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November 4, 1997

The Honorable John S. McCain
Chairman
Committee on Commerce,
Science, and Transportation
United States Senate

Subject: NAFTA-TAA Program: Certification Criteria, Procedures, and Activity

Dear Mr. Chairman:

This letter responds to your letter of July 30, 1997, and subsequent discussions with your office regarding issues concerning the North American Free Trade Agreement's Transitional Adjustment Assistance (NAFTA-TAA) program. As agreed with you, we are providing information about (1) the statutory basis for the NAFTA-TAA program, including the criteria under which workers are certified as eligible to receive benefits; (2) procedures followed to certify workers as eligible for these benefits; and (3) certification activity to date.[1]

SUMMARY

The NAFTA-TAA program was established as part of the 1993 North American Free Trade Implementation Act (NAFTA act).[2] Under this program, assistance may be provided to workers who are displaced because of increased imports from or shifts in production to Mexico or Canada, provided certain eligibility criteria are met. Neither the act nor the Department of Labor's implementing guidance concerning worker eligibility for assistance under NAFTA-TAA requires that increased imports or production shifts be linked directly to NAFTA. State and federal governments

[1]We are currently conducting a broader review of the NAFTA-TAA program requested by Representatives Evans and Lipinski.

[2]Public Law 103-182 (December 8, 1993).

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share responsibility for determining eligibility, with the final determination made by the Secretary of Labor. As of September 4, 1997, 1,206 groups of workers, comprising 142,884 individuals from 46 states, had been certified as eligible to apply for NAFTA-TAA benefits. Certification was denied for 772 groups of workers, covering 87,034 individuals, through August 31, 1997.

STATUTORY BASIS FOR THE NAFTA-TAA PROGRAM

The NAFTA-TAA program was established under title V of the NAFTA Implementation Act. The program provides assistance to workers in firms directly affected by imports from or shifts in production to Mexico or Canada, if certain eligibility criteria are met. Assistance for eligible workers may include employment services, training, extended income support payments (up to 52 weeks after exhaustion of unemployment compensation when enrolled in training), and job search and relocation allowances. The NAFTA-TAA program is similar in many respects to the general Trade Adjustment Assistance program established by the Trade Act of 1974, which provides assistance to U.S. workers adversely affected by the consequences of international trade.[3]

Eligibility Criteria

The NAFTA act specifies when a group of workers shall be certified as eligible to apply for assistance. Specifically, certification is to be made if the Secretary of Labor determines that a significant number or proportion of the workers in a firm have become or are threatened with becoming totally or partially separated from their jobs,[4] as a result of either (1) increased imports from Mexico or Canada or (2) a shift in production by the workers' firm to Mexico or Canada.

For workers to be eligible for NAFTA-TAA certification under the first criterion relating to increased imports, three conditions must be met:

(1) the sales or production, or both, of their firm (or subdivision of the firm) must have decreased absolutely;

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[3]The NAFTA-TAA program is codified as subchapter D of chapter 2, title II of the Trade Act of 1974, as section 250 of that Act. Subchapter A of chapter 2 sets forth the general Trade Adjustment Assistance Program, which remains in effect and available for all eligible parties. The NAFTA act, section 503, provides that no worker may receive assistance under both subchapter A and subchapter D.

[4]The statute provides that only those workers separated after the date of enactment of the NAFTA act (Dec. 8, 1993) are eligible to be certified for assistance.

(2) imports from Mexico or Canada of articles "like or directly competitive with" articles produced by their firm or subdivision must have increased; and

(3) the increase in imports must have "contributed importantly" to the workers' separation or threat of separation and to the decline in the sales or production of the firm or subdivision.[5]

With respect to the third condition, the NAFTA act provides that increased imports will be considered to have "contributed importantly" to the separation of workers and a decline in the firm's sales or production if they are a "cause which is important but not necessarily more important than any other cause" of worker separation and sales or production decline.[6] This definition also appears in the general Trade Adjustment Assistance (TAA) program legislation and has been subject to interpretation by the U.S. Court of International Trade (CIT). Noting that the language in the TAA legislation "offers little assistance in ascertaining the precise meaning to be accorded the word 'important,'" the CIT looked to the legislative history and concluded that Congress intended that a cause be significantly more important than "de minimis" (a very small or negligible amount) to have "contributed importantly" to worker separations.[7] While the CIT has stated that the required degree of importance is not subject to "any mechanical designation such as a percentage of causation,"[8] it has denied claims for trade adjustment assistance where factors other than increased imports were "so dominant" that worker separations and a decline in sales or production would have occurred even without the presence of increased imports.[9]

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[5]19 U.S.C. 2331(a)(1)(A).

[6]19 U.S.C. 2331(a)(2).

[7]Cherlin v. Donovan, 585 Fed. Supp. 644 (1984).

[8]Cherlin v. Donovan.

[9]For example, the CIT has upheld worker certification denials where the Labor Department determined, based on surveys of customers of the workers' firm, that the customers of that firm were choosing to purchase from different domestic sources. Cherlin v. Donovan. The CIT has also upheld denials where, irrespective of an increase in imports, production of the product was moved to a different U.S. plant or discontinued. Former Employees of Digital Equipment Corp. v. U.S. Secretary of Labor, CIT Slip Op. 96-136 (Aug. 13, 1996). Similarly, "technological unemployment"–that is, plant closure due to technological obsolescence–does not

As noted above, the second eligibility criterion for certifying workers under the NAFTA act applies to shifts of production. Under this criterion, workers are eligible for certification if there has been a shift of production by their firm (or subdivision) to Mexico or Canada of "articles like or directly competitive with articles" which are produced by their firm.[10] As recognized by the Department of Labor's guidelines implementing the program, the law does not address ownership of the producing firm. Thus, the shift in production can result either from the firm moving its own plant to Mexico or Canada, or from the firm contracting with a producing plant located in Mexico or Canada.

While the legislative history of the NAFTA act indicates that the assistance program was viewed as a means of helping workers dislocated as a result of NAFTA,[11] there is no requirement in either of the statutory tests that increases in imports from or shifts in production to Mexico or Canada be directly attributable to NAFTA. Thus, the Labor Department is not required to distinguish between the effects of import increases and production shifts caused by NAFTA and those that would have occurred independently.[12]

Implementing Regulations

Section 502 of the NAFTA Act requires the Department of Labor to issue regulations relating to the application of eligibility criteria for worker certification. In response to this requirement, the Department has issued operating instructions in the form of a General Administrative Letter, which is the controlling guidance in

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form a basis for worker certification.

[10]19 U.S.C. 2331(a)(1)(B).

[11]See, for example, S. Rep. No. 103-189 at 50 (1993).

[12]As a practical matter, linking imports from Mexico or Canada, and associated job impacts, to specific NAFTA provisions would be difficult. Prior to NAFTA implementation, Canada and Mexico ranked first and third as U.S. trading partners, with many imports subject to low or no duties. While total trade between the United States and its NAFTA partners has expanded since 1994, this is due not only to NAFTA but to other factors and trends existing prior to NAFTA. In addition, other factors occurring after NAFTA have influenced trade flows between NAFTA partners, notably the implementation of the Uruguay Round agreements, and Mexico's peso devaluation and subsequent deep recession.

implementing and administering the NAFTA-TAA program.[13] Our review and analysis of the operating instructions found them to be in accordance with the act. The operating instructions define key terms and criteria contained in the NAFTA-TAA legislation, and they reflect the regulatory definitions for terms that also appear in the general Trade Adjustment Assistance program legislation.[14]

Coverage of Secondary Workers

In addition to the NAFTA-TAA program provided for in the act, a Statement of Administrative Action (SAA) was issued, whereby the Administration made a commitment to provide a program of adjustment services for certain "workers in firms that are indirectly affected by imports from Mexico or Canada" who are not eligible for the statutory program; that is, firms that supply or assemble products produced by directly affected firms certified under NAFTA-TAA. For example, workers who produce automobile bumpers but do not work directly for the company affected by the increased imports in cars are eligible for benefits. For this supplemental program, the Department stated it will use existing authority under Title III of the Job Training Partnership Act.[15] The Department has issued Training and Employment Guidance Letter 7-93, April 19, 1994, providing additional information on the title III program.

Department of Labor officials stated that there have only been 36 cases in which secondary workers were certified for benefits, and that the benefits for secondary workers are the same as those provided to NAFTA-TAA beneficiaries. In a 1994 report on NAFTA-TAA,[16] we found that limited guidance, unclear authority, and a slow and cumbersome funding mechanism may make it difficult for secondary workers to access benefits. Department of Labor officials indicated that this underutilization of the secondary worker provisions continues to be of concern.

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[13]See General Administrative Letter No. 7-94, December 28, 1993, as amended.

[14]See 29 C.F.R. part 90, which contains definitions of key terms in the general TAA legislation (for example, "totally or partially separated," and a "like or directly competitive" article).

[15]29 U.S.C. 1651-1658.

[16]See Dislocated Workers: An Early Look at the NAFTA Transitional Adjustment Assistance Program (GAO/HEHS-95-31, Nov. 28, 1994).

THE NAFTA-TAA CERTIFICATION PROCESS

Both states and the federal government play a role in the NAFTA-TAA certification process, with the final certification determination made by the Secretary of Labor. The process begins at the state level, when workers in a firm or their authorized representative files a petition with the Governor of the state in which the affected workers' firm is located. Once a state receives a petition for assistance, the Governor is required to make a preliminary finding within 10 days about whether the petition meets certain eligibility criteria. The Secretary of Labor is required to make a final determination within 30 days of receiving the state's preliminary finding.[17]

In making a preliminary finding, state representatives consider several factors, including whether employment, production, and sales of the affected workers' firm have declined, based on data collected from the firm. State officials also inquire about production shifts to Mexico or Canada. No state-level determination is made regarding whether a rise in imports "contributed importantly" to the workers' separation. Once the state investigation is completed, the petition and relevant data are sent to the Department of Labor's Office of Trade Adjustment Assistance (OTAA) for review. At that point, if the state makes an affirmative finding, the state is to ensure that title III Job Training Partnership Act benefits, including rapid response and basic readjustment services (information on available assistance programs, skill assessment, career counseling, and job placement services), are made available.[18]

Once the petition and supporting materials are received from a state, OTAA conducts its own review of the information provided and may also collect additional data. This data collection is done from Washington, with telephone interviews, letters, and facsimile transmissions. In cases where there is a claimed shift in production to Mexico or Canada, investigators contact officials where workers covered by the petition have been employed to verify the production shift and

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[17]NAFTA-TAA certifications of eligibility for benefits remain open for up to two years from the date the certification is issued, and cover separations that occurred up to one year prior to the date of the petition.

[18]Title III of the Job Training Partnership Act benefits are available to dislocated workers who have lost their jobs and are unlikely to return to their previous industries or occupations. This includes workers who lose their jobs because of plant closures or mass layoffs; long-term unemployed persons with limited job opportunities in their fields; and farmers, ranchers and other self-employed persons who become unemployed due to general economic conditions.

attendant job loss. Where there is claimed production or sales decline due to increased imports, OTAA may survey up to six of the firm's major declining customers to see whether their reduced purchases from the firm were accompanied by increased imports of like or directly competitive products made in Mexico or Canada. OTAA considers in some cases aggregate import data in making certification decisions. Recent cases where aggregate import data have been used involve apparel or footwear, where large quantities of imports have been entering the U.S. market.

OTAA has a training handbook on applying certification criteria originally developed for reviewing Trade Adjustment Assistance petitions. This includes some guidance on judging whether increased imports might be considered to have "contributed importantly" to production declines or how to determine whether products are "directly competitive" with other products. However, OTAA officials indicated that they do not use specific numerical thresholds in making their determinations. They maintain that numerical thresholds are not appropriate because the impact on a firm of a certain level of import activity is dependent on a broad range of firm and industry-specific factors. They cited apparel as an example of an industry in which a small percentage shift toward imported products by a firm's customer base would be considered to affect the firm, because profit margins are tight and firms rely on volume production to sustain profitability.

PROFILE OF NAFTA-TAA CERTIFICATION ACTIVITY

According to OTAA officials, the majority of their certification decisions are straightforward. These include petitions based on shifts in production to Mexico or Canada. Other relatively straightforward cases include a clear decrease in a firm's sales accompanied by a clear increase in the purchase of imports from Mexico or Canada by its customers. However, a small percentage of the certification decisions fall into "gray areas." These include cases where changes in sales, production, or imports are small, and linkages can be difficult to determine.

As of September 4, 1997, 1,206 groups of workers, comprising 142,884 individuals in 48 states, had been certified as eligible to apply for benefits under the program. Certification was denied for 772 petitions covering 87,034 workers through August 31, 1997. Table 1 shows the distribution of factors supporting NAFTA-TAA certification. Just over half (623) of the 1,206 certifications were for production shifts to Mexico or Canada. Increased customer imports, based on customer survey data, were the factor cited in about one-third (380) of certifications, with increased company imports and high and rising aggregate imports the factors cited in the remaining certification cases.

Table 1: Factors Supporting NAFTA-TAA Certification, January 1, 1994 - September 4, 1997

Factors supporting certification	Number of Petitions			
	Mexico	Canada	Mexico or Canada not identified	**Total**
Production shifted	499	124	0	623
Increased customer imports	108	113	159	380
Increased company imports	106	50	11	167
High/rising aggregate imports	0	0	36	36
Total	**713**	**287**	**206**	**1,206**

Source: OTAA, Department of Labor.

As noted, neither the statute nor the Department of Labor's implementing guidance requires that increased imports or production shifts be linked directly to NAFTA. Further, NAFTA-TAA certifications represent potentially affected workers, not the actual number of jobs lost, making certifications an inaccurate proxy for job dislocations due to NAFTA.[19]

Table 2 summarizes reasons for NAFTA-TAA denials. Sixty-two percent (481) of these petitions were denied because no shift in production occurred and no increased customer imports were identified. In 16 percent (127) of the cases, the workers did not "produce an article" (because the certification criteria require that the workers' firm produce an article, service workers such as trucking or warehouse employees are not covered under NAFTA-TAA). Other factors cited for denials included domestic production transfers and no employment decline or sales/production decline.

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[19]For information on NAFTA-TAA certifications for key sectors and states, see North American Free Trade Agreement: Impacts and Implementation (GAO/T-NSIAD-97-256, Sept. 11, 1997).

Table 2: Factors Supporting NAFTA-TAA Denials, January 1, 1994 - August 31, 1997

Factors supporting denial	Number of petitions
No shift in production and no increased customer imports	481
Workers did not produce an article	127
Domestic production transfer	86
Workers not separated or threatened with separation or no production shift	33
No sales/production decline and no production shift to Canada or Mexico	28
No worker separation within the required 2-year window	17
Total	**772**

Source: OTAA, Department of Labor.

SCOPE AND METHODOLOGY

To understand the statutory basis for the NAFTA-TAA program, including the criteria under which workers are certified as eligible to receive benefits, we reviewed the NAFTA act, the legislative history of the act, and relevant Court of International Trade decisions. We also examined the Department of Labor General Administrative Letters that serve as controlling guidance in administering the program, and reviewed the guidance for consistency with the NAFTA-TAA provisions. We also reviewed the SAA that accompanied the implementing legislation.

To document procedures followed to certify workers as eligible for NAFTA-TAA benefits, we interviewed OTAA administrators, examined forms used to collect information to support certification decisions, and analyzed 20 randomly selected case files. To profile NAFTA-TAA certification activity to date, we obtained descriptive statistics on certification decisions from OTAA administrators. These statistics were derived from the OTAA management information database maintained on certification decisions. While we did not independently verify these data using original sources, we did discuss with OTAA officials their procedures for

maintaining accurate records, such as data entry procedures and steps taken to check information. We also obtained and reviewed a printout of relevant data frc the management information system database through September 9, 1997. These data encompassed information on each petition reviewed, including the identification number and certification date, company name and location, decision status, estimated number of workers, and products made by the workers.

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We are providing copies of this letter to other interested congressional committees, the Secretary of Labor, and the Director of the Office of Management and Budget. Copies will be provided to others upon request.

Contributors to this letter were Celia Thomas, Phillip Herr, Nina Pfeiffer, and Ernie Jackson. Please contact me at (202) 512-8984 if you or your staff have any questions regarding this letter.

Sincerely yours,

JayEtta Z. Hecker, Associate Director
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