual or entity performing the installation of the modular building requires an installers' or construction license. This on-site work is under the jurisdiction of the local building official, requires a building permit and is subject to inspection as required by the local jurisdiction.
4. The aforementioned work is required to remove the modular sections from their carriers, place and secure them on the foundation. Additional work is required but may be completed at a later date without compromising the integrity of the modular building.

Conclusion:

T.R. Arnold and Associates is accredited by the International Accreditation Service as an inspection agency and has been serving the modular home industry as a Third Party Inspection Agency and engineering firm since 1969 and maintains individual state certification in each of the states it transacts business in. It is our conclusion and professional opinion, utilizing common terminology of the building trades and the modular industry that all work performed in the setting of a modular home must be defined as construction work.

Please contact me with any questions or concerns.

Yours truly,

T.R. Arnold & Associates, Inc.



Robert W. Tanger, President

International Accreditation Service, Inc.

SCOPE OF ACCREDITATION

Inspection Agency AA-674
Type A (Third-Party) Body

T.R. Arnold & Associates, Inc.
700 East Beardsley Avenue
Post Office Box 1081
Elkhart, Indiana 46515

Robert W. Tanger
President
(574) 264-0745

| FIELDS OF INSPECTIONS | TYPE AND RANGE OF INSPECTIONS | INSPECTION METHODS AND PROCEDURES |
|---|-------------------------------|--|
| Manufactured (Mobile) Homes; Panelized Housing; Modular Housing; Prebuilt Commercial Structures | In plant | 2000 International Building Code, Section 1701 |

July 1, 2002
Commencement Date


C. P. Ramani, P.E.
President

This accreditation certificate supersedes any IAS accreditation certificate bearing an earlier date. The certificate becomes invalid upon suspension, cancellation, revocation, or expiration of accreditation. See the IAS Accreditation Listings on the web at www.iasonline.org for current accreditation information, or contact IAS directly at (562) 699-0541. Print Date: 09/29/2003

Sec. 43 Building Permit

It shall be unlawful to start any work for the purpose of construction, alteration, or removal of any building unless a building permit has been issued. Any person starting construction before making application and paying fees as per Section 44, shall pay double the applicable fee.

The applicant for a building permit shall submit a site plan at a suitable scale showing:

- A. The shape, size and location of the lot to be built upon and the buildings to be erected, altered or removed;
- B. Any buildings already on the lot;
- C. Depth of front yards of buildings on adjoining lots;
- D. Any other information needed by the Building Inspector or the Board of Appeals to determine whether the provisions of this ordinance are being observed.

If the application conforms with the provisions of this ordinance, the State Plumbing Code, and other applicable codes and ordinances, a permit shall be issued upon payment of the required fee to the municipality. If not, the building permit shall be refused by the Building Inspector stating such refusal in writing with the cause.

If no substantial progress of construction has been made in six months from the date the permit is issued, the permit becomes invalid. The Building Inspector may renew the permit upon payment of a renewal fee.

Sec. 44 Fees

Building Permits or renewals shall be at the following rates:

| Value of Project | Fee |
|--|----------------|
| 0 - 5,000 | Min. 10.00 |
| Over 5,000 | 2.00 per 1,000 |
| Application for Variance/ DESIGN REVIEW | 20.00 |
| Advertising | 20.00 |
| Demolition of structure | 25.00 |
| Moving of Mobile Home | 15.00 |
| Swimming Pool (in or above ground) | 25.00 |

The applicant for a building permit requiring a variance from the Zoning Board of Appeals shall also be responsible for any fees incurred due to public advertising of the Public Hearing as required by this Ordinance.

Sec. 45 Certificate of Occupancy Required

A certificate of occupancy issued by the Building Inspector is required in advance of the use of:

- A. Any lot or change of the use thereof.
- B. A building hereafter erected or a change in the use of an existing building.

No certificate of occupancy shall be issued unless the lot or building complies with all the provisions of this ordinance. A record of all certificates of occupancy shall be kept on file in the office of the Building Inspector and available for public inspection.

Sec. 45A Penalties for Violation

Any person violating any provision of this ordinance may be fined not exceeding \$50.00 for each offense. Each day that the violation occurs shall constitute a separate offense, beginning with the day following notification by the Building Inspector of each violation.

Sec. 46 Remedies

If any building is constructed, altered, or removed, or any building or land is used in violation of this ordinance the Building Inspector or any other appropriate authority or any person who would be damaged by such violation, in addition to other remedies may institute appropriate legal procedures to prevent such violation.

ARTICLE VIII BOARD OF APPEALS

Sec. 47 Establishment and Organization

A Zoning Board of Appeals is hereby established. The Zoning Board of Appeals, also referred to in this Ordinance as the Board, shall consist of seven (7) members appointed by the Council. Each member shall serve for a term of three (3) years. No member may serve more than two consecutive terms on the Board.

A. Appointment. The Town Council by majority vote shall upon the expiration of each member's term appoint a member to the Board for a three (3) year term. Upon the resignation of a member, the Council shall appoint a member to serve that person's unexpired term. Members serving shall continue in office until a successor is appointed and qualified.

areas in which development would adversely affect water quality, productive habitat, biotic systems, or scenic and natural values.

D. Permitted Land Uses:

Land uses permitted in the City's Land Use Zones, in conformance with the Standards of this Ordinance, are shown in the following table:

KEY:

P = Yes, permitted; requires only a building permit for a structure.

S = Permitted, but subject to Site Plan Review and the issuance of a building permit.

Blank = Not permitted.

Numbers refer to notes at the end of the table.

TABLE OF LAND USES

| | R-1 | R-2 | R-3 | R-4 | C-1 | C-2 | C-3 | I-1 | I-2 | RP |
|---|-----|-----|-----|-----|-----|-----|-----|-----|-----|----|
| RESIDENTIAL USES: | | | | | | | | | | |
| Accessory use or structure | P | P | P | P | P | P | P | P | P | P |
| Cluster subdivision | S | S | S | S | | | | | | |
| Congregate Care Facility | | | S | S | | S | S | | | |
| Home occupation | S | S | P | P | | | P | | | |
| Manufactured housing | P | P | P | P | | | | | | |
| Mobile home park | | S | S | S | | | S | | | |
| Multi-family dwelling | S | S | S | S | | | | | | |
| Single-family dwelling | P | P | P | P | | | | | | |
| Two-family dwelling | P | P | P | P | | | | | | |
| COMMERCIAL USES: | | | | | | | | | | |
| Accessory use or structure | | | | | S | S | S | S | S | |
| Antique sales | | P | P | P | S | S | S | | | |
| Apartments on upper floor of building | | | | | P | P | P | | | |
| Art gallery, pottery barn, ceramic studio | | | | S | S | S | S | | | |
| Automobile sales | | | | | S | S | S | | | P |

2. **Rear Lot Line:** The lot line opposite the front lot line abutting adjacent lots not in common frontage. On a lot pointed at the rear, the rear lot line shall be an imaginary line between the side lot lines, not less than ten feet long, lying at the farthest possible distance from the front lot line and parallel to it.
3. **Side Lot Line:** Any boundary line ~~other than the front or rear lot line.~~ abutting adjacent lots of common frontage.

Lot of Record: A parcel of land, a legal description of which or the dimensions of which are recorded on a document or map on file with the Washington County Register of Deeds.

Lot, Shorefront: Any lot abutting a body of water regulated by the Shoreland Zoning Ordinance.

Lot, Through: Any interior lot having frontages on two more or less parallel roads or between a road and a body of water, or between two bodies of water. In a corner lot, these two boundaries intersect.

Lot Width: The distance between the two side lot lines measured at the front setback line.

Lowest Floor: The lowest floor of the lowest enclosed area (including basement). An unfinished or flood resistant enclosure, usable solely for parking of vehicles, building access or storage in an area other than a basement area is not considered a building's lowest floor, provided that such enclosure is not built so as to render the structure in violation of the applicable non-elevation design requirements described in Article VI of this ordinance.

Manufactured Home: A structure, transportable in one or more sections, which is built on a permanent chassis and is designed for use with or without a permanent foundation when connected to the required utilities. For floodplain management purposes the term manufactured home also includes park trailers, travel trailers, and other similar vehicles placed on a site for greater than 180 consecutive days.

Manufactured Home Park or Subdivision: A parcel (or contiguous parcels) of land divided into two or more manufactured home lots for rent or sale.

Manufactured Housing: A structural unit designed for occupancy, and constructed in a manufacturing facility and then transported by the use of its chassis, or placed on an independent chassis, to a building site. The term includes any type of building which is constructed at a manufacturing facility and then transported to a building site where it is utilized for housing and may be purchased or sold by a dealer in the interim. For the purpose of this Ordinance two types of manufactured housing are included.

1. **New mobile homes:** Units constructed after June 15, 1976 which the manufacturer certifies are in compliance with the United States Department of Housing and Urban

(Amended 8-24-96)

How Do I Enter the United States as a Commercial Truck Driver?

Temporary Visitors for Business

Immigration regulations and policies have long held that alien truck drivers may qualify for admission as B-1 visitors for business to pick up or deliver cargo traveling in the stream of international commerce.

Truck drivers must meet the general entry requirements as a visitor for business (B-1 classification) set forth in section 101(a)(15)(B) of the Immigration and Nationality Act of 1952 (INA) and the Department of State regulations. To qualify as a bona fide visitor for business, the driver must:

- Have a residence in a foreign country which he or she has no intention of abandoning
- Intend to depart the United States at the end of the authorized period of temporary admission
- Have adequate financial means to carry out the purpose of the visit to and departure from the United States
- Establish that he or she is not inadmissible to the United States under the provisions of section 212(a) of the INA, which includes such grounds of inadmissibility as health related, criminal, subversive, public charge, improper manner of arrival or improper documents, other immigration violations and several other categories of ineligibility.

Documentary Requirements

Canadian citizens entering the United States as visitors for business do not require either a passport or a visa. However, each applicant for admission is required to satisfy the inspecting officer of his or her citizenship. An oral declaration may be accepted or the inspecting officer may require supporting documentation, for example, a birth certificate, certificate of citizenship or a passport (valid or expired). In addition, all travelers should carry some form of photo-identification.

Mexican citizens entering the United States as visitors for business are required to present a valid passport and non-immigrant visa. These requirements may be satisfied in one of two ways:

- A valid Mexican passport containing a valid B-1/B-2 non-immigrant visa obtained at a United States Consulate. Consulates in Mexico also issue a combination B-1/B-2 visa and Mexican Border Crossing Card that serves the same purpose.
- Form DSP-150, "Laser Visa", a credit-card style document that is both a Border Crossing Card and a B1/B2 visitor's visa obtained by applying at a United States Consular post in Mexico. The Laser Visa may be obtained by applying at one of the following U.S. Consular posts in Mexico: Mexico City, Ciudad Juarez, Guadalajara, Hermosillo, Merida, Matamoros, Monterrey, Nogales, Nuevo Laredo, Tijuana, and at the Tijuana and Mexicali Temporary Processing Facilities. In Mexico, visa information is available by calling 01-900-849-3737 or on the U.S. Embassy Internet homepage at www.usembassy.org.mx.

What Does the Law Say? Immigration Regulations

Immigration regulations at 8 CFR 214.2(b)(4) codify the provisions of the North American Free Trade Agreement (NAFTA) with respect to the admission of Canadian and Mexican citizens as B-1 business visitors. The intent of the Transportation Operator provision of the NAFTA Business Visitor category is to allow the free movement of goods across the border, an activity that is international in scope; it is not to facilitate access to the domestic labor market. 8 CFR 214.2(b)(4)(i)(E) defines the distribution activity as:

Transportation operators transporting goods or passengers to the United States from the territory of another Party or loading and transporting goods or passengers from the United States to the territory of another Party, with no unloading in the United States. (These operators may make

deliveries in the United States if all goods or passengers to be delivered were loaded in the territory of another Party. Furthermore, they may load from locations in the United States if all goods or passengers to be loaded will be delivered in the territory of another Party. Purely domestic service or solicitation, in competition with United States operators, is not permitted.)

General Principles

- The goods must be entering or leaving the United States, and remain in the stream of international commerce.
- Cargo that has its origin and final destination within the United States generally moves in the stream of domestic, rather than international commerce. The mere fact that goods originate from a foreign source does not make such goods "foreign" for purposes of immigration laws. The goods must remain in the international stream of commerce - once they have come to rest they assume a domestic character.
- A driver bringing goods from Canada or Mexico may transport those goods to one or several locations in the United States, and may pick up goods from one or several U.S. locations for delivery to Canada or Mexico, but the driver may not load, haul, or deliver a cargo that is both picked up and dropped off at a destination within the United States.
- The entry of the driver must be for the purpose of an international movement of goods.
- Drivers may not engage in any activity that qualifies as local labor for hire.
- The burden of proof remains with the driver to establish eligibility for entry.

Frequently asked Questions

Q. A Canadian driver is taking a shipment from Canada for delivery to a point in the United States. The dispatcher has been notified of a shipment destined to Canada that is located in another state. May the driver take an empty trailer (deadhead) from the delivery point to the other state to pick up the shipment and deliver it to Canada?

A. A driver may deadhead a trailer from one location to another within the United States PROVIDED the deadhead trailer is either the one the driver came in with or the one he or she is departing with. The driver may not haul an empty trailer from one location to drop it off at another location.

Q. Under what circumstances may a driver enter with an empty tractor?

A. 1) A driver may enter with an empty tractor to pick up a trailer for delivery to Canada or Mexico.

A. 2) The driver may enter with an empty tractor to pick up a loaded trailer or goods previously brought from Canada or Mexico and left at the port-of-entry or a Customs warehouse or lot for government inspection or entry processing by a government agency, even if the driver did not bring the goods. (Note - this only applies when the goods have been held for Federal inspection by a government agency. It does not apply to goods that have already cleared inspection.)

Q. Does the driver have to depart with the same trailer with which he or she entered the United States?

A. The driver may drop a trailer at one location and drive empty to another location to pick up a loaded trailer destined to Canada or Mexico.

Q. May a foreign driver taking a shipment from the United States to Canada also take merchandise destined to another point in the United States since it is on the way?

A. No. For Immigration purposes, that is considered point-to-point hauling within the United States and is not permitted. The driver may only take goods loaded in the United States to Canada or Mexico.

Q. May a driver perform associated functions such as loading and unloading cargo?

A. The driver may perform a function that is a necessary incident to international trade. Loading and unloading that is merely incidental to the primary purpose of transporting goods into or out of the United States is permitted.

Q. May a U. S. carrier employ foreign drivers?

A. A United States carrier may employ a foreign driver if the driver is engaged only in the international delivery of goods and cargo to or from the United States. The foreign driver must have an established foreign residence that he or she does not intend to abandon. The foreign driver may not engage in any domestic carriage of goods without employment authorization to work in the U.S.

Last Modified 02/28/2003

Internationally Speaking

Industry Canada

submitted by Murray Hardie

During the first two months of 1999 exports of prefabricated buildings to the U.S. continued to grow on a year over year basis. Exports to the U.S. in January and February were valued at \$21.3 million, an increase of \$3.1 million over the corresponding period in 1998. During the same period, exports to Japan continued to trend downward. Japanese prefabricated housing imports from Canada were valued at \$9.2 million for the first two months of 1999, a decrease of \$7.4 million from \$16.6 million during the first two months of 1998. During this early 1999 time frame these two markets accounted for an astounding 87 percent of total Canadian prefabricated building exports.

For the first time in many years the U.S. in 1998 became the leading export market for Canadian manufacturers. This trend is expected to continue for the foreseeable future. Canadian firms are reporting increased exports of housing components, such as trusses and wall and roof panels to the U.S. and a number of shortages of building materials are being reported in U.S. trade publications. Industry Canada's forecast for exports of prefabricated housing to the U.S. for 1999 calls for an increase of 20 percent this year. Leading States by import volume so far this year include Virginia, Washington, California, Maine, Florida and New York. Eased on first quarter housing starts data the outlook for the U.S. residential construction sector in 1999 remains very positive.

CMHI Export Update

German Systems Approval

One of the first technical priorities set by the CMHI Export Council was to pursue the approval of the Canadian housing system in Germany. From an initial meeting of four agencies, this endeavour has grown to several dozen government agencies, associations and companies. In the spring of this year word was received back that the application submitted to Germany's DiBT had been approved subject to some clarifications. DiBT's reply has been reviewed by the Canadian Committee and a final response from the Germans is due in August.

The approval of the Canadian wood frame housing system in Germany is a significant accomplishment. Germany has traditionally been recognized as having some of the highest and most demanding standards in Europe. Beyond the direct opportunities, the German approval will provide our industry with increased acceptance in the balance of the European community.

US Domestic Market

The strong U.S. dollar and no growth in the single family housing stats have both contributed to increased Canadian exports into the US. The encouraging

aspect of this trend is the gradual and healthy growth curve. While other export destinations have been subject to "boom/bust" cycles, the stable growth in the U.S. tends to signify more secure fundamentals.

Virtually every modular and mobile home manufacturer in Canada is or is in the process of producing homes for sale in the U.S. What can be done to further increase exports to the US? The majority of companies' US sales have been obtained through regional target marketing and dealer/builder networks. Firms from coast to coast have developed varying niche markets in the Border States. Typically these manufacturers have capitalized on Canada's reputation for quality and value and are producing a moderately upscale product. As a result firms for the most part are not going head to head with American producers at the affordable end of the housing spectrum.

This niche marketing, while typically slower to develop is proving to be a very successful approach. The nature of niche marketing makes it very difficult to conduct an industry wide strategy to market Canadian homes in the US. For this reason, CMHI has taken a limited role in support of US exports, focusing our efforts on issues of a truly national nature. The recent "Team Canada" directory of manufacturers, jointly published by CMHI and MFAC was distributed to all US consulates and select groups.

One of the limiting factors to shipping homes into the US has been the movement of skilled Canadian labour across the border to erect and service the homes. Based on concerns raised by manufacturers, retailers and builders, CMHI undertook an investigation to determine what could be done to facilitate the movement of construction labour across the border.

In co-operation with DFAIT, CMHC and CHEA, CMHI has produced a 72 page document which is an easy to understand guide to labour movement including answers to a list of frequently asked questions. Through this group's efforts the "construction" labour movement issue has been raised at the ministerial level and will be discussed at the next joint US/Canada meeting on cross border issues.

Other initiatives that exporting firms should be aware of include the CMHC match making service. A recent pilot project was held in Seattle in conjunction with the Canadian Consulate. A firm was retained to solicit, qualify and invite US firms interested in importing Canadian building products to a one day match making service where Canadian Firms were brought in for a series of one on one meetings. By all reports the process was extremely successful and similar "meetings" will be co-ordinated at other cities in Canada in the near future. On a similar note, DFAIT run a series of New Exporters to Border States Missions (NEES). These are sector focused and in some cases include building products.



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Prestige Homes are sold through a network of independent builders across Atlantic Canada and Northeastern United States. Prestige builders are professional, experienced and well trained to take you through the entire home buying process. They know homes inside out. They are familiar with financing. They also know what's going on in their community.

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Our staff in Sussex are enthusiastic about homebuilding, skilled and dedicated to top-notch performance. From our innovative designers and construction specialists to our service department, everyone plays an important role in keeping Prestige Homes at the forefront of the industry.



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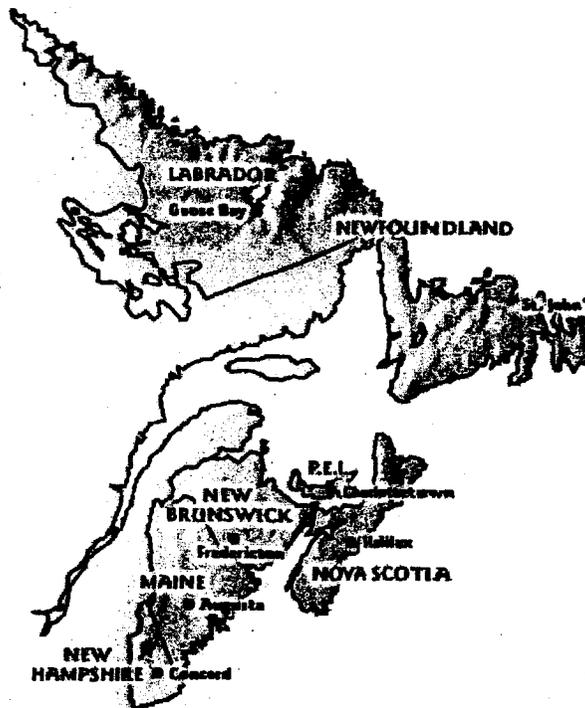
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