Come and Go? How Temporary Visa Works Under U.S. Bilateral Trade Agreements with Arab countries

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I. Introduction

The United States (U.S.) and Jordan launched negotiations for a free trade agreement in 2000.[1] Several reasons explain the U.S. desire to negotiate a free trade agreement with Jordan. The failed WTO Ministerial Conference in 1999 led U.S. trade officials to analyze the possibilities for a free trade agreement that would include certain provisions that are resisted at the multilateral trading level.[2] Moreover, the U.S. and Jordan had already signed a trade and investment framework in 1999, which is usually a precursor for a FTA.[3] Economically, U.S. exports to Jordan would increase as a result of the FTA while Jordanian imports to the U.S. would not threaten U.S. industries.[4] The FTA could also spur Jordan's economic growth, allowing for the possibility that it would become less dependant on foreign aid. Moreover, the U.S. needed to negotiate a FTA because it was losing ground to the EC which, which had

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[1] See Gary G. Yerkey, *U.S., Jordan Make "Substantial" Progress in Talks on Free Trade Agreement, USTR Says*, 17 Intl. Trade Rep. (BNA) 1224 (Aug. 3, 2000) (stating agreement to initiate negotiations was announced by U.S. officials following a meeting between President Clinton and King Abdullah on June 6 in Washington, D.C.).

[2] In the wake of protests by environmentalists and human rights activists at the WTO summit in Seattle in late 1999, then president Clinton promised to link future trade accords to labor, environmental, and human rights issues. See Eric M. Uslaner, *The Democratic Party and Free Trade: An Old Romance Restored*, 6 NAFTA: L & Bus. Rev. Am. 347, 359 (2000).

[3] See Grary G. Yerkey, *U.S., Jordan Sign Framework For Trade and Investment Pact*, 16 Intl. Trade Rep. (BNA) 468 (Mar. 17, 1999) (then USTR Charlene Barshefsky stated that the agreement would put in place institutional foundation for trade relationship. The agreement opened dialogue on issues such as agriculture, intellectual property, services, investment, and trade-related aspects of labor and environmental policy).

[4] A study conducted by the Office of Economics and the Office of Industries of the USITC, found that Jordan's exports to the U.S. would not have a measurable impact on U.S. industries, U.S. employment, and production. Based on 1999 trade figures, U.S. imports from Jordan totaled $31 million as compared to total US imports of $1 trillion. See U.S. International Trade Commission, Economic Impact on the United States of a U.S.-Jordan Free Trade Agreement, 5-1 Pub. No. 3340 (Sep. 2000) (an FTA with Jordan is not expected to have a measurable impact on U.S. imports from Jordan for the 15 sectors reviewed).

concluded association agreements with several Mediterranean countries.[5] By signing the FTA, the U.S. could catch up to the EC with respect to economic dominance in Arab countries.

On October 24, 2000, the United States-Jordan Free Trade Agreement (US-JO FTA) was signed in a record time.[6] The US-JO FTA was the first FTA to be concluded with an Arab country. It was also the first FTA to be concluded in the absence of fast track authority, which had lapsed since 1994.[7] Without fast track authority, Congress could have made amendments to the FTA, voted it down, delayed its passage, and added amendment.

The US-JO FTA includes a preamble, nineteen articles, three annexes, joint statements, memorandums of understanding, and side letters. In addition to the interesting articles on labor and environment, the US-JO FTA provides the opportunity for Jordanian nationals to come to the U.S. to make investments and

[5] The official movement towards a closer relationship between the EC and its Mediterranean neighbors was launched at a meeting of the European Council in Lisbon in 1992. It takes place between the EC and 12 countries to the east and south of the Mediterranean. The major premise of the partnership is to create an enormous zone of free trade between Europe and several countries of the Middle East by the year 2010. The Euro-Mediterranean Partnership was created in 1995 in Barcelona with the signing of the Barcelona Declaration by the EC and 12 Mediterranean Countries. The 12 Mediterranean countries are as follows: Morocco, Algeria, Tunisia, Egypt, Jordan, Israel, The Palestinian Authority, Lebanon, Syria, Cyprus, Malta, and Turkey. This partnership will lead to a series of Euro-Mediterranean association agreements. See Jacqueline Klosek, *The Euro-Mediterranean Partnership*, 8 Intl. Leg. Persp. 173 (1996).

[6] This record time of approximately four months can be compared with the 15 months of intensive debate between the U.S. and Israel which resulted in the conclusion of the US-Israel FTA. See Andrew James Samet & Moshe Goldberg, *The U.S.-Israel Free Trade Area Agreement* 1.02 (Bus. L. 1989). NAFTA parties completed negotiations in 1992 after 14 months of negotiations. Along the lines of the US-JO FTA, the US-Bahrain FTA of 2004 was concluded within four months starting January 2004 and ending in May of the same year.

[7] The fast track authority is a procedure, delegated by the U.S. Congress, gives the U.S. executive the authority to enter into trade negotiations under certain procedural requirements. It was used to conclude the Tokyo Round of 1979, the US-Israel FTA of 1985 whereby a specific section (section 401) of the U.S. Trade and Tariff Act of 1984 was designed as "trade with Israel", the US-Canada FTA of 1988, NAFTA of 1993, and the Uruguay Multilateral Trade Round of 1994. Since then, the fast track authority was not revived, despite various attempts, until the year 2002. For more on fast track authority see I.M DESTLER, *Renewing Fast-Track Legislation* 8 (Inst. Intl. Econ. 1997).

participate in trade.[8] Under certain conditions, Jordanian nationals can enter the U.S. to render professional services.

The purpose of this article is to examine in detail article 8 of the US-JO FTA which relates to entry of nationals of one party into the territory of the other. The article starts by providing a brief background of the negotiation and conclusion of the US-JO FTA. Then, the article analyzes in detail the specific provision related to temporary entry of nationals. The article draws a comparison between US-JO FTA with the North American Free Trade Agreement (NAFTA) and the more recent trade agreements between the U.S., Oman, Bahrain, and Morocco. Finally, the article observes that although the US-JO FTA, like all US FTAs, is designed to permit temporary entry, without intent to establish permanent residence, of persons, the U.S. should have provided Jordan with special and differential treatment for entry of its nationals. Taking into account the special circumstances of Jordan as a developing country with low-income status, high unemployment rate, and lack of resources, movement of business visitors, investors, intra-company transferees, and professionals should have been dealt with leniency so that the FTA could generate effective and real market access.

II. Treaty-Trader and Treaty-Investor Visas under the U.S.-Jordan FTA

The US-JO FTA permits entry of nationals of one party in the territory of the other.[9] From the outset, it is necessary to distinguish between migration and the ability of Jordanians to enter into the U.S. temporarily to make investments and participate in trade. Like all persons seeking to come to the U.S. on treaty trader or treaty investor visas, Jordanian nationals are not allowed permanent resident status, but are only given the opportunity to acquire a visa on a "temporary" basis or

[8] See Agreement between The United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, 41 I. L. M. 63, art. 8.
[9] *Id*. art. 8.

"non-immigrant" status.[10] While treaty trader and treaty investor visas are formally classified as temporary non-immigrant visas, these visas can be renewed on an indefinite basis. In this aspect, Jordanians are treated no different from other nationalities under other US FTAs.[11] In sum, the US-JO FTA does not set limits on the number of renewals for trader and investor visas.

The US-JO FTA allows nationals of Jordan to enter into the U.S. to carry solely "substantial trade", including trade in services and technology. The yardstick in the FTA is "substantial trade." Article 8 does not specify what constitutes "substantial trade."[12] For example, should a Jordanian trader be major exporter to the U.S to be eligible for entry? Or the U.S is obliged, subject to its laws on entry, to allow Jordan's traders entry into its territory for attending a trade fair or partnering with U.S firms.

In effect, the language of article 8 of the US-JO FTA is drawn from the Immigration and Naturalization Service (INS), now known as US Citizenship and Immigration Services within the Department of Homeland Security,[13] and the U.S Department of State regulations. The Department of State regulations define a treaty trader as an alien, classifiable as a nonimmigrant treaty trader (E-1), who will be in the U.S solely to carry on trade of a "substantial nature" either on the alien's behalf or as an employee of a foreign person or organization engaged in trade, "principally" between the U.S and the foreign state of which the alien is a national.[14] This language

[10] There is a U.S immigrant investor's status for those who commit to invest in the U.S in the amount of $1million generally. For more see 8 U.S.C.A §1153 (b) (5) (c) (2003).
[11] See Christopher S. Rugaber, *Senate Judiciary Committee Members Criticize USTR on Temporary Entry Provision*, 20 Int'l Trade Rep. (BNA) 1216 (July 17, 2003) (The texts of the Chile and Singapore FTAs create new visa categories in the United States for the temporary entry of professionals that would workers from Chile and Singapore to enter the United States each year. The visas could be renewed annually for an indefinite period).
[12] However, the term is defined in regulations of the U.S. State Department and Department of Homeland Security.
[13] Many of the functions of the Department of State related to visa have been transferred to the Department of Homeland Security. See Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, 451-456 (2002).
[14] See 22 C.F.R § 41.51 (a) (2003).

is identical to the language of article 8.1 of the US-JO FTA. The regulations of the Department of State reads that consideration being given to any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade. Moreover, the alien must prove that he intends to depart the U.S after the termination of E-1 status.[15]

Although US-JO FTA does not define the term "substantial trade", the Department of State regulations define it as the quantum of trade "sufficient" to ensure a continuous flow of trade items between the U.S and the treaty country.[16] Continuous flow contemplates numerous exchanges over time rather than a single transaction, regardless of the monetary value.[17] The U.S regulation considers monetary value as an important factor. However, greater weight is given to more numerous exchanges of larger value.[18] Therefore, Department of State regulations do not specify an exact monetary value of substantial trade as a benchmark that would qualify a Jordanian trader as eligible for E-1 visa. Rather, Department of State regulations leave it to the U.S Consular Office in Jordan, as the case for other US Consular Offices in other countries, the flexibility of determining "substantial trade" that would qualify Jordanian nationals of for E-1 visa. This conclusion is supported by the fact that the regulations of the Department of State itself read that consideration being given to any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade. In other words, the U.S Consular Office will have to take into account the conditions prevalent in Jordan

[15] *Id*. § 41.51 (a) (2).
[16] *Id*. § 41.51 (j).
[17] *Id*.
[18] In the case of smaller businesses, an income derived from the value of numerous transactions which is sufficient to support the treaty trader and his or her family constitutes a favorable factor in assessing the existence of substantial trade. *Id*.

when evaluating a petition for E-1 visa. Thus, the term "substantial trade will be evaluated on a case-by-case basis.

Additionally, the term "trade" is not defined in the US-JO FTA. The negotiators of the US-JO FTA perhaps wanted to give a non-exhaustive list of trade activities that could be conducted in the territory of the other party such as trade in services and technology. Other items of trade may include trade in monies, international banking, insurance, transportation, tourism, communications, and some news gathering activities.[19]

The US-JO FTA also allows nationals of one party to enter into the territory of the other party to establish, develop, administer, or advise on the operation of an "investment."[20] However, investment is qualified by the requirement that the nationals or the company that employs them "have committed" or "in the process of committing" a substantial amount of capital or other resources. In other words, the language of "have committed" or "in the process of committing" seems to require a significant amount of upfront investment such as transferring money before a national of Jordan can obtain the visa. The purpose such language could be interpreted so as to prevent maneuvering and fraud. Again, in the investment provision of the FTA, the yardstick is commitment to a "substantial amount of capital or other resources". The Department of State regulations define a treaty investor as an alien, classifiable as a nonimmigrant treaty investor (E-2), that has invested or is actively in the process of investing a substantial amount of capital, as distinct from a relatively small amount of capital solely for the purpose of earning a living, and he seeks entry solely to develop

[19] These non-exhaustive items are incorporated in the definition of items of trade in the Department of State regulations. *Id*. § 41.51 (i).
[20] See Agreement between the United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* note 8, art. 8.2.

and direct the enterprise.[21] Moreover, the treaty investor must intend to depart from the U.S upon the termination of E-2 status. Thus, subparagraph 8.2 of the US-JO FTA is drawn directly from the U.S regulations.

The US-JO FTA is silent as to the definition of "investment" and "substantial amount of capital." However, the Department of State regulation defines investment as the treaty investor's placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a profit. The treaty investor must be "in possession" of and "have control" over the capital invested or being invested.[22] Furthermore, the U.S regulations require that capital in the process of being invested must be "irrevocably" committed to the enterprise.[23] In other words, the treaty investor must commit capital in an unalterable way or commit beyond recall. The treaty investor must have the burden of establishing such irrevocable commitment given to the particular circumstances of each case. Moreover, according to the U.S regulations, the treaty investor may use any legal mechanism available that would not only irrevocably commit funds to the enterprise but also extend some personal liability protection to the treaty investor. Even if all other conditions are met, the investment must not be passive or virtual but rather a "real" and "active" commercial or entrepreneurial undertaking, producing some service or commodity for profit and must meet applicable legal requirements for doing business in the particular jurisdiction in the U.S.[24] This language intends to prevent visa fraud.

As to the definition of "substantial amount of capital", article 8 of the US-JO FTA is silent on this matter. However, the U.S Department of State regulations define "substantial capital" as the amount that is 1) substantial in the proportional sense for

[21] See 22 C.F.R, *supra* note 14, § 41.51 (b).
[22] *Id*. § 41.51 (l).
[23] *Id*.
[24] *Id*. § 41.51 (m).

example in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration; 2) sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and 3) of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.[25] The U.S regulations define whether an amount of capital is substantial in the proportionality sense in terms of an inverted sliding scale. For example, the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet the criteria. Moreover, the Department of State regulations require that projected future capacity of the enterprise should generally be realizable within five years from the date the alien commences normal business activity of the enterprise.[26] In summation, U.S regulations do not specify an exact amount of capital that would serve as a yardstick to evaluate whether an investment could qualify its holder for E-2 visa. Rather, the regulations leave "substantial amount of capital" test to be evaluated on a case-by-case basis.

Article 8.2 of the US-JO FTA allows nationals of either party to enter the territory of the other party to "establish", "develop", "administer", or "advise" of an investment. These four terms are not defined in article 8 of the US-JO FTA. Again, U.S Department of State regulations define some of these terms. For example, the regulations define "develop and direct" as what the business or individual treaty investor does or will develop and direct the enterprise by controlling the enterprise through ownership of at least 50% of the business, by possessing operational control through a managerial position or other corporate device, or by other means.[27]

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[25] *Id*. § 41.51 (n).
[26] *Id*. § 41.51 (o).
[27] *Id*. § 41.51 (p). In United States V. Matsumaru, the U.C Court of Appeals for the Ninth Circuit ruled that it is not enough for an investor to hold majority ownership in the investment, but he must "develop and direct" the investment. Thus, an investor loses his E-2 status if he cedes to exercise managerial control over his investment by delegating his managerial control to another person. The defendant in

Therefore, an investor under the US-JO FTA, as would an investor of any other nationality under other US FTAs, must play a key role in the investment whether through establishment, development, administration, or advice in order to be eligible for E-2 visa.

Similar to other FTAs and Bilateral Investment Treaties between the U.S. and other countries, the US-JO FTA did not exempt nationals of Jordan from acquiring U.S. visa for entry.[28] Jordanian nationals must appear at the U.S. embassy in Jordan and be inspected by a consular officer and acquire a visa stamp before entering the U.S. for inspection by an immigration officer.[29] In other words, Jordanian nationals will be subjected to the normal visa processing/screening proceedings.

Two-way trade between the U.S. and Jordan is up substantially since the free trade agreement between the two countries took effect, but a provision enabling temporary entry of Jordanian nationals into the U.S. has seen little use.[30] For the period 2002-2010, there were no trader or investor visas issued to Jordanian nationals under the visa provisions of the FTA.[31] Indeed, according to the American Chamber

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this case, Matsumaru, a lawyer in Hawaii of Japanese origin on behalf of Japanese investors, argued that the disjunctive "or" in the Department of State regulations means that it is enough for the investor to hold ownership in the investment. Thus, management of the investment is one way to satisfy the U.S regulations. However, the Court rejected this argument by stating that if an investor has no managerial control over the investment, the investor's physical presence in the U.S is unnecessary and thus there would be no reason to award him E-2 visa. Thus, there is no need for an investor to live temporarily in the U.S. For more see United States V. Matsumaru, 244 F.3d 1092, 1099-1100 (9th Cir. 2001).

[28] There is no FTA or Bilateral Investment Treaty between the U.S. and another country that exempts nationals of the latter from obtaining entry visa to the U.S. See Christopher S. Rugaber, *House Approves Chile, Singapore Pacts; Senate Sets Time for Debate, Likely Vote*, 20 Int'l Trade Rep. (BNA) 1292 (July 31, 2003) (the Chile and Singapore FTAs allow professionals workers from Chile and Singapore to enter the U.S. provided they secure the necessary visas).

[29] Indeed, the US-JO FTA itself explicitly states that Jordanian nationals are eligible for the E-1 and E-2 visas "subject to the applicable provisions of US laws and corresponding regulations governing entry, sojourn, and employment of aliens." See Agreement between the United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* note 8, art 8.2, footnote 12.

[30] Annually, two-way trade between the U.S. and Jordan exceeds a US $1 billion compared a little over US $150 million in 1999. See U.S. Foreign Trade Statistics, Imports and Exports, available at <http://www.census.gov/foreign-trade/statistics/product/atp/2009/01/ctryatp/atp5110.html> (last visited July 15, 2009).

[31] See Visa Statistics, U.S. Department of State, available at <http://travel.state.gov/visa

of Commerce in Jordan, no Jordanian has ever applied for such visas.[32] The reason why no one is seeking the E visas under the US-JO FTA is lack of awareness on the part of Jordanian nationals as to E category of visas.[33] Further, Jordanian traders or investors face difficulties in meeting the thresholds of "substantial trade" or "substantial amount of capital" for investment, or difficulties of proving intent to return back to Jordan. Few Jordanian traders or investors can meet these thresholds.[34]

Jordanian nationals are alarmed about being subjected to tighter screening procedures due to security concerns in the U.S.[35] In response to the Sept. 11, 2001 terrorist attacks, the U.S Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act of 2001).[36] The purpose of the Patriot Act, among others, is to deter and punish terrorist acts in the U.S and around the world.[37] Under the Patriot Act of 2001, the INS has begun detailed visa applications through name-matching databases in National Crime Information Center to access criminal history.[38] The necessity of such national security crackdown procedures is well understood. However, national security could have created a chilling effect on Jordanian nationals entering the U.S. to conduct trade and investment. In addition, national security procedures could have

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/frvi/statistics/statistics_1476.html> (last visited Oct. 6, 2009). Letter from Ms. Cher Young, Consular Associate, The U.S Embassy in Amman, Jordan (January 5, 2010) (on file with author).

[32] Telephone Interview with Ahmad Tawfiq, Trade Officer, The American Chamber of Commerce in Jordan (Sep. 29, 2009).

[33] Although the American Chamber of Commerce in Jordan has done a lot of work in organizing workshop to introduce its members to the E visas under the FTA. *Id.*

[34] *Id.*

[35] Letter from Ms. Cher Young, Consular Associate, The U.S Embassy in Amman, *supra* note 31.

[36] See USA Patriot Act, Pub. L. No. 107-56, 115 Stat. § 272 (2001). Part of this overall act is the integration of the U.S Immigration and Naturalization Service into the newly established Department of Homeland Security.

[37] *Id.*

[38] *Id.* § 403. Visa applications involving high-tech work are increasingly referred from overseas consulates to Washington D.C., for a security advisory opinion (SAO) which requires an interagency review. Moreover, the act requires report on the feasibility of enhancing the Integrated Automated Fingerprint Identification in order to identify a person who holds a foreign passport or a visa and may be wanted for a criminal investigation in the U.S or abroad. *Id.* § 405. The U.S authorities shall fully implement the integrated entry and exit data system for airports, seaports, and land border ports of entry. *Id.* § 414.

added more time and cost for traders which impaired the essence of free trade.[39] Significant delays in processing visas for business travelers, a trend that is necessary of security, might affect a trade opportunity that will be foregone.[40] To ease the visa approval process, the U.S could institute a "gold card" program for frequent business travelers.[41]

Besides national security, immigration has been a hotly debated issue in the U.S.[42] U.S trade negotiators feared backlash from Congress especially that the US-JO FTA is an agreement with a low-income country. The power over immigration rests in Congress.[43] U.S trade negotiators may neither add nor take that power from Congress. However, the issue in the US-JO FTA is not one of immigration because temporary entry provisions do not address issues of citizenship, permanent residence, or permanent employment. The temporary entry provisions are intended to enable

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[39] See Ryan Walters, *Managing Global Mobility Free Trade in Services in the Age of Terror*, 6 U.C. Davis Bus. L.J. 92, 109-111 (2006) (U.S. business visa policies became more stringent after the Sept. 11 terrorist attacks. The system also became less transparent as applicants were rejected without explanation, even in cases where they had been approved before).

[40] See The NATIONAL U.S-ARAB CHAMBER OF COMMERCE, THE IMPACT OF U.S. VISA POLICIES: IMPLICATIONS FOR AMERICA'S ECONOMY (2004) (A survey of U.S. companies sponsored by the eight groups found that 73 percent of the respondents have experienced "unexpected delays and/or seemingly arbitrary denials" in seeking business travel visas for their foreign customers, employees, or other associates. The restrictive U.S approach to granting visas is costing the U.S economy an estimated $5 billion a year in lost commercial opportunities with the Arab world alone. The report puts the direct economic impact of the policies at $1.5 billion a year and up to $5 billion if lost services and indirect revenues resulting from reduced contact with the Arab world were included. Annual revenues from the Arab world being lost because of the visa policies include $400 million in business in general, 50 million in academia, $500 million in culture and the arts, medicine, and health care, and $500 million in travel and tourism).

[41] See Christopher S. Rugaber, *Delays in Visa Processing Cost U.S. Exporters $30 Billion, Business Study Finds*, 21 Int'l Trade Rep. (BNA) 973 (June 10, 2004) (other suggestions-made by a coalition of eight U.S. international business groups- include offering multiple-entry, longer duration visas to additional countries, integrating government databases to prevent duplicative security checks, and processing visas within 48 hours with a maximum limit of 30 days).

[42] See Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 Stan. L. & Pol'y Rev 445, 453-458 (2005). See also Jagdeep S. Bhandari, *Migration and Trade Policies: Symmetry or Paradox?* 6 J. Int'l Bus. & L. 17 (2007) (immigration touches upon deeply controversial questions concerning race, class, ethnicity, culture, language, local employment, and national identity).

[43] See U.S CONST. art. I, δ 8, cl. 4. See also Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress. It has the power to regulate commerce with foreign nations).

business people to temporarily enter the U.S. to conduct meetings, negotiate contracts, make sales, establish offices, and provide services

All these reasons-lack of awareness, thresholds of "substantial trade" or "substantial amount of capital", and proof of intent, combined result in significant damage to Jordanian nationals in the form of lost business deals and lost productivity. National security and immigration concerns are issues that need to be addressed, but the U.S. must rationally weigh the costs and benefits of limiting movement of individuals. Increasing temporary worker mobility, and for that matter trade in general, has greater potential to benefit trade development, mutual understanding, peace, and tolerance.[44] Failure to consider movement for individuals as a vital component of economic infrastructure and foreign policy will seriously affect economic growth and stability.

III. US-Jordan FTA Cross-Border Provision of Services

Historically, most trade agreements focused on reducing tariffs and non-tariff barriers on goods as they cross international borders.[45] However, the services sector now accounts for about seventy five percent of employment activity in industrialized countries like the U.S. Therefore, current trade agreements deal with trade in services.

While WTO achieved major progress in liberalizing the trade in goods, it later has begun to liberalize trade in services. The WTO's General Agreement on Trade in Services (GATS) recognizes several modes of supplying services with "Mode 4"

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[44] See Howard F. Chang, *The Economic Impact of International Labor Migration: Recent Estimates and Policy Implications,* 16 Temp. Pol. & Civ. Rts. L. Rev. 321 (2007) (The movement of people between countries links national economies. The free flow of resources in response to market signals promotes efficiency and produces economic gains for both producers and consumers. The movement of human resources, both domestically and internationally, represents such a flow of productive resources). See Jagdeep S. Bhandari, *International Migration and Trade: A Multi-Disciplinary Synthesis*, 6 Rich. J. Global L. & Bus. 113, 164 (2006). See also Gabriela A. Gallegos, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy Border Matters*, 92 Calif. L. Rev. 1729, 1378 (2004).

[45] See Edward John Ray, *The Political Economy of International Trade Law and Policy: Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariffs Barriers*, 8 Nw. J. Intl. & Bus. 285, 294-298, 303-305 (1987).

addressing the temporary cross-border movement of business and professional workers.[46] The US-JO FTA goes beyond the primary focus on goods and it deals with a new frontier, liberalization of trade in services.[47] Such liberalization is important for freer flow of labor over national borders.

The US-JO FTA sets out several service obligations. The FTA requires each party to accord to service providers of another party treatment no less favorable than that it accords, in like circumstances, to its own service providers.[48] The idea of this provision is nondiscrimination whereby Jordan must treat service provider from the U.S. the same way that Jordan treats service provider from Jordan. The other key US-JO FTA obligation is the most-favored nation obligation whereby each party is to accord to service providers of another party treatment no less favorable than that it accords, in like circumstances, to service providers of any other Party or of a non-Party.[49] For example, if Jordan treats a service provider from Iraq more favorably than it treats a service provider from the U.S., the treatment provided to the Iraqi must be accorded to an American service provider.

Jordanian professional service providers, like other service providers of other nationalities who wish to provide their services in the U.S., need permission to enter the jurisdiction from the U.S. immigration authorities. Movement of natural persons, professionals, is of particular importance to Jordan. However, temporary entry into the U.S. is limited to executives, managers, or specialists of a Jordanian company that

[46] See Rafael Leal-Arcas, *Resumption of the Doha Round and the Future of Services Trade*, 29 Loy. L.A. Int'l & Comp. L. Rev. 339, 343 (2007).
[47] See Agreement between the United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* note 8, art. 3.
[48] *Id*. art. 3.2.b.
[49] *Id*.

has a physical presence in the U.S. in the form of branch, subsidiary, or affiliate.[50] Such entry is limited to three years with a one-time two years extension.

The U.S. commitment, while covering the intra-corporate movement of senior personnel, does not extend to other categories of workers. Low-skilled workers seeking entry into the U.S. will not be admitted under the US-JO FTA. This state of affair applies across the board for all U.S. FTAs and even NAFTA does not permit low skilled workers to enter the U.S. from Mexico or Canada.[51] Both the U.S. and Jordan would benefit more from relaxed restrictions on unskilled labor rather than on skilled labor. Jordan has primarily unskilled labor to supply while the U.S. has primarily unskilled jobs to offer.

Under the US-JO FTA, a corporate employee cannot move to the U.S. unless his company already maintains commercial presence in the U.S. In other words, the FTA requires a Jordanian service providers to establish or maintain a representative office or any form of enterprise in the U.S. as a condition for the cross-border provision of a service. The "commercial presence" requirement prohibited if not stopped stop temporary movement of workers between the U.S. and Jordan. The US-JO FTA should have prohibited the parties from imposing local presence requirements on cross-border service providers.

The U.S. opted for skilled workers and commercial presence requirement in the FTA perhaps out of concerns over education, professional accreditation, and licensing in Jordan. This suggests that Jordanian nationals, as for all other nationalities, must acquire U.S. professional credentials before working in the U.S. For example, an

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[50] See U.S. Service Schedule, Annex 3.1, available at < http://www.ustr.gov/sites/default/files/uploads/agreements/fta/jordan/asset_upload_file558_8459.pdf> (last visited February 2010).

[51] See Ellen G. Yost, *NAFTA - Temporary Entry Provisions - Immigration Dimensions*, 22 Can.-U.S. L.J. 211, 219 (1996). See also Alison Umberger, *Free Trade Visas: Exploring the Constitutional Boundaries of Trade Promotion Authority*, 22 Geo. Immigr. L.J. 319, 333-334 (2008) (Visas are available to highly skilled workers coming from Mexico, Canada, Chile, and Singapore).

engineer who wants to build a bridge in the U.S. is going to need two pieces of paper; in addition to a temporary visa permit, they also need to be licensed by the U.S. professional regulatory body.

In order to increase worker mobility, the U.S. and Jordan could have concluded mutual recognition agreements and harmonized professional standards in certain sectors. Additionally, the U.S. and Jordan could have placed more emphasis on education and experience rather on passing exams or interviews. For example, a Jordanian engineer can obtain a temporary license to practice in the U.S. if he has a minimum of twelve years of acceptable engineering experience.

IV. Labor Mobility in the North American Free Trade Agreement

Compared with the modest language of article 8 of the US-JO FTA, NAFTA dedicates a whole chapter-chapter 16- dedicated to temporary entry for business persons.[52] The purpose of chapter 16 of NAFTA is to facilitate temporary entry of business persons.[53] NAFTA parties endeavor to develop and adopt common criteria and definitions for the implementation of chapter 16.[54]

Moreover, each NAFTA party is committed to furnish the other parties with materials that enable them to be acquainted with chapter 16.[55] To facilitate the movement of persons across the borders, each NAFTA party is committed to provide explanatory material regarding the requirements for temporary entry under chapter 16 in such a manner as will enable business persons of the other parties to become

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[52] See North American Free Trade Agreement, 32 I.L.M 289, art. 1601 (1993). Chapter 16 of NAFTA consists of eight Articles and supplemented by annexes. Chapter 16 of NAFTA was modeled on chapter 15 of the US-Canada FTA of 1989 titled "Temporary Entry for Business Persons". However, with the implementation of NAFTA, chapter 15 of the US-Canada FTA was suspended. See Kenneth A. Schultz, *The North American Free Trade Agreement: The Provisions for the Temporary Entry of Canadian and Mexican Business Persons into the United States*, 15 SPG INT'l L. PRACTICUM 50 (2002).

[53] See Patricia Fernandez-Kelly and Douglas S. Massey**,** *Political and Economic Dimensions of Free Trade: Borders for Whom? The Role of NAFTA in Mexico-U.S. Migration***,** 610 Annals 98 (2007). 103, 109

[54] See NAFTA, *supra* note 52, art. 1602.2.

[55] *Id*. art. 1604.1.

acquainted with them. According to NAFTA, any dispute regarding refusal to grant temporary entry of business persons is subject to the dispute settlement mechanism.[56]

Chapter 16 of NAFTA created four categories of business persons who are citizens of a member country to be granted temporary entry. These four basic categories are: business visitors, intra-company transferees, professionals, and traders and investors. Business visitors who are engaged in international business activities may enter a NAFTA member country in B-1 status for the purposes of conducting research and design, growth, manufacture and production, marketing.[57] In addition, NAFTA created L-1 visa category for business persons employed by an enterprise who seek to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge.[58] NAFTA established a new non-immigrant visa category, the TN visa, to accommodate business visitors from Canada and Mexico.[59] This kind of visa is unique for NAFTA nationals and is not available for other nationals such as Jordanians under the US-JO FTA. The TNA visa category accommodates an alien, along with their spouse and children, entering the U.S. to engage in business activities at a professional level described in NAFTA.[60] For example, a lawyer has to posses LL.B (for example Canadian common law degree), J.D., LL.L., B.C.L. (for example Canadian civil law

[56] *Id*. 1606.1.
[57] For a description of the four categories of temporary entry of business persons see William J. Benos, *The Movement of Professionals, Technicians, and other Workers across NAFTA Borders*, 8 US-Mex. L. J 25, 26 (2000).
[58] In this category, no NAFTA party may impose numerical restrictions on temporary entry. See North American Free Trade Agreement, *supra* note 52, appendix 1603.C.1.
[59] See Benos, *supra* note 56, at 27. H-1B status, which also provides for the entry of professionals, should not be confused with TN category under NAFTA. The preamble to the INS interim rule specifically stated that admission pursuant to NAFTA to engage in professional level activities does not imply qualification as a "professional" under the Immigrant and Nationality Act § 101(a)(15)(H)(i), or § 203(a)(3). The H-1B category is for "specialty occupations", namely, those in occupations for which an entry level requirement is customarily a university degree at the American baccalaureate level. On the other hand, NAFTA seeks to simplify the admission process for a select and "precisely" defined group of Canadian and Mexican professionals. See Schultz, *supra* note 43, at 52.
[60] Appendix 1603.D.1 of NAFTA lists 63 professions whom its holder may be eligible for TN visa after meeting the minimum requirements. See NAFTA, *supra* note 52, appendix 1603.D.1.

degree) or Licenciatura degree (Mexican law degree consists of studying for five years) or membership in a state/provincial bar.

NAFTA also provided E-1 and E-2 visas for traders and investors. The conditions for granting visa under this category are similar to those under article 8 of the US-JO FTA. NAFTA mandates that no NAFTA party may impose or maintain any numerical restriction relating to temporary entry for traders or investors.[61] Also, the U.S may not impose numerical limits on the number of visa traders or investors under the US-JO FTA. However, the distinction between NAFTA and the US-JO FTA under the treaty trader and investor provisions is that a Canadian or Mexican business person may be denied E visa if there is a labor dispute in the Canadian or Mexican's occupational classification in progress where the Canadian or Mexican will be employed and their entry may adversely affect the settlement of the labor dispute or the employment of any person involved in the dispute.[62] This provision is only triggered when the Department of Labor certifies the existence of a strike or work stoppage, and does not apply to E visa holders already in the US. This language is absent from the US-JO FTA which means in effect that even if there is a labor dispute in the Jordanian's occupational classification, still a Jordanian national can enter the U.S as trader or investor.

Since NAFTA took effect in 1995, traders and investors visas spiked substantially. For example, between 2000-2010, more than 12632 E-1 and E-2 visas were granted to Mexican nationals and 13135 E-1 and E-2 visas for Canadian nationals.[63] Those numbers are indicative of the interests of Mexicans and Canadians

[61] See NAFTA, *supra* note 52, annex 1603.B.2.
[62] *Id*. art. 1603.2.
[63] See Nonimmigrant Visas Issued by Classification and Nationality (Including Border Crossing Cards), available at <http://www.travel.state.gov/visa/frvi/statistics/ statistics_1476.html> (last visited Sep. 24, 2009).

to enter the U.S. in order to conduct trade and take full advantage of the opportunities offered by NAFTA.

V. Mapping the Temporary Labor Mobility Provisions in Bilateral Trade Agreements between the U.S. and Other Arab Countries

The post – Jordan U.S. FTAs with Morocco, Bahrain and Oman represent a key element in a broader U.S. political and economic strategy to encourage economic development and democracy in the Middle East and North Africa, with most of the same political and security considerations that were material in the conclusion of the Jordan FTA. In 2003, President Bush proposed the establishment of a U.S.-Middle East Free Trade Area within a decade, so as "to re-ignite economic growth and expanded opportunity in the Middle East."[64] Among the elements of the Bush initiative were the completion of FTA negotiations with Morocco and the initiation of new FTA negotiations with governments committed to high standards and comprehensive trade liberalization.

Bahrain, Morocco, and Oman were obvious candidates for FTAs with the U.S., in part, because both had acceded to the WTO.[65] The result to date has been the Morocco, Bahrain and Oman FTAs.[66] The US-Morocco FTA, US-Bahrain FTA, and US-Oman FTA were not particularly controversial FTAs in the U.S., apart from the usual non–country -- specific concerns over textiles, agriculture, intellectual property, investment, labor and environment. These three FTAs, while sharing some similarities

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[64] See White House Fact Sheet, Proposed Middle East Initiatives, May 9, 2003, at 1, available at <http://www.whitehouse.gov/news/releases/2003/05/print/20030509-12.html>

[65] Bahrain and Morocco are original members of the WTO. In 2000, Oman acceded to the WTO. See WTO, Members and Observers, available at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (last visited August. 28, 2009).

[66] See United States-Morocco Free Trade Agreement, available at <http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file680_3841.pdf> (June 15, 2004); United States-Bahrain Free Trade Agreement, available at <http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file418_6280.pdf> (Sep. 14, 2004); and United States-Oman FTA, available at <http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file987_8839.pdf> (Jan. 19, 2006).

with the US-JO FTA in some aspects, vary in terms of visa and temporary mobility provisions.

The US-Morocco FTA does not include any specific provision concerning treaty-trader (E-1) and treaty-investor (E-2) visas. As to cross-border movement of professionals, the FTA includes an important provision which prohibits either party from requiring of a service provider to maintain a representative office or any form of enterprise, or to be resident, in the territory of a party as a condition for the cross-border supply of a service.[67] In other words, the FTA with Morocco does not impose local presence requirement.

The US-Bahrain and US-Oman FTAs mimic the US-Morocco FTA in its lack of coverage for trader and investor visas. Additionally, the US-Bahrain and US-Oman FTAs closely resemble the US-Morocco FTA by including provisions prohibiting any local presence requirements as a condition for the supply of cross-border services.[68] Under a side letter on immigration with Oman, the U.S. has retained its ability to protect its domestic labor force and employment.[69] The validity of this side letter is in question. Based on the experience of the NAFTA sugar side letter, the U.S. and Oman should have included the language of the letter into the main text of the FTA so as to form a binding and legal commitment.[70]

Although US-Morocco, US-Bahrain, and US-Oman FTAs exclude from their coverage trader and investor visas, these countries have bilateral investment treaties (BITs) with the U.S. which predates their FTAs. These BITs are negotiated to protect

[67] See United States-Morocco Free Trade Agreement, *supra* note 66, art. 11.5.
[68] See United States-Bahrain Free Trade Agreement, *supra* note 66, art. 10.5; and United States-Oman Free Trade Agreement, *supra* note 66, art. 11.5.
[69] See United States-Oman Free Trade Agreement, *supra* note 667, Side Letter on Immigration.
[70] During the NAFTA debate, the U.S. and Mexico agreed to a sugar deal that was attached as a side letter to the text of NAFTA. However, the U.S. and Mexico are still litigating the validity of the letter.

U.S. investment abroad.[71] In addition, US-Morocco, US-Bahrain, and US-Oman BITs qualify theirs citizens for admission into the U.S. under the E-2 treaty investor visa category.

A Moroccan, Bahraini, or Omani national can enter the U.S. so as to establish, develop, direct, or administer the operations of an investment in which he has invested or is in the process of investing a substantial amount of capital.[72] One of the significant aspects of this language is that it expands the number of persons who are potentially eligible for E-2 visas by permitting not only those persons who develop and direct a business, but also those who establish, administer, or advise an enterprise to apply for E-2 visas. Additionally, US-Morocco, US-Bahrain, US-Oman BITs permit key employees to enter the U.S.[73]

The E-2 visa category in the US-Morocco, US-Bahrain, US-Oman BITs has essentially three basic requirements. First, a bilateral investment treaty must exist, as it is the current case, between the U.S. and Morocco, Bahrain, and Oman respectively. Second, the person or corporation making the investment is a national of Morocco,

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[71] These BITs require Morocco, Bahrain, and Oman to investment protection standards which would guarantee a U.S. citizen in these countries the same investment protection as a citizen of these countries would enjoy. Generally, such protections include most favored nation treatment to covered investments, free and prompt monetary transfers relating to the investment, and specified dispute resolution alternatives. Additionally, there must be fair compensation if investments are expropriated for public purpose. See Trade Compliance Center, Treaty between the United States of American and the Kingdom of Morocco Concerning the Encouragement of Reciprocal Protection of Investments (1985), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005864.asp>; Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment (2001), available at < http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002777.asp >; and United States-Oman Amity, Economic Relations And Consular Rights Treaty (1960), available at <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005876.asp>.

[72] See Treaty between the United States of American and the Kingdom of Morocco Concerning the Encouragement of Reciprocal Protection of Investments, art. II.4 (a); Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, art.7.1; United States-Oman Amity, Economic Relations and Consular Rights Treaty, art. II.1, *supra* note 71.

[73] See Treaty between the United States of American and the Kingdom of Morocco Concerning the Encouragement of Reciprocal Protection of Investments, art. II.4 (b); Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, art.7.2, *supra* note 71.

Bahrain or Oman. Third, the Moroccan, Bahraini or Omani is entering to invest a substantial amount of capital in the U.S. Thus, according these BITs, E-2 treaty investment individuals or entities must prove that an individual or entity possessing treaty nationality has invested or is in the active process of investing a substantial amount of capital in a U.S.-based enterprise or project. Further, qualified individuals or entities must submit a satisfactory evidence of the required investment activity and proof of the individual visa applicant's qualifications for employment in the U.S. as an executive or supervisor. The U.S., Morocco, Bahrain, and Oman also agreed that they will not require a labor certification test or apply any numerical restriction to entrants under their BITs. Once nationals of Morocco, Bahrain, and Oman enter the U.S., there is no maximum duration of stay.[74]

The US-Morocco, US-Bahrain, and US-Oman BITs are similar to their FTAs because they are bilateral agreement that provides for reciprocal rights these countries. However, the subject matter of the agreement is the distinguishing factor between them. The FTAs extend to trade while these BITs concern the protection of investments.[75] Because BITs involves treaties whose subject is foreign investment and not foreign trade, nationals of Morocco, Bahrain and Oman qualify for treaty investor (E-2) but not for the treaty trader (E-1) designation.

Conclusion

Freer trade applies not only for trade in goods but also extends to include other factors of production such as labor and capital. Production is not just a function of

[74] Statistically, between 2000-2010, fifty-eight nationals of Morocco were granted an E-2 treaty investor visa. During the same period, no national of Bahrain or Oman applied for E-2 visa. See Nonimmigrant Visas Issued by Classification and Nationality (Including Border Crossing Cards), available at <http://www.travel.state.gov/visa/frvi/statistics/ statistics_1476.html> (last visited Sep. 25, 2009).

[75] See Treaty between the United States of American and the Kingdom of Morocco Concerning the Encouragement of Reciprocal Protection of Investments; Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment; United States-Oman Amity, Economic Relations and Consular Rights Treaty, *supra* note 71.

capital and natural resources, but also of labor. Little attention has been paid to liberalizing the movement of persons who trade in these goods and services. In the formulation of all trade agreements, the flow of goods between the member countries should be discussed in connection with the flow of people.

The US-JO FTA is designed to permit temporary entry, without intent to establish permanent residence, of traders and key business personnel. Despite that, the FTA does not provide "truly temporary entry." As of this date, Jordanian nationals are not able to benefit from the visa commitments of the US-JO FTA. The US-JO FTA permits entry for narrowly defined investment-related and trade-related purposes. Jordanian businesspeople face difficulties in meeting the threshold of "substantial trade", "investment", and "substantial amount of capital". The difficult aspect of this is the requisite dollar volume, which could stand at US $250000 or above, and the requisite number of transactions. Not all Jordanian businesspeople can meet these thresholds so as to obtain E-visas.

Moreover, the U.S. couples the movement of key business personnel with local presence requirements. Only Jordanian nationals with money and extensive professional skills can gain entry to the U.S. The US-JO FTA prioritized workers with advanced educational training and capital to invest. The US-JO FTA, as for all other FTAs, prioritizes the cross-border movement of corporate executives, researchers, and professionals with advanced degrees. In effect, in the US-JO FTA, and for that matter other FTAs, wealth buys mobility and these FTAs are designed to export goods, not people.

The U.S. should have adopted a lenient approach in drafting the temporary visa provisions taking into account the conditions in Jordan and the purpose of the FTA to promote employment. The U.S could have permitted entry of Jordanian traders or

investors as long as they submit a declaration of a good business plan or extend the length of temporary business visas from three months to one year with multiple entries. In addition, the U.S should have created new visa category for temporary entry of professionals that would allow certain number of Jordanians to enter the U.S each year. Those visas would not be counted against the H1B numerical caps each year and fees will not be required of U.S companies that employ temporary workers under the FTA provisions. The U.S. and Jordan could have concluded mutual recognition agreements and harmonized professional standards in certain sectors. Additionally, the U.S. and Jordan should have placed more emphasis on education and experience rather on passing exams or interviews. Also, the U.S. should ensure more transparent and objective implementation of their rules for issuing temporary visas and work permits. Furthermore, disputes over temporary entry provisions should subject to dispute panel.

Trade and temporary labor mobility should be coupled together as is a clear correlation between trade and labor mobility in countries that allows the exchange of people.[76] Temporary labor mobility could have contributed to more trade flow between the U.S. and Jordan whereby businesspeople would acquire skills and contacts, negotiate contracts, and enter into sales.

The US-JO FTA, as other US-Arab FTAs, is a trade agreement concerned with the movement of goods and services but not with the movement of persons. The U.S. has chosen to actively pursue a free trade agenda in the Middle East while simultaneously restricting inbound temporary labor mobility. Jordanian nationals are human beings and they have a baccalaureate degree. They are part of the free trade agreement. There can be no free trade without people to facilitate it. The issue of trade

[76] See Michael J. Trebilcock, *The Law and Economics of Immigration Policy*, 5 AM. L. & ECON. REV. 271, 272, 284 (2003) (elimination of restrictions on movement of people could double worldwide annual GNP).

and temporary visas should be of immediate relevance to negotiators when crafting the broader US-Middle East FTA. Unless the inter-relationship between trade and temporary visas is properly understood, trade liberalization and market access may be easily undone.