



U.S. Citizenship and
Immigration Services

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\ afm \ Adjudicator's Field Manual \ Chapter 22 Employment-based Petitions, Entrepreneurs and Special Immigrants [Updates all of Chapter 22 as of 09-12-2006] \ 22.2 Employment-based Immigrant Visa Petitions (Form I-140)

[Previous Document](#) | | [Next Document](#)

22.2 Employment-based Immigrant Visa Petitions (Form I-140)

In an employment-based immigrant visa petition, an employer must demonstrate to USCIS that the alien beneficiary is a foreign national qualified for the immigrant classification sought. If the immigrant petition is based on an underlying certified labor certification application, then the immigrant petition must be filed during the validity period of the labor certification established by the Department of Labor (DOL). The employer must demonstrate that the alien beneficiary is qualified for the position certified by DOL. However, as discussed in more detail later in this Chapter, there are several immigrant classifications that do not require the employer to first obtain labor certification. In addition, in certain classifications, the alien beneficiary is able to self-petition for the classification sought. Below is a discussion of the initial steps that should be taken when adjudicating all employment-based immigrant petitions. A more detailed discussion of the specific immigrant classifications follows. (Revised AD07-20)

(a) Adjudication Procedures .

Detailed procedures for the receipting and adjudicating of [Form I-140](#) are set forth in the I-140 Standard Operating Procedures (I-140 SOPs).

(1) Form .

Employment-based petitions seeking classification under [section 203\(b\)\(1\)](#) , [section 203\(b\)\(2\)](#) ,

or [section 203\(b\)\(3\)](#) of the Act are filed on [Form I-140](#) (Immigrant Petition for Alien Worker) with the appropriate fee as specified in 8 CFR 103(a)(7).

(2) Filing .

Form I-140 must be filed with the appropriate Service Center as specified in the instruction to that form. If an immigrant visa is available for the petition's priority date (see section (c) of this chapter), and the beneficiary is otherwise eligible for adjustment of status, an Application to Register Permanent Residence or Adjust Status (Form [I-485](#)) may be filed concurrently with the I-140 petition.

(3) Initial Processing .

Regardless of the classification sought, there are several common steps taken to initiate processing of the petition:

- Verify that the fee has been paid;
- Verify that the signature in Part 8 matches the petitioner's name in Part 1;
- Check the classification in Part 2. Some classifications allow that the alien or anyone on the alien's behalf may file the petition; others require that the employer file it. Check at this point to see that the petition has been filed by the correct person;
- Review the documentation to see that the alien qualifies for the classification requested and that any required labor certification is attached. If documents are missing or insufficient to establish eligibility for the classification, process and issue a request for evidence (RFE) as provided for in 8 CFR 103.2(b)(8) . Be sure your request is as specific as possible to eliminate future additional RFEs.

(b) General I-140 Petition Adjudication Issues . [Revised 01-23-2007]

The issues discussed in this subchapter pertain to the adjudication of [I-140](#) petitions in general. Additional information on section [203\(b\)\(1\)](#) of the Act (first employment-based preference) issues is contained in subchapter [22.2\(i\)](#) of this field manual; on section [203\(b\)\(2\)](#) (second employment-based preference) issues is contained in subchapter [22.2\(j\)](#) of this field manual; and on section [203\(b\)\(3\)](#) (third employment-based preference) issues is contained in subchapter [22.2\(k\)](#) of this field manual.

(1) Review of Documents .

You may determine that, although a bona fide job offer exists, the evidence submitted does not establish that the beneficiary qualifies for the position. It has been the experience of USCIS that, among other types of fraud and misrepresentation, documents from fictitious persons have been presented, and other persons have fraudulently attested to employing the beneficiary. Fraudulent documentation can be prevalent in foreign countries and, in some cases, a beneficiary may present documentation issued by civil authorities in his or her home country representing qualifications that the beneficiary does not, in fact, possess. In any cases where you strongly question the validity of the evidence submitted in support of education or experience gained abroad, you may request an investigation by the appropriate USCIS office overseas. However, before requesting an investigation, review the petition carefully to determine:

- If there are existing grounds for denial that would render an investigation unnecessary;

and

- Whether there are any additional issues that should be resolved or explored as part of the investigation. (You don't want to have to request a second investigation on the same case.)

(2) Job Offers .

In most cases, the beneficiary of an I-140 petition must be the recipient of a job offer from an employer in the United States. As evidence of the job offer, most petitioners who file EB-2 and EB-3 immigrant I-140 petitions must first obtain an individual labor certification from the Department of Labor (DOL). In other cases where the alien is eligible for Schedule A blanket labor certification, labor certification applications are submitted to USCIS with the I-140 petition. In relatively few cases (those involving aliens seeking classification under [section 203\(b\)\(1\)\(A\)](#), as well as those seeking classification under [section 203\(b\)\(2\)](#) who qualify for a "national interest waiver"), an individual labor certification from DOL and a job offer are not required (see [subchapter 22.2\(d\)](#) of this field manual).

(3) Labor Certifications .

A significant percentage of employment-based immigrant visa petitions are based on labor certification applications approved by the DOL. In adjudicating such petitions, please note that DOL does not generally review the alien beneficiary's qualifications for the position when adjudicating a labor certification application; this authority and responsibility rests with USCIS. Thus, adjudicators must assess these immigrant petitions to ensure that the position offered is the same or similar position that was certified by the DOL and that the alien beneficiary meets the qualifications for the position. Below is a detailed description of the labor certification application process.

(A) Applicability .

Priority workers under section [203\(b\)\(1\)](#) are not required to be the beneficiaries of approved labor certifications issued by the DOL; however, aliens seeking immigrant visas pursuant to sections [203\(b\)\(2\)](#) or [203\(b\)\(3\)](#) generally must be the beneficiaries of approved labor certifications. The DOL regulations regarding permanent labor certifications, [20 CFR 656](#) , are found immediately following [section 204](#) of the Act in your law books.

(B) Individual Labor Certifications .

In general, U.S. employers filing EB-2 and EB-3 employment-based [I-140](#) petitions must first obtain an approved labor certification application from DOL on behalf of the foreign worker. An approved labor certification application demonstrates that: (1) the employer tested labor market in the geographic area where the permanent job offer is located to establish that there are no able, qualified, and available U.S. workers who are willing to accept the permanent job offer; and (2) the employment of the alien will not adversely affect the wages and working conditions of similar ly employed U.S. workers. (See [212\(a\)\(5\)\(A\)](#) and [\(D\)](#) and [203\(b\)\(3\)\(C\)](#) of the Act.) DOL has established procedures for obtaining labor certifications under [20 CFR part 656](#) . 20 CFR part 656 was amended by the DOL PERM final rule published on December 27, 2004, which took effect on March 28, 2005 ([69 FR 77326](#)). Labor certification applications are approved and issued by DOL only after the U.S. employer has complied with DOL advertising and recruiting requirements and has established that there are no able, qualified, and available U.S. workers for the position and has rejected any U.S. job applicants for valid job-related reasons. Approved labor certifications issued by DOL are certified with an official DOL certification stamp and may have a Letter of Labor Certification Determination attached to the front p age of the document.

(C) Labor Certifications Filed with DOL Prior to March 28, 2005.

Prior to the effective date of the new PERM regulation (March 28, 2005), U.S. employers filed the Application for Alien Employment Certification, [Form ETA-750](#) , in order to obtain an approved labor certification. The Form ETA-750 has two parts. Part A focuses on the details of the position being certified and describes the name and address of the U.S. employer, the location of the job opportunity, the proffered wage for the position and the minimum education, training, or experience requirements to successfully perform the duties of the position. Part B focuses on the alien beneficiary and contains his or her name, date of birth, address, and describes his or her education, training and work history. A valid, approved Form ETA-750 must be signed by the U.S. employer in Part A and the alien beneficiary in Part B, contain the DOL certification stamp, and be signed and dated by the DOL certifying officer in the endorsements section on the front page on Part A of the form.

Note

Form ETA 750 is still in use, but only for the temporary labor certifications, i.e., visa classifications H-2A and H-2B.

(D) Transition to the PERM Labor Certification System . [Revised 09-14-2009]

DOL implemented the permanent labor certification system (PERM) on March 28, 2005, effectively eliminating the old labor certification system whereby employers had an option of filing labor certification applications under supervised recruitment or reduction in recruitment rules. The PERM application, [DOL Form ETA-9089](#) , replaced [DOL Form ETA-750](#) . Form ETA-9089 can be filed electronically or by mail.

(E) Labor Certifications filed with DOL on or after March 28, 2005 .

The Application for Permanent Employment Certification, [Form ETA-9089](#) , replaced the Application for Alien Employment Certification, [Form ETA-750](#) , on March 28, 2005. See [20 CFR 656.17](#) . Form ETA-9089 details the specifics of the job offer and the alien beneficiary that were contained in the ETA-750 Part A and Part B. Form ETA-9089 can be filed electronically or by mail.

To be valid, the Form ETA-9089 must be signed by the alien beneficiary in Section L, the form preparer, if any, in Section M and the U.S. employer in Section N. It must also contain the DOL certification stamp; and be signed and dated by the DOL certifying officer in Section O of the form.

Exception

Until June 1, 2008, employers filing applications on behalf of aliens to be employed as professional athletes on professional sports teams used special procedures that were put into place prior to the implementation of the PERM regulations. They filed their applications using the [Form ETA-750](#) and must have filed the applications at the DOL, Employment & Training Administration (ETA) national office in Washington, DC.

DOL provided notice, that as of June 1, 2008, employers filing applications on behalf of aliens to be employed as professional athletes on professional sports teams must file applications directly with the Atlanta National Processing Center. See DOL Federal Register notice, Non-Electronic Filing of Applications for Permanent and Temporary Foreign Labor Certification published on March 5, 2008. [73 FR 11954](#) .

U.S. employers commonly misperceive the scope and meaning of an approved labor certification. An approved labor certification is not evidence that DOL has certified that the alien beneficiary named on the labor certification qualifies for the position. Only USCIS has the authority to determine qualifications for nonimmigrant and immigrant classifications. An approved labor certification means that the petitioning employer made a good faith effort to test the labor market and demonstrated to DOL that there were no qualified, able, and available U.S. workers for the position.

You must determine whether the beneficiary has met the minimum education, training, and experience requirements of the labor certification at the time the application for labor certification was filed with DOL. You cannot approve a petition for a preference classification if the beneficiary was not fully

qualified for the preference by the priority date of the labor certification. See Matter of Katigbak, [14 I&N 45](#) (R.C. 1971) ; Matter of Wing's Tea House, [16 I&N 158](#) (Acting R.C. 1977) .

(F) Validity of Approved Labor Certifications .

(i) DOL 180 Day Labor Certification Validity Period .

DOL amended its regulations at 20 CFR part 656 on May 17, 2007 with an effective date of July 16, 2007. [71 FR 27904](#) . DOL established a 180 day validity period for individual labor certifications approved on or after July 16, 2007, as well as an implementation period for the imposition of a validity period on labor certifications that were approved prior to July 16, 2007. An approved labor certification must be submitted in support of a [Form I-140](#) petition during the validity period of the labor certification. See [20 CFR 656.30\(b\)](#) .

USCIS will reject [Form I-140](#) petitions that require an approved labor certification if the labor certification has expired, or if the Form I-140 is filed without the approved labor certification. USCIS will deny a petition that was inadvertently accepted without a required, valid labor certification.

Exception

USCIS will continue to accept amended or duplicate [Form I-140](#) petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate [Form I-140](#) petition is filed, if the original labor certification was submitted in support of a previously filed petition during the labor certification's validity period. These filings may occur when:

- A new petition is required due to a successor-in-interest employer change;
- The petitioning employer wishes to file a new petition subsequent to the denial, revocation or abandonment of the previously filed petition, and the labor certification was not invalidated due to material misrepresentation or fraud relating to the labor certification application;
- An amended petition is filed to request a different visa classification than the visa classification requested in the previously filed petition; or
- The previously filed Form I-140 petition has been determined to have been lost by USCIS or DOS.

In accordance with 8 CFR 103.1(f)(3)(iii)(B), as in effect on February 28, 2003, petitioning employers may not file an appeal of a USCIS decision to deny a Form I-140 petition that is filed with an expired labor certification issued by DOL.

· Validity of Labor Certifications that Were Approved by DOL Prior to July 16, 2007 .

[20 CFR 656.30\(b\)\(2\)](#) established an implementation period for the continued validity of labor certifications that were approved by DOL prior to July 16, 2007. The labor certifications had to have been submitted in support of a [Form I-140](#) petition with USCIS by January 12, 2008.

Validity of Labor Certifications that Were or Are Approved by DOL on or After July 16, 2007

[20 CFR 656.30\(b\)\(1\)](#) provides for a 180-day validity period for approved labor certifications. Petitioning employers have 180 calendar days after the date of the approval of the labor certification application by DOL within which to submit the labor certification in support of a [Form I-140](#) petition with USCIS.

(ii) Labor Certification Validity for Labor Certifications with an Ending Validity Date that Falls on a Saturday, Sunday or Federal Legal Holiday .

An approved labor certification must be filed in support of a [Form I-140](#) petition during the validity period established by DOL. The ending validity date of a labor certification may fall on a Saturday, Sunday, or a Federal legal holiday. In those instances, a Form I-140 cannot be filed on the ending validity date of the labor certification, using the USCIS paper-based filing process, as USCIS does not accept the filing of paper-based petitions on those days.

USCIS consulted with DOL and determined that DOL has no published guidance regarding the validity of labor certifications that expire on a Saturday, Sunday, or federal legal holiday. This action is most consistent with existing USCIS regulations, which allow cut-off dates for the filing of petitions and applications that fall on a Saturday, Sunday or Federal legal holiday to be extended until the next business day. See [8 CFR 1.1\(h\)](#) . This procedure provides petitioning employers the benefit of the full 180 day validity period for approved labor certifications established by DOL.

Note —

— E-filed petitions are considered filed at the time that they are e-filed; thus, these filings are not affected by Service Center mailroom closures.

(4) Schedule A Blanket Labor Certifications and Petitions .

Schedule A is a list of pre-certified occupations codified in [20 CFR 656.10](#) and 20 CFR 656.22 in the pre-PERM regulations and in 20 CFR 656.5 and 656.15 in the PERM regulations for which the Secretary of the Department of Labor previously has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens in such occupations. The IMMACT '90 amendments to the Immigration and Nationality Act (Act) gave separate visa classifications

to some groups that previously were included in Schedule A. As a result, DOL eliminated these groups from Schedule A, leaving only Group I, registered nurses and physical therapists, and Group II, aliens of exceptional ability. Under the PERM regulations, the Schedule A, Group II designation is limited to aliens of exceptional ability in the sciences or arts ([656.5\(b\)\(1\)](#)) and aliens of exceptional ability in the performing arts ([656.5\(b\)\(2\)](#)). Because the PERM regulations changed various aspects of the Schedule A evidence requirements, the discussion below separately discusses the requirements for pre-PERM and post-PERM filings based on a filing date either before or beginning with March 28, 2005 (the effective date of the PERM regulations) and then provides some policy guidance that applies regardless of filing date.

(A) Petitions Filed Prior To March 28, 2005 :

In order to apply for certification under Schedule A for petitions filed before March 28, 2005, the petitioner should complete and submit:

- The Form I-140 petition, with appropriate filing fees,
- An uncertified [Form ETA-750](#) A and B, in duplicate, signed in the original by an authorized official of the petitioning entity and by the alien,
- A copy of the notice sent to an applicable collective bargaining unit, or a copy of the posted notice posted with attestation of posting for at least ten consecutive calendar days (see general discussion below concerning posting locations and related issues), and
- Evidence of the alien's qualifications:
 - For Form I-140 petitions filed for registered nurses, an unrestricted permanent license to practice nursing in the state of intended employment, CGFNS certificate issued by the Commission on Graduates of Foreign Nursing Schools or evidence that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.
 - For Form I-140 petitions filed for physical therapists, a permanent license to practice in the state of intended employment or a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating that the beneficiary is qualified to take that state's written licensing examination for physical therapists.
 - For Form I-140 petitions filed for Schedule A Group II for aliens of exceptional

ability , evidence of widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field and evidence that alien's prior and intended work requires exceptional ability.

For Form I-140 petitions filed before March 28, 2005, the pre-PERM DOL regulations at [20 CFR 656.22\(b\)\(2\)](#) and [656.20\(g\)\(1\)](#) required that an employer provide notice of the position(s) it seeks to fill under Schedule A, Group I or II, to the bargaining representative or, if there is no such representative, to the employer's employees via a notice that must be posted for at least 10 consecutive days at the facility or location of the employment.

In order to be in compliance with DOL's notification requirements, the notice must be posted for at least 10 consecutive calendar days. The notice must be clearly visible and unobstructed while posted and be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. The notice must contain a description of the job and rate of pay and state that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant position. The notice must also state that any person may provide documentary evidence bearing on the Schedule A labor certification application to the appropriate DOL Certifying Officer of holding jurisdiction over the location where the alien beneficiary will be physically working.

In the absence of evidence supporting a petition filed before March 28, 2005, adjudicators should issue a request for evidence (RFE) that requests evidence of compliance with DOL's notification requirements in the form of a notice of posting that conforms to the conditions noted above. If all posting requirements are met and the notice has been posted the requisite 10 days prior to the date of the RFE response, the posting will be considered timely for adjudication purposes. Issuing an RFE for this documentation is preferable to the issuance of a notice of intent to deny (NOID), to minimize the impact on Service Center resources as opposed to the more resource intense process for the issuance of an NOID. Note : the issuance of an RFE specified in this memorandum supersedes the guidance provided in the December 23, 2004 memorandum instructing USCIS officers to issue a NOID.

(B) Petitions Filed On Or After March 28, 2005 :

DOL Regulations Effective March 28, 2005 :

On December 27, 2004, DOL published a final rule, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System , which significantly restructures the permanent labor certification process. This final rule deletes the current language of [20 CFR part 656](#) and replaces the part in its entirety with new regulatory text, effective on March 28, 2005. Many of the evidentiary requirements relating to Schedule A petitions have been changed as of that date.

Pursuant to new [20 CFR 656.10](#) and [20 CFR 656.15](#) , in order to apply for certification under Schedule A for petitions filed on or after March 28, 2005, the petitioner should complete and submit:

- The Form I-140 petition, with appropriate filing fees,
 - An uncertified [Form ETA-9089](#) , in duplicate, signed in the original by an authorized official of the petitioning organization, the alien, and the representative, if any,
 - A wage determination issued by the State Workforce Agency (SWA) having jurisdiction over the proposed area where the job opportunity exists or by the SWA having jurisdiction over the petitioner's headquarters if the prevailing wage will be derived from the area of the employer's headquarters in the situation of roving employees.
 - A copy of the notice sent to an applicable collective bargaining unit, or a copy of the notice posted with attestation of posting for at least ten consecutive business days within the period between 30 and 180 days preceding the petition filing (see general discussion below concerning posting locations and related issues), and
 - Copies of any and all in-house media, whether electronic or printed, in accordance with the normal procedures used in the employer's organization for the recruitment of similar positions to the position specified in the Form 9089.
 - Evidence of the alien's qualifications:
 - For petitions filed for registered nurses , a full unrestricted permanent license to practice nursing in the state of intended employment; CGFNS certificate issued by the Commission on Graduates of Foreign Nursing Schools; or evidence that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.
 - For petitions filed for physical therapists , a permanent license to practice in the state of intended employment or, a letter or statement, signed by an authorized state physical therapy licensing official, stating that the beneficiary is qualified to take that state's written licensing examination for physical therapists.
 - For petitions filed for Schedule A Group II for aliens of exceptional ability , evidence of widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field and evidence that alien's prior and intended work requires exceptional ability.

New Labor Certification Form :

Pursuant to the new [20 CFR 656.17](#) , the Application for Permanent Employment Certification ([ETA Form 9089](#)) has replaced the Application for Alien Employment Certification ([Form ETA-750](#)). In support of Schedule A, Form I-140 petitions, the Form 9089 should be provided in duplicate, signed in the original by an authorized official of the petitioning entity, the alien, and the representative, if any. In the event that the Form I-140 petition is approved, one copy of the [Form ETA-9089](#) must be forwarded by USCIS to the Chief, Division of Foreign Labor Certification, identifying the occupation, the Immigration Officer who made the determination, and the date of the determination. See [20 CFR 656.15\(f\)](#) .

State Prevailing Wage Determination :

In accordance with [20 CFR 656.15\(b\)\(i\)](#) , the [Form 9089](#) provided with the Form I-140 from the petitioning employer must be accompanied by a prevailing wage determination issued by the SWA having jurisdiction over the proposed area where the job opportunity exists. See [20 CFR 656.40](#) and [20 CFR 656.41](#) . The petitioner will request a prevailing wage determination from the appropriate SWA using the form required by the state where the job opportunity exists. (See general discussion below concerning posting and prevailing wage locations).

A completed SWA form must reflect the date on which the SWA made the prevailing wage determination in order for it to be valid for purposes of being submitted to USCIS together with the Form 9089 in support of a Form I-140 petition. A properly completed SWA form, in all cases, must specify on its face the validity of the prevailing wage, and the date on which the SWA made the determination, which may not be less than 90 days or more than 1 year from the date of the SWA determination. The Form I-140 must be filed within this timeframe in order for the prevailing wage determination to be valid. Adjudicators should notify their supervisors in the event the SWA determination is valid for less than 90 days from the date of issuance, and the supervisor will contact the Department of Labor, Employment and Training Administration (ETA) for further guidance. The purpose of the validity date for the prevailing wage determination is to ensure that the prevailing wage determination is reflective of the wages being offered for comparable positions in the location where the job offer exists at the time that the Form I-140 petitioner recruits the alien worker.

For the purposes of evaluating the validity of the petitioner's proffered wage, be advised that the past practice of allowing a 5 percent variance of the wage actually paid relative to the prevailing wage has been eliminated by the enactment of the H-1B Visa Reform Act of 2004, contained in [Public Law 108-447](#). This Act amended the [INA Section 212\(p\)\(3\)](#) , 8 USC 1182(p)(3)) by specifying that "...the prevailing wage required to be paid pursuant to [212\(a\)\(5\)\(A\)](#) , [\(n\)\(1\)\(A\)\(i\)\(II\)](#) and [\(t\)\(1\)\(A\)\(i\)\(II\)](#) shall be 100 percent of the wage determined pursuant to those sections." Therefore, for petitions filed after March 28, 2005, the prevailing wage to be paid must be no less than 100 percent of the prevailing wage determination.

Labor Application Notice:

In order to comply with 20 CFR 656.10(d), the petitioner must give notice of the filing of the

Application for Permanent Employment Certification and be able to document that notice was provided to either:

1 . The bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment, (documentation of this may consist of a copy of the letter that was sent to the bargaining representative(s) and a copy of the Application for Permanent Employment), or

2 . If there is no such bargaining representative, by posted notice to the employer's employees at the facility or physical location of the employment. Such notice:

- must be posted for at least 10 consecutive business days (Monday through Friday, regardless of whether the facility operates seven days a week);
- must be clearly visible and unobstructed while posted; and
- must be posted in conspicuous places within the location of the job where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment.

The documentation requirement in support of the I-140 petition may be satisfied by providing a copy of the posted notice and an attestation executed by an authorized official of the employer that identifies the physical location(s) where the notice was posted and the date of publishing.

PERM rules also require that the employer publish the notice in all in-house media, whether electronic or print, that the employer normally uses to announce similar positions within the employer's organization. The Form I-140 petition for Schedule A must include the employer's attestation of such in-house publication. The attestation may be, but need not be, provided in the same document as the proof of worksite posting.

The notice must state that it is being provided as a result of the filing of a petition for the relevant position. (The DOL regulations refer to an application for labor certification, which technically is also filed, and notices referring to a labor certification application to DOL rather than a petition to USCIS are equally acceptable). It must also state that any person may provide documentary evidence bearing on the Schedule A labor certification application to the DOL Certifying Officer holding jurisdiction over the location of the proposed employment. (At one point, USCIS guidance reflected that the notice should drive complaints to USCIS; thus, such notices should be accepted as sufficient).

Pursuant to [20 CFR 656.10\(d\)\(3\)\(iv\)](#), such notice must be posted between 30 days and 180 days prior to the filing of the Form I-140 petition. The last day of the posting must fall at least 30 days prior to filing in order to provide sufficient time for interested persons to submit, if they so choose, documentary evidence bearing on the application. Adjudicators should deny the Form I-140 and any concurrently filed [I-485](#) in instances where the notice was not posted between 30 and 180 days prior to the filing of the petition.

(C) Special Considerations For All Schedule A Petitions :

(i) Household Workers

In the case of a private household, notice is required only if the household employs one or more U.S. workers at the time the application for labor certification is filed.

(ii) Minimum Requirements

Remember that qualifying for Schedule A means only that the labor certification requirement has been met. You must make a separate determination on the alien's qualification for the specific visa classification requested using the evidence described above. The "minimum requirements" in Schedule A cases as listed in [Item 14 and 15 of Part A of the ETA-750](#) for petitions filed before March 28, 2005 and in [Item H of the ETA-9089](#) for petitions filed on or after March 28, 2005 may not be a true reflection of the actual education, training and experience needed to perform the job. In many cases a Schedule A petitioner will give the particular alien's qualifications rather than actual minimum requirements, and, because the labor certification form is sent directly to USCIS, this will not be reviewed first by DOL and corrected through DOL involvement. This point is important because many classifications require that the petitioner establish that the position requires a person of a particular caliber. As long as the **duties** shown on the labor certification application are appropriate for a position that requires licensure as a registered nurse, licensure as a physical therapist or performance of a worker of exceptional ability, the petition should not be denied and a request for evidence need not be sent to confirm the precise minimum job requirements.

(iii) Separate Posted Notices for Every Occupation or Job Classification

A separate notice must be posted for every *occupation or job classification* that will be the subject of a Schedule A petition, but not for every nurse or physical therapist Schedule A petition. Thus, for example, separate notices would be posted for an attending nurse and a supervisory nurse (i.e., nurses having different job duties and wage rates). An employer can satisfy notice of filing requirements with respect to several nurses in each of these job classifications with a single posting, as long as the posting complies with the regulation for each application (e.g., contains the appropriate prevailing wage and was posted for the requisite period of time).

(iv) Posting and Prevailing Wage Locations .

All Schedule A petitions must each meet specific notice of posting requirements which are described below. Effective February 15, 2006, the location of the intended employment for notification purposes will be determined as follows:

(A) *If the employer knows where the Schedule A employee will be placed:*

The employer must post the notice at the work-site(s) where the employee will perform the work **and** publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.

(B) *If the employer currently employs relevant workers at multiple locations and does not know where the Schedule A employee will be placed:*

The employer must post the notice at the work-site(s) of **all** of its locations or clients (i.e., clients under contract to the staffing employer at the time the employer seeks to post a timely notice of filing for a Schedule A employee) where relevant workers currently are placed, **and** publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters.

(C) *If the work-site(s) is unknown and the employer has no current locations or clients:*

The application would be denied based on the fact that this circumstance indicates no *bona-fide* job opportunity exists. The employer cannot establish an actual job opportunity under this circumstance. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application.

In support of the petition, the employer may provide a copy of one posting notice, supported by a list of all locations where the notice was posted and dates of posting in each location, rather than a copy of each notice in support of the petition.

Exception:

If, on March 20, 2006, the I-140 is pending or was denied and a timely filed motion to reopen or

reconsider is pending, and the employer timely posted a notice but not in correct location(s) of intended employment as described above, adjudicators should issue an RFE to allow the employer to comply with DOL's notification requirements. If all posting requirements are met and the notice has been posted the requisite 10 business days prior to the date of the RFE response, the posting will be considered timely for adjudication purposes. For all petitions filed after March 20, 2006 (or motions to reopen filed after March 20, 2006 , to reopen a petition that was filed and denied after March 28, 2005), employers must comply with the posting requirements set forth above.

(v) Sample Notice of Posting . [Revised 09-14-2009]

[Note: USCIS is in the process of updating the below sample Notice of Filing to comply with all regulatory requirements. Notices of Filing must comply with 20 CFR 656.10(d) and not this sample Notice.]

There is no specific form that petitioning employers must use to comply with the notice of posting requirements for Schedule A petitions. The following is a sample notice of posting which petitioners may elect to use for their posting notices.

USCIS worked with DOL to develop the sample for stakeholders' convenience. However, the sample notice that was initially published in this chapter on September 12, 2006 did not contain a field for the name of the petitioning organization as required by [20 CFR 656.17](#) and [20 CFR 656.10](#) , for non-Schedule A posting notices. The current sample now contains a field for the employer's name, though it is not required to establish compliance with the notice of posting requirements for Schedule A petitions filed with USCIS.

Adjudicators should accept posting notices that are modeled after the sample, but should not require use of the sample. Petitioning employers may use other forms as long as they comply with the DOL regulations. Petitions already approved should not be reopened and revoked for failure to comply with posting requirements.

SAMPLE NOTICE OF FILING OF APPLICATION UNDER THE U.S. DEPARTMENT OF LABOR'S PERMANENT LABOR CERTIFICATION PROGRAM

An application concerning the employment of one or more alien workers for the following permanent position will be filed with the Department of Labor (for non-schedule A positions) or with the Department of Homeland Security (for Schedule A positions). This Notice of Filing will be posted for 10 consecutive business days, ending between 30 and 180 days before filing the permanent labor certification application.

EMPLOYER'S NAME:

POSITION TITLE:

POSITION DUTIES:

RATE OF PAY: \$ _____ per _____

The employer will pay or exceed the prevailing wage, as determined by the U.S. Department of Labor

LOCATION OF EMPLOYMENT: _____

Posting a clearly visible and unobstructed notice, for at least ten (10) consecutive business days, in conspicuous location(s) in the workplace, where the employer’s U.S. workers can readily read the posted notice, including but not limited to locations in the immediate vicinity of the wage and hour notices.

AND

Publishing the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer’s organization.

DATE POSTED: _____

DATE REMOVED: _____

LOCATIONS WHERE THE NOTICE WAS POSTED: _____

MEANS OF IN-HOUSE NOTICE, if applicable: _____

EXPLANATION OF ANY LACK OF IN-HOUSE NOTICE: _____

I attest, under penalty of perjury, that the above notice was provided as shown.

[PRINTED NAME AND TITLE] [SIGNATURE]

DATE: _____

(5) Successor-In-Interest Determinations **[Updated 08-06-2009]**

(A) Interpretation of Matter of Dial Auto Repair Shop, Inc .

USCIS has determined that legacy INS applied an very restrictive reading of the Board of Immigration Appeal’s (Board) decision in [Matter of Dial Auto Repair Shop, Inc.](#) , 19 I&N Dec. 481 (Comm. 1986). The Board found that the petitioner failed to adequately describe how it had acquired its predecessor, Elvira Auto Body’s, business. As a result, Dial Auto Repair Shop failed to meet its burden and was not eligible to claim continued validity of the original labor certification.

The Board stated that if Dial Auto Repair Shop’s “claim of having, assumed all of Elvira Auto’s rights, duties, obligations, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification.... Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown....” Id. at 482. The Board did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity’s rights, duties, and obligations.

According to Black’s Law Dictionary, 1473 (8th Ed, 2004), the definition of a successor in interest is:

- One who follows another in the ownership or control of property.
- A successor in interest retains the same rights as the original owner, with no change in substance.

Similarly, the term “successor” with reference to corporations is defined as “a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation.” See Black’s Law Dictionary (8th Ed, 2004). These definitions are consistent with the determinations made in *Matter of Dial Auto Repair Shop, Inc.*, which highlight three factors that should be considered when determining if a previously approved or pending labor certification remains valid for [Form I-140](#) petition adjudications.

The three factors are:

- whether it is the same job;
- if the successor has established eligibility for the requested visa classification in all respects ; and
- if the successor has adequately detailed the nature of the transfer of rights, obligations, and ownership of the prior entity.

If a business can establish these three factors, it is possible to find a valid successor-in-interest relationship even in situations where a successor does not wholly assume a predecessor entity’s rights, duties and obligations.

(B) Factors for Successorship Determinations

The three successor-in-interest factors are:

Factor #1

The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification;

Factor #2 .

The successor bears the burden of proof to establish eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage, as of the date of filing of the labor certification with DOL, and;

Factor #3 .

For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petition must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

Detailed explanations of each of the three factors are:

Factor #1.

The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification.

The job offered in the successor-in-interest petition by the successor must remain unchanged with respect to the rate of pay, job description and job requirements specified on the labor certification. A successor in interest claim will fail if the successor is requesting that USCIS accept any changes to the items specified on the labor certification that relate to the labor market test.

In other words, USCIS ISOs should deny any successor claim where the successor is requesting changes to the labor certification that, if made at the time that the labor certification was filed with DOL, could have affected the number or type of available U.S. workers that applied for the job opportunity.

Note

An increase in the rate of pay due to the passage of time does not affect the successor-in-interest claim.

The job opportunity must also remain valid and available from the time of the filing of the labor certification with DOL until the issuance of an immigrant visa abroad or the alien beneficiary's adjustment of status to lawful permanent resident while in the United States. Otherwise, a new test of the labor market and new labor certification application by the successor employer is required.

Prior to the transfer of ownership: the original job opportunity ceases to exist if, at any time prior to the transfer of ownership, the predecessor ceases business operations entirely or, even partially so that the alien beneficiary's services are no longer required.

After the transfer of ownership: the original job opportunity ceases to exist if the business operation in which the job opportunity was originally offered has a substantial lapse in business operations after the transfer of ownership.

Example .

- A predecessor was involved in the operation of a restaurant and the job opportunity specified on the labor certification is for a specialty cook.
- The successor acquires the business and closes the restaurant for extensive renovations.
- The restaurant reopens six months later.
- In this case, the original job opportunity is no longer valid as there was a substantial lapse in business operations after the transfer of ownership.

- The successor would have to conduct a new test of the labor market for the job opportunity through the filing of a labor certification application with DOL.

Conversely, if in the example described above the restaurant did not close during the renovations to the property but continued business operations in a manner that would require the beneficiary's services as a specialty cook, then the job offer would remain valid during the business transition and no new labor certification would be required.

Factor #2

The successor bears the burden of proof to establish eligibility for petition approval, as of the date of filing of the labor certification with DOL.

In order to establish its eligibility as a successor in interest petitioner and the alien's eligibility for the visa classification, the successor must demonstrate that all of the criteria have been met for the visa classification. This includes but is not limited to, the predecessor's ability to pay the proffered wage from the date of the filing of the labor certification with DOL until the date of the transfer of the ownership of the predecessor to the successor.

The successor must meet the definition of "employer" and demonstrate the ability to pay the proffered wage as of the date of the transfer of ownership of the predecessor to the successor, continuing until the time of immigrant visa issuance or the alien beneficiary's adjustment of status in the United States.

In cases of sales of discrete operational divisions or units of the predecessor (see "partial transfers" discussed below) the predecessor's ability to pay the proffered wage should be analyzed by considering the financial data relating to the predecessor entity, not just the business unit.

Reminder

The evidence in the petition must also show that the alien beneficiary possessed the minimum education and work experience requirements specified on the labor certification, as of the filing date of the labor certification with DOL. See AFM [Chapters 22.2\(j\)](#) and [22.2\(k\)](#).

Example

- A petitioner files and obtains a DOL-approved labor certification for an architect.
- The petitioner then became insolvent in the following year and is unable to meet its existing financial obligations.
- The firm is ultimately acquired by another architectural firm which files an I-140 successor petition on the beneficiary's behalf.
- In this case Factor #2 is not met because the predecessor entity did not possess the ability to pay the beneficiary's wage from the time of filing of the labor certification until the acquisition of the predecessor by the successor.
- The successor would have to conduct a new test of the labor market for the job opportunity through the filing of a labor certification application with DOL.

Conversely, in the example above, if the predecessor remains solvent up until the time that it is acquired by the successor, then Factor #2 may be met if all other areas of eligibility are established.

Factor #3. [Technical correction made 12/22/2010; PM-602-0005.1; AD11-14]

For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

Note

For successor-in-interest purposes, the transfer of ownership may occur at any time after

the filing or approval of the original labor certification with DOL.

Documentary Evidence

Evidence of business transactions resulting in the transfer of ownership may include, but is not limited to:

- A contract of sale for the acquisition of the predecessor;
- Mortgage closing statements;
- A Security Exchange Commission (SEC) Form 10-K for the successor entity;
- Audited financial statements of the predecessor and successor for the year in which

the transfer occurred;

- Documentation of the transfer of real property and business licenses from the predecessor to the successor;
- Copies of the financial instruments used to execute the transfer of ownership; and
- Newspaper articles or other media reports announcing the merger and acquisition of

the predecessor.

The evidence provided must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor.

The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled and carried on by the successor must remain substantially the same as it was before the ownership transfer.

However, a valid successor-in-interest relationship may still be established in certain instances where liabilities unrelated to the original job opportunity are not assumed by the successor; e.g., where the successor does not assume the liability of pending or potential sexual harassment litigation, or other tort obligations unrelated to the job opportunity in the labor certification.

Contractual agreements or other arrangements in which two or more business entities agree to conduct business together or agree to provide services to each other without the transfer of the ownership of the predecessor to the successor do not create a valid successor-in-interest relationship for [I-140](#) purposes.

Example

- "Company A" filed a labor certification application with DOL for a computer systems analyst, which is ultimately approved.
- Company A subsequently signs a contract with "Company B" for the provision of computer systems analyst services to Company A by Company B, effectively outsourcing the computer systems analyst duties that were to be performed by the alien beneficiary to Company B.
- A valid successor-in-interest relationship between Company A and Company B does not exist in this instance. The contractual agreement between the companies did not result in the transfer of the ownership of Company A to Company B in a manner so that its business interests are carried on and controlled in the same manner by Company B.

Conversely, in the example above, Company A sells its computer software development unit to Company B and the computer systems analyst position specified within the approved labor certification is located within that business unit. A valid successor-in interest relationship may exist between Company A and Company B if the sale of the business unit results in the transfer of the ownership of Company A to Company B in a manner so that its business interests are carried on and controlled in the same manner by Company B.

Transfers in Whole or In Part

The transfer of the ownership of the predecessor to the successor may occur through a merger, acquisition or reorganization. These business transactions may involve business entities with differing organizational structures, such as:

- General Partnerships;
- Limited Partnerships;
- LLPs (Limited Liability Partnerships);
- LLCs (Limited Liability Company);
- Regular "C" Corporations; or
- Subchapter "S" Corporations.

The structure of business transactions resulting in the transfer of ownership of the predecessor to the successor vary from case to case. Frequently, the acquiring entity (successor) purchases a discrete operational division or unit, resulting in the sale or "spin off" of only a part of the predecessor.

For [I-140](#) petition successor-in-interest purposes, the operational division or unit of the business entity that is being transferred to the successor must be a clearly defined unit within the predecessor entity and that unit must be transferred as a whole to the successor, with the exception of certain unrelated liabilities such as those previously outlined.

The job offered to the alien beneficiary in the successor petition must have been, and must continue to be, located within the operational division or unit of the business entity that is transferred from the predecessor to the successor. The three successor-in-interest factors must also be met.

Example

The manufacturing division of a chemical wholesale corporation, which utilizes plant and equipment, management, accounting and operational structures that are readily divisible from the general structure of the predecessor entity might qualify if the manufacturing division is sold to another business entity engaged in chemical manufacturing.

Example

Another example might involve the sale of a branch office of a bank to another entity engaged in the provision of banking services as a member organization in the banking industry.

Conversely, the sale of a patented chemical formula by Company A to Company B, which allows Company B to manufacture a product using the chemical formula, does not create a successor-in-interest relationship between the two companies, even if Company A ceases to manufacture the product and starts to purchase the product from Company B.

This transaction did not result in the transfer of a clearly defined business unit. Rather, Company A merely sold the manufacturing rights for a given product to Company B without the transfer of the other related assets located within its business unit.

Important Note for ISOs

ISOs should issue an RFE to the petitioner if the petitioner has failed to demonstrate a qualified successor-in-interest relationship. The RFE should explain why the labor certification that was originally provided in support of the petition is not valid for the proffered position, based on one or more of the reasons outlined above, and other reasons, if any. If the petitioner does not provide a new original labor certification that was valid at the time of filing of the Form I-140 petition or sufficient evidence to overcome the concerns outlined in the RFE, then the petition should be denied.

(C) Implications of Section 106(c) of AC21 and Section 204(j) of INA on Portability on Successor-In-Interest Filing Requirements

[Section 204\(j\)](#) of the INA allows for certain [I-140](#) petitions to "remain valid" even if the alien is no longer seeking to adjust status on the basis of employment with the petitioner which originally filed the I-140 petition on that alien beneficiary's behalf.

See AFM [Chapter 20.2\(d\)](#) for information regarding [AC21, section 106\(c\)](#), eligibility requirements.

Note

In cases where an alien is eligible for AC21 "portability" pursuant to [section 204\(j\)](#) of the INA, a successor entity need not file a new petition on the alien's behalf, provided that all the requirements of that section have been met. For instance, the alien would have to show for purposes of adjustment that the successor job opportunity is the "same or similar" as the job opportunity on the labor certification according to applicable guidance on the section 204(j) of the INA.

(D) Successor-In-Interest Analysis Not Applicable to I-140 Visa Preference Categories that Do Not Require Labor Certification

Successor-in-interest determinations are principally relevant to the continuing validity of a labor certification. Successor-in-interest petitions are not required to reaffirm the validity of the initial [I-140](#) petition for petitions that are filed requesting visa preference categories that do not require a labor certification, such as the EB1 Alien of Extraordinary Ability and the EB2 National Interest Waiver (Non-NIW Physician cases).

An employer seeking to classify the alien as an EB1 Multi-National Executive or Manager or EB1 Outstanding Professor or Researcher, must file a new [I-140](#) petition and establish the alien's eligibility under the requested category's specific eligibility requirements.

(E) New Approved Labor Certification Requirements

The submission of a new original labor certification in support of the [Form I-140](#) petition is required when any of the following conditions exist:

- The successor entity (petitioner) has not established that a successor-in-interest relationship exists between the successor and the predecessor in accordance with the three successor-in-interest factors described in AFM Chapter [22.2\(b\)\(5\)\(B\)](#);

- The labor certification is not valid for the new geographic area of the alien beneficiary's proposed employment; or

- There has been any other material change in the job opportunity covered by the original labor certification.

(F) Form I-140 Successor-In-Interest and Other Labor Certification Amendment Filing Procedures

Form I-140 Petitions Involving a Subsequent Employer Name Change or Change in Business Location

A petitioning employer may change its name or, in certain cases, the location where the alien beneficiary is to be employed. A new [I-140](#) petition does not have to be filed to amend a previously filed or approved petition to evidence:

- A legal change in the name of the petitioning employer so long as the ownership and legal business structure of the petitioning employer remains the same. Likewise, a change to a petitioning employer's "doing business as" (DBA) name does not require the filing of an amended [I-140](#) petition, or;
- A new job location, as long as the new business location and job are within the area of intended employment stated on the labor certification.

Note

When the alien beneficiary files a [Form I-485](#) adjustment of status application with USCIS or applies for an immigrant visa with the Department of State (DOS), the alien beneficiary may need to document that the employer is the same employer that filed the [I-140](#) petition, and/or that the job opportunity is still located in the area of intended employment specified on the labor certification.

Initial I-140 Petitions Filed by a Successor that Request the Use of a Predecessor's Approved Labor Certification

A successor may file [I-140](#) petitions that request the use of approved labor certifications filed by a predecessor with DOL that have never been submitted in support of an I-140 petition filed with USCIS. Such petitions must be filed within the validity period of the labor certification and should be supported by:

- Documentation to establish the qualifying transfer of the ownership of the predecessor to the successor;
- Documentation from an authorized official of the successor which evidences the transfer of ownership of the predecessor, the organizational structure of the predecessor prior to the transfer, and the current organizational structure of the successor; and the job title, job location, rate of pay, job description and job requirements for the permanent job opportunity for the alien beneficiary;

- Documentation to demonstrate that the alien beneficiary possesses the requisite minimum education, licensure and work experience requirements specified on the labor certification;
- The original approved labor certification; and
- Documentation to establish the ability to pay the proffered wage by the predecessor and the successor.

Pending or Approved I-140 Petitions with a Subsequent Change in Employer Due to a Transfer of Ownership to a Successor

Successor-in-interest entities which need to reaffirm the validity of an [I-140](#) petition and the labor certification filed by a predecessor entity must file an amended I-140 petition that demonstrates that a qualifying successor-in-interest relationship exists in accordance with the three successor-in-interest factors described in Section B. above.

Each amended [I-140](#) petition should be supported by:

- Documentation, such as a copy of the Form I-797 approval or receipt notice, that provides the previously filed I-140 petition's receipt number, and the petitioner's name and address;
- A statement that provides the alien beneficiary's name, date of birth, and alien registration number (if any);
- Documentation to establish the ability to pay the proffered wage by the predecessor and the successor;
- Documentation to establish the qualifying transfer of ownership of the predecessor to the successor; and
- Documentation from an authorized official of the successor evidencing the transfer of ownership of the predecessor, the organizational structure of the predecessor prior to the transfer, and the current organizational structure of the successor; and the job title, job location, rate of pay, job description and job requirements for the permanent job opportunity for the alien beneficiary.

Consolidated Processing of Multiple Successor-In-Interest Petitions at a Service Center

Each successor-in-interest petition must be evaluated according to the three factors previously outlined in AFM [Chapter 22.2\(b\)\(5\)\(B\)](#) and will be adjudicated on its own merits with regard to eligibility for the requested visa preference classification in the petition. However, multiple filings based on the same transfer and assumption of the ownership of the predecessor by the successor may have duplicative evidence provided in each case to establish Factor #3.

In the interest of efficiency and consistency, Service Center directors may elect to accept consolidated evidence, e.g., one copy of the SEC Form 10-K for 20 petitions instead of 20 copies the SEC Form 10-K, coordinate the adjudication of multiple pending successor petitions so that the petitions are adjudicated at a single Service Center and/or at the same time, to the extent that other pressing work priorities permit.

Petitioners can initiate a request for the consolidated processing of multiple successor-in-interest cases affected by the same transfer of ownership through the National Call Center.

Note

The decision to grant a request for consolidated case processing rests solely with the Service Center director(s) with jurisdiction over the filing of [Form I-140](#) petitions based upon the location of the intended employment of the affected alien beneficiaries.

(6) Labor Certification Substitution Changes .

NOTE

DOL has amended the administrative regulations at 20 CFR part 656 through a final rule-making published May 17, 2007, effective on July 16, 2007 (71 FR 27904). DOL has, through this final rule making at 20 CFR 656.11, prohibited the alteration of any information contained in the labor certification after the labor certification application is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications.

Substitution Petitions filed on or after July 17, 2007:

USCIS will reject all Form I-140 petitions requesting labor certification substitution that are filed on or after July 17, 2007 pursuant to 20 CFR 656.11. Such petitions that are accepted by USCIS in error will be denied based on the fact that the petition was filed without a valid approved labor certification that identified the alien beneficiary on the Form I-140 petition as the alien named on the labor certification at the time that it was approved by DOL.

Please Note

Some petitioning employers may have requested labor certification substitution during the labor certification application process with DOL. Labor certification substitution requests that are granted by DOL on or before the approval of the labor certification application do not impact the validity of the labor certification. Such an approved labor certification may be accepted in support of the Form I-140 petition filed on or after the effective date of the DOL final rule, provided the labor certification is otherwise filed within the applicable time period.

In accordance with 8 CFR 103.1(f)(3)(iii)(B), petitioning employers may not file an appeal of USCIS' decision to deny a Form I-140 petition that is filed with an approved labor certification issued by DOL in the name of an alien other than the alien named in the Form I-140 petition.

Substitution Petitions filed prior to July 17, 2007:

Historically, USCIS and DOL have allowed U.S. employers to substitute an alien named on a pending or approved labor certification with another prospective alien employee while maintaining the previously established "priority date". Labor certification substitution could occur either while the labor certification application was pending at DOL or while a Form I-140, filed with an approved labor certification, was pending with USCIS.

USCIS will continue to accept Form I-140 petitions that request labor certification substitution that are filed prior to July 16, 2007. Form I-140 petitions that request labor certification substitution that are filed prior to July 17, 2007 will be adjudicated to completion following the procedures outlined in this section, to include the adjudication of any relating motions to reopen or reconsider, or an appeal (Form I-290B) by the Administrative Appeals Office (AAO). (See the March 7, 1996, Memorandum of Understanding between the former Immigration and Naturalization Service (INS) and Employment and Training Administration.)

In such substitution filings, the petitioning employer files an immigrant petition on behalf of the new employee based on the approved labor certification, seeking to retain the priority date of the original labor certification filing. The priority date for a petition that is supported by a labor certification substitution is the earliest date the certification was accepted for processing by the DOL. Labor certification substitutions were allowed only if the original beneficiary named on the approved labor certification, or any previously substituted alien, had not obtained an employment-based immigrant visa (or adjustment of status) based on that labor certification application.

The substituted beneficiary must have met all of the minimum education, training, or experience requirements as stated in the original individual labor certification at the earliest time the original labor certification application was submitted to the state employment office or to DOL.

For individual labor certifications filed with the Department of Labor prior to March 28, 2005, a new Form ETA-50, Part B signed by the substituted alien must be included with the petition. For individual

labor certifications filed with the Department of Labor on or after March 28, 2005, a new Form ETA-9089 signed by the substituted alien must be included with the petition.

Additionally a written notice of withdrawal of any pending or approved Form I-140 initially submitted for the original beneficiary or any previously substituted alien must be included, as well as a photocopy of the Form I-797 receipt and/or approval notice, if available.

(7) Submission of a Photocopy of Labor Certification .

Ordinary legible copies of documents are generally acceptable; however, you may request that the original of a document be submitted when necessary. The original labor certification must be submitted unless it has already been filed with another petition (a situation commonly encountered when adjudicating a labor certification substitution filing).

(8) Issuance of a Duplicate Labor Certification .

If the original labor certification has been lost, DOL will not issue a duplicate labor certification to the petitioner but will issue a duplicate directly to USCIS for Form ETA-750 labor certification applications filed prior to March 28, 2005 and to a Consular officer or an Immigration officer for [Form ETA-9089](#) labor certifications filed on or after March 28, 2005, only after notice is given to USCIS or by the petitioner and upon request by USCIS to DOL.

(9) Duplicate Labor Certification Requests for Labor Certifications Filed Prior to March 28, 2005 : **[Revised 09-14-2009]**

DOL will only provide duplicate labor certifications at the written request by USCIS for labor certifications filed prior to March 28, 2005. Adjudicators should only make the request to DOL if it is in conjunction with a [Form I-140](#) petition filed with USCIS where the original labor certification has been irretrievably lost or destroyed. The duplicate labor certification must be retained as part of the record of the Form I-140 petition after it is received from DOL, and should not be forwarded to the petitioner or the petitioner's representative.

Example

An adjudicator would **not** make such a request to DOL if the petitioner's attorney requested a duplicate labor certification in general correspondence to USCIS, merely because he or she wants a copy for his or her records.

Also, an adjudicator should be aware of the possibility that the original was not, in fact, lost or destroyed, but rather used on behalf of another alien. If another alien has used or been substituted on a labor certification that the petitioner claims has been lost or denied, the request for a duplicate labor certification should be denied.

A request for duplicate [Form ETA-750](#) labor certification should be e-mailed from USCIS to DOL and should include:

1.	USCIS Requester Name
2.	USCIS Requester Address
3.	USCIS Receipt Number
4.	Employer Name
5.	Certification Date
6.	Attorney name
7.	Petitioner's name
8.	Beneficiary's name
9.	ETA case number
10.	Priority Date
11.	An annotation reflecting that the case was filed on Form ETA-750
12.	A print screen showing that the case has been certified
13.	As a courtesy to DOL, reason(s) for requesting that the Service Center secure a duplicate, approved labor certificate from DOL, e.g. "Case was certified, original approved labor certificate was never received in the mail."

The duplicate certification e-mail request to DOL should be sent to Duplicate.PERM@dol.gov. The e-mail must contain the petitioner's name in the subject line.

(10) Duplicate Labor Certification Requests for Labor Certifications Filed on or after March 28, 2005
: [Revised 09-14-2009]

DOL will provide duplicate labor certifications for labor certifications filed on or after March 28, 2005, at the request of a Consular officer or USCIS adjudicator, an alien, employer, or an alien's or employer's attorney or agent. The request must include documentary evidence that a visa application or visa petition has been filed, and must include the U.S. Consular Office or USCIS case tracking number that is associated with the visa application or visa petition.

DOL will only send the duplicate labor certification to a Consular officer or USCIS adjudicator, regardless of who makes the request. See [20 CFR 656.30\(e\)](#). An adjudicator should only make the request to DOL if it is in conjunction with a [Form I-140](#) petition filed with USCIS where the original labor certification has been irretrievably lost or destroyed. The duplicate labor certification must be retained as part of the record of the Form I-140 petition after it is received from DOL, and should not be forwarded to the petitioner or the petitioner's representative.

Example

An adjudicator would **not** make such a request to DOL if the petitioner's attorney requested a duplicate labor certification in general correspondence to USCIS, merely because he or she wants a copy for his or her records.

Also, an adjudicator should be aware of the possibility that the original was not, in fact, lost or destroyed, but rather used on behalf of another alien. If another alien has used or been substituted on a labor certification that the petitioner claims has been lost or denied, the request for a duplicate labor certification should be denied.

A request for duplicate [Form ETA-9089](#) labor certification should be emailed from USCIS to DOL and should include:

1.	USCIS Requester Name
2.	USCIS Requester Address
3.	USCIS Receipt Number
4.	Employer Name
5.	Certification Date
6.	Attorney name
7.	Petitioner's name
8.	Beneficiary's name
9.	ETA case number
10.	Priority Date
11.	An annotation reflecting that the case was filed on Form ETA-9089
12.	A print screen showing that the case has been certified
13.	As a courtesy to DOL, reason(s) for requesting that the Service Center secure a duplicate, approved labor certificate from DOL, e.g. "Case was certified, original approved labor certificate was never received in the mail."

The duplicate certification email request to DOL should be sent to Duplicate.PERM@dol.gov . The email must contain the petitioner's name in the subject line.

(11) [Invalidation or Revocation of a Labor Certification](#) . [Revised 09-14-2009]

(A) Labor Certification Invalidation .

DOL regulations at [20 CFR 656.30\(d\)](#) state:

After issuance labor certifications are subject to invalidation by USCIS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Office of Foreign Labor Certification (OFLC), the CO or the Chief of the Office of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

DOL does not invalidate labor certifications. However, USCIS or DOS may invalidate a labor certification if fraud or willful misrepresentation is discovered. The term “fraud or willful misrepresentation” has the same meaning here as it does in [section 212\(a\)\(6\)\(C\)](#) of the Act. If an adjudicator invalidates the labor certification under this provision, the adjudicator should then deny the corresponding I-140 petition due to the lack of a valid labor certification.

Note 1

An adjudicator does not need to issue a separate notice of invalidation of the labor certification. Rather, the inclusion of the reasons for invalidation in the denial of the I-140 petition is sufficient. In other words, an adjudicator must explain what fraud or willful misrepresentation of a material fact is contained in the labor certification that would warrant the invalidation of the labor certification.

The adjudicator should annotate the labor certification "INVALIDATED BY USCIS - SEE DECISION DATED [insert date of I-140 decision]" and forward "for your information" copies of the I-140 denial notice and the annotated invalidated labor certification to:

Office of Foreign Labor Certification 200 Constitution Avenue, N.W.,
Room C-4312 Washington, DC 20210

Note 2

Although an adjudicator cannot invalidate a labor certification due to inaccuracies which do not rise to the level of fraud or willful misrepresentation, before approving an I-140 petition, the adjudicator must be satisfied that all of the information contained in the petition, which includes the supporting labor certification, is true.

If the adjudicator finds that the labor certification contains significant inaccuracies, the petition may be denied due to the petitioner's failure to meet his or her burden of proof, even absent clear evidence of fraud or willful misrepresentation. The adjudicator should explain the reasons for denial in the denial order.

(B) Revocation of a Labor Certification.

The DOL regulation at [20 CFR 656.32](#) provides for the revocation of approved labor certifications by DOL if a subsequent finding is made that the certification was not justified. In such instances, DOL provides notice to the employer in the form of a Notice of Intent to Revoke an approved labor certification that contains a detailed statement of the grounds for the revocation and the time period allowed for the employer's rebuttal.

The employer may submit evidence in rebuttal within 30 days of receipt of the notice. If rebuttal evidence is not filed by the employer, the Notice of Intent to Revoke becomes the final decision of the DOL Secretary.

If the employer files rebuttal evidence and DOL determines the certification should nonetheless be revoked, the employer may file an appeal under [20 CFR 656.26](#) within 30 days of the date of the

adverse determination. If the labor certification is revoked, DOL will also send a copy of the notification to USCIS and the Department of State.

Adjudicators must bear in mind that the labor certifications remain valid until they are actually revoked, or are invalidated, as discussed above. Adjudicators should provide notice to the petitioner in the form of an Intent to Deny or Intent to Revoke if there is documentation in the [Form I-140](#) petition that the underlying labor certification has been revoked in order to provide the petitioner with an opportunity to supplement the petition with a valid labor certification. If the rebuttal evidence provided in response to the Intent notice does not include a valid labor certification, then the I-140 petition must be denied or revoked.

In addition, per the AAO's decision in *Matter of V-S-G- Inc.*, beneficiaries who are otherwise eligible to and have properly requested to port under AC21 are affected parties. As a result of this decision, USCIS will provide a notice of intent to revoke (NOIR) and/or a notice of revocation (NOR) to a beneficiary who has an approved Immigrant Petition for Alien Worker (Form I-140), an Application to Register Permanent Residence or Adjust Status (Form I-485) that has been pending for 180 days or more, and has properly requested to port. The porting request is proper when it has been reviewed and favorably adjudicated by USCIS prior to the issuance of a NOIR or NOR. Prior to January 17, 2017, a beneficiary requested to port by submitting a request in writing. Beginning on January 17, 2017, a beneficiary must request to port by submitting Form I-485 Supplement J.

(c) Assessing the Petitioner's Ability to Pay the Required Wage

The regulations require that any petition that requires a job offer be accompanied by evidence that the U.S. employer had the ability to pay the proffered wage at the time the labor certification application was filed and continuing until the beneficiary obtains permanent residence.

Note

Establishing that the employer has the ability to pay the proffered wage is different from establishing that the employer is already paying the proffered wage. A petition may still be approved if the employer can demonstrate the financial ability to pay the required wage and the intent to do so once the Form I-485 is approved or the beneficiary immigrates, even if the petitioner is not paying that wage when it files the Form I-140, or the beneficiary has not yet been employed by the petitioner.

[8 CFR 204.5\(g\)\(2\)](#) requires that the evidence be in the form of annual reports, federal tax returns, or audited financial statements. In a case where the prospective employer employs 100 or more workers, you may accept a statement from a financial officer of the organization regarding its ability to pay the proffered wage.

In appropriate cases, the petitioner can submit or USCIS may request additional evidence such as profit/loss statements, bank account records, or personnel records. The burden remains on the petitioner to establish its ability to pay the wage.

Depending on corporate structure, acceptable evidence can include:

- **Publicly traded corporations** - annual reports are sufficient if they contain detailed financial information, such as audited or reviewed financial statements issued by an independent accounting firm.
- **Privately held corporations** - audited or reviewed financial statements from an independent accounting firm.
- **Partnerships** - audited or reviewed financial statements from an independent accounting firm.
- **Non-profit institutions** - a letter from an inside financial officer is sufficient for large, well-established institutions. Documentary evidence of the non-profit's financial status may be required for institutions that are not as well-established.

Sometimes companies will operate at a loss for a period of time to improve their business position in the long run. A prime example of that would be research and development costs on a product line that is not expected to generate revenue for several years. In those instances the documentation should fully explain the sources of funding for the entity (or unit) and the expected profit potential. Whether the company can demonstrate it has the ability to pay the alien the wages described in the petition will depend on the specific facts presented. You should exercise discretion in requesting evidence of ability to pay. In the case of large well-known corporations and other well-known entities such as universities that have established records of filing petitions with USCIS, the financial information contained on the petition is usually sufficient.

(d) Priority Dates .

The priority date is used in conjunction with the Visa Bulletin issued by the Department of State (DOS) to determine when the beneficiary can apply for adjustment of status or for an immigrant visa abroad. Determining the correct priority date for an immigrant visa petition is very important. Of equal importance is making sure that the Form I-140 approval notice carries the correct date. Another USCIS office or DOS may use the information on the approval notice to make a determination on the beneficiary's eligibility to file an application for adjustment or for a visa. Issuance of an incorrect approval notice can create problems for USCIS, other DHS entities, consular posts, petitioners, and alien beneficiaries.

(1) Determining the Priority Date .

In general, if a petition is supported by an individual labor certification issued by DOL, the priority date is the earliest date upon which the labor certification application was filed with DOL. In those cases where

the alien's priority date is established by the filing of the labor certification, once the alien's Form I-140 petition has been approved, the alien beneficiary retains his or her priority date as established by the filing of the labor certification for any future Form I-140 petitions, unless the previously approved Form I-140 petition has been revoked because of fraud or willful misrepresentation. This includes cases where a change of employer has occurred; however, the new employer must obtain a new labor certification if the classification requested requires a labor certification (see the section on successor in interest).

(A) Schedule A Labor Certifications.

The priority date for a petition supported by a Schedule A designation, or for a petition approved for a classification which does not require a labor certification, is the date the Form I-140 petition is filed with USCIS.

(B) Individual Labor Certifications Filed with DOL Prior to March 28, 2005:

The priority date for a petition supported by a Form ETA-750 labor certification filed with DOL prior to March 28, 2005, is the earliest date the application for labor certification, Form ETA-750, was accepted by any office in the employment service system of DOL.

(C) Individual Labor Certifications Filed with DOL on or after March 28, 2005 :

The priority date for a petition supported by a Form ETA-9089 labor certification filed with DOL on or after March 28, 2005, is the earliest date the application for labor certification is filed with the ETA Processing Center.

(D) Re-filed Individual Labor Certifications During PERM Transition :

The priority date for a petition supported by a Form ETA-9089 labor certification that was filed with DOL on or after March 28, 2005 as a re-filed labor certification application after a withdrawal of a previously filed Form ETA-750 will be the filing date that DOL specifies in Section "O." of the Form ETA-9089. Please Note : As part of the implementation of the PERM labor certification system DOL is allowing U.S. employers who have not already had a job order placed by the SWA for labor certification applications that were filed prior March 28, 2005, to withdraw the pending Form ETA-750 labor certification application and re-file under the new PERM system. The new labor certification will be assigned a new priority date unless all of the elements relating to the job opportunity and the alien beneficiary on the newly filed Form ETA-9089 labor certification application are identical to the elements specified on the Form ETA-750 (with the exception of the prevailing wage determination.) DOL will examine the previously filed Form ETA-750 and compare it with the newly filed Form ETA-9089 to make that determination and will annotate the correct priority date in Section "O." of the Form ETA-9089.

(E) Incorrect or Disputed Priority Date Assignments by DOL for Labor Certifications Filed with

DOL on or after March 28, 2005 :

There may be instances where the petitioner indicates that DOL erred by assigning a new priority date on the Form ETA-9089 even though a request for the treatment of the newly-filed Form ETA-9089 as a re-file was requested by the petitioning employer. In other cases, Section O. of the Form ETA-9089 may be blank. In such instances, it is appropriate to request a corroborative statement or other evidence from DOL that clarifies what the correct priority date should be. USCIS adjudicators will not attempt to determine whether DOL's decision to deny the re-file request and assign a priority date was in error, and assign a priority date that differs from the priority date annotated by DOL. These determinations are made by DOL.

(2) Effect of Denial of Petition on Priority Date .

If a Schedule A petition or a petition which does not require labor certification is denied, no priority date is established. In addition, no priority date is established by an individual labor certification if a petition based upon that certification was never filed and there is a change of employer (except in successor in interest cases).

(3) Priority Date Based on Earlier Petition .

If an alien is the beneficiary of two (or more) approved employment-based immigrant visa petitions, the priority of the earlier petition may be applied to all subsequently-filed employment-based petitions. For example:

Company A files a labor certification request on behalf of an alien ("Joe") as a janitor on January 10, 2003. The DOL issues the certification on March 20, 2003. Company A later files, and USCIS approves, a relating I-140 visa petition under the EB-3 category. On July 15, 2003, Joe files a second I-140 visa petition in his own behalf as a rocket scientist under the EB-1 category, which USCIS approves. Joe is entitled to use the January 10, 2003, priority date to apply for adjustment under either the EB- 1 or the EB-3 classification.

(4) Conversion of Pre-IMMACT Petitions .

Petitions filed under the old third and sixth preferences were automatically converted to one of the new classifications when the provisions of IMMACT 90 went into effect. Priority dates established by the previously approved petitions may be applied to any petition filed under the new provisions.

If the application for labor certification was filed before October 1, 1991, a petition must have been filed by October 1, 1993, in order to preserve the date of the labor certification as the priority date. If the application for labor certification was filed before October 1, 1991, but not granted until after October 1, 1993, the petition must have been filed within 60 days after the date of certification to maintain the priority date. Otherwise the date the petition is/was filed with USCIS (or prior to March 1, 2003, the Service) will be the priority date.

(e) Suspect Elements in General Review of I-140 Petitions

In petitions seeking to bring aliens into the country to be employed either as temporary workers or as immigrants, it may occur that the petition was filed on behalf of an alien beneficiary as a favor or accommodation to the alien or to a friend or relative of an alien. The following list is offered as a guide to suspect elements. (**Note:** None of these reasons should automatically result in the petition being denied; however, they may alert you to the need for further examination, interview or investigation.)

(1) Overly Specific Job Offer .

The language of both the labor certification and the visa petition is overly precise or legalistic, which may indicate that the petitioner catered the petition to a specific alien.

(2) Questionable Address .

The address of the petitioner (other than for domestic, live-in help) appears to be a private residence or the office of an attorney or notary public (especially in Schedule A cases). Also, be on the alert for mail addressed to the alleged business address and returned by the postal authorities as undeliverable (you may be able to terminate the petition for lack of prosecution as discussed in [Chapter 20](#) of this field manual).

(3) Marginal Business .

The petitioning company for a multinational executive or manager appears to be only marginally doing business, especially if the beneficiary is the owner or major stockholder of the business.

(4) Documentation from a Business or School No Longer in Operation .

Documentation in support of an alien's qualifications comes in part or wholly from prior employers no longer in business or from a school no longer operating. This makes verification difficult.

(5) Affidavits in Lieu of Documents .

Affidavits attesting to the alien's skills, education, or prior employment experience are submitted with the claim that the original records have been lost or destroyed.

(6) Affidavits Tailored to Agree with Job Offer .

Affidavits attesting to the alien's prior employment experience describe the job duties in exactly the same words as the duties described on the labor certification.

(7) Experience or Education Not Current .

The beneficiary's employment experience or education, which is being used for qualification, occurred many years earlier, and the immediate employment history has been in a completely unrelated job.

(8) Beneficiary Overqualified .

The beneficiary's education substantially over-qualifies him or her for the job offered.

(9) Beneficiary Unemployed for Many Years .

The petition and labor certification relate to an alien who has not been employed for many years and who has not been active in the proposed field of employment.

(10) Alien Did Not Reside Where Education or Experience Obtained .

Dates of attendance at an academic institution when compared to the alien's employment history reflect residence in an area remote from the location of the institution attended. The degree may be a counterfeit or a "mail-order" degree.

(11) Petitioner Habitually Substitutes Names on Approved Labor Certifications .

The beneficiary has been substituted on approved Labor Certification Applications by a petitioner (or agent on behalf of the petitioner) who is known to do this repeatedly and routinely.

(12) Case Fits a Known Local Fraud Pattern .

In addition to problems with individual petitions, you may notice trends peculiar to your area or jurisdiction that will also suggest the need for closer scrutiny. Both the local office and the service center should exchange information on possible trends through appropriate channels.

(13) Multiple Petitions .

Several petitions filed by the same company, especially for aliens of the same occupation or nationality, repeated and multiple labor certification substitutions filed with petitions by the petitioner's attorney/agent, different companies using the same address, or suspect third parties, are some indications of possible fraud.

When you suspect that a job offer is not bona fide, or that the petitioner's agent designated on the [G-28](#) may be operating without the knowledge of the prospective employer, use the procedure in place in your office to obtain information from the field about the petitioner or business. In many cases simple telephonic verification by the case adjudicator may resolve questions and avoid the need for a formal investigation. In others, a referral of the case to the Fraud Detection and Data Analysis Unit may be advisable, in accordance with established case referral criteria and procedures. In still others, the issues can only be resolved through interview at a local USCIS office or referral to an ICE office for investigation.

(f) Section 204(c) Fraudulent Marriage Prohibition

[Section 204\(c\)](#) of the Act prohibits the approval of a visa petition filed on behalf of a beneficiary who has been determined to have attempted or conspired to enter into a marriage for the purpose of evading immigration laws. Please note that the fraudulent marriage prohibition that is articulated in section 204(c) of the Act and [8 CFR 204.2\(a\)\(1\)\(ii\)](#) does not distinguish between [Form I-130s](#) , [I-360](#) , and [Form I-140s](#) , but merely states “ a petition for immigrant visa classification.” (emphasis added).

Although it is not necessary that the beneficiary have been convicted of, or even prosecuted for the attempt or conspiracy, the evidence of the actual act, attempt or conspiracy must be contained in the beneficiary's A-file. If a review of the beneficiary's A-file indicates that he or she has attempted or conspired to obtain an immigration benefit by virtue of a fraudulent marriage, an intent to deny or intent to revoke notice should be sent to the petitioner that outlines the basis for the [204\(c\)](#) determination. The marriage must be shown to have been a sham at its inception in order for 204(c) to apply.

Adjudicators should deny or revoke an I-140 petition filed on behalf of any alien beneficiary for whom there is substantial and probative evidence of such an attempt or a conspiracy, regardless of whether the

beneficiary received a benefit through the attempt or conspiracy, if the evidence provided in response to the intent to deny or revoke the petition does not overcome the 204(c) determination. The petitioner must convincingly demonstrate that the beneficiary entered into the marriage for the purpose of starting a life with his or her spouse and not strictly for the purpose of obtaining an immigration benefit in order to overcome this ground of ineligibility.

(g) Licensure

General:

Neither the statute nor the regulations require that the beneficiary of an employment-based petition be able to engage in the occupation immediately. There are often licensing and other additional requirements that an alien must meet before he or she can actually engage in the occupation. Unless needed to meet the requirements of a labor certification, such considerations are not a factor in the adjudication of the petition.

Please note

Licensure requirements for Schedule A registered nurses and physical therapists are discussed in [subchapter 22.2\(b\)\(3\)\(C\)](#) of this chapter.

(h) Portability .

See [Chapter 20.2\(c\)](#) of this field manual.

(i) Special Considerations Relating to EB-1 Cases .

Certain alien beneficiaries are exempted from the labor certification application process by virtue of their extraordinary ability, outstanding research, or positions as international managers and executives. The discussion below highlights issues that you may encounter in adjudicating first preference petitions filed on behalf of such alien beneficiaries.

(1) E11 Aliens with Extraordinary Ability - Section 203(b)(1)(A) of the INA . An immigrant petition filed on behalf of an alien with extraordinary ability must demonstrate that the alien beneficiary possesses a level of expertise indicating that he or she has risen to the top of the field of endeavor.

(A) Evaluating Evidence Submitted in Support of a Petition for an Alien of Extraordinary Ability .
[Revised 12/22/2010, AD 11-14; PM-602-0005.1]

[8 CFR 204.5\(h\)\(3\)](#) and [\(4\)](#) describe various types of evidence that must be submitted in support of an I-140 petition for an alien of extraordinary ability. In general, the petition must be accompanied by initial evidence that: (a) the alien has sustained national or international acclaim; and (b) the alien’s achievements have been recognized in the field of expertise. This initial evidence must include either evidence of a one-time achievement (i.e., a major international recognized award, such as the Nobel Prize), or at least three of the types of evidence listed in 8 CFR 204.5(h)(3).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under [203\(b\)\(1\)\(A\) of the INA](#). First, USCIS officers should evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence objectively meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the immigrant classification.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of either a one-time achievement (that is, a major, internationally recognized award) or at least three of the ten regulatory criteria listed at 8 CFR 204.5(h)(3) (as discussed below), applying a preponderance of the evidence standard.

Note: While USCIS officers should consider the quality and caliber of the evidence when required by the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination regarding whether or not the alien is one of that small percentage who have risen to the very top of the field or if the alien has sustained national or international acclaim in Part One of the case analysis. See the table below for guidance on the limited determinations that should be made in Part One of the E11 analysis:

<u>Part One Analysis of Evidence Submitted Under 8 CFR 204.5(h)(3) and (4)</u>	
Note: In some cases, evidence relevant to one criterion may be relevant to other criteria set forth in 8 CFR 204.5(h)(3).	
<u>Regulation</u>	<u>Limited Determination</u>
8 CFR 204.5(h)(3)(i): <i>Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;</i>	<p>1. Determine if the alien was the recipient of prizes or awards.</p> <p>The description of this type of evidence in the regulation provides that the focus should be on <u>the alien's</u> receipt of the awards or prizes, as opposed to his or her employer's receipt of the awards or prizes.</p> <p>2. Determine whether the alien has received lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.</p> <p>Relevant considerations regarding whether the basis for granting the prizes or awards was excellence in the field include, but are not limited to:</p> <ul style="list-style-type: none"> • The criteria used to grant the awards or prizes; • The national or international significance of the awards or prizes in the field; and • The number of awardees or prize recipients as well as any limitations on competitors (an award limited to competitors from

a single institution, for example, may have little national or international significance.

8 CFR 204.5(h)(3)(ii): *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievement of their members, as judged by recognized national or international experts in their disciplines or fields;*

1. Determine if the association for which the alien claims membership requires that members have outstanding achievements in the field as judged by recognized experts in that field.

The petitioner must show that membership in the associations is based on the alien being judged by recognized national or international experts as having attained outstanding achievements in the field for which classification is sought. For example, admission to membership in the National Academy of Sciences as a Foreign Associate requires individuals to be nominated by an academy member, and membership is ultimately granted based upon recognition of the individual's distinguished achievements in original research. See www.nasonline.org.

Associations may have multiple levels of membership. The level of membership afforded to the alien must show that in order to obtain that level of membership, the alien was judged by recognized national or international experts as having attained outstanding achievements in the field for which classification is sought.

Relevant factors that may lead to a conclusion that the alien's membership in the associations was not based on outstanding achievements in the field include, but are not limited to, instances where the alien's membership was based:

- Solely on a level of education or years of experience in a particular field;
- On the payment of a fee or by subscribing to an association's publications; or
- On a requirement, compulsory or otherwise, for employment in certain occupations, such as union membership or guild affiliation for actors.

8 CFR 204.5(h)(3)(iii): *Published material about the alien in professional or major trade publications or other major media relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and*

1. Determine whether the published material was related to the alien and the alien's specific work in the field for which classification is sought.

The published material should be about the alien relating to his or her work in the field, not just about his or her employer or another organization that he or she is associated with. Note that marketing materials created for the purpose of selling the alien's products or promoting his or her services are not generally considered to be published material about the beneficiary.

2. Determine whether the publication qualifies as a professional publication or major trade publication or a major media publication.

Evidence of published material in professional or major trade publications or in other major media publications about the alien should establish that the circulation (on-line or in print) is high compared to other circulation statistics and show who the intended audience is, as well as the title, date and author of the material.

<p><i>any necessary translation;</i></p>	
<p>8 CFR 204.5(h)(3)(iv): Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;</p>	<p>Determine whether the alien has acted as the judge of the work of others in the same or an allied field of specialization.</p> <p>The petitioner must show that the alien has not only been invited to judge the work of others, but also that the alien actually participated in the judging of the work of others in the same or allied field of specialization.</p> <p>For example:</p> <ul style="list-style-type: none"> • Peer reviewing for a scholarly journal, as evidenced by a request from the journal to the alien to do the review, accompanied by proof that the review was actually completed. • Serving as a member of a Ph.D. dissertation committee that makes the final judgment as to whether an individual candidate's body of work satisfies the requirements for a doctoral degree, as evidenced by departmental records.
<p>8 CFR 204.5(h)(3)(v): Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;</p>	<p>1. Determine whether the alien has made original contributions in the field.</p> <p>2. Determine whether the alien's original contributions are of major significance to the field.</p> <p>USCIS officers must evaluate whether the original work constitutes major, significant contributions to the field. Although funded and published work may be "original," this fact alone is not sufficient to establish that the work is of major significance. For example, peer-reviewed presentations at academic symposia or peer-reviewed articles in scholarly journals that have provoked widespread commentary or received notice from others working in the field, or entries (particularly a goodly number) in a citation index which cite the alien's work as authoritative in the field, may be probative of the significance of the alien's contributions to the field of endeavor.</p> <p>USCIS officers should take into account the probative analysis that experts in the field may provide in opinion letters regarding the significance of the alien's contributions in order to assist in giving an assessment of the alien's original contributions of major significance. That said, not all expert letters provide such analysis. Letters that specifically articulate how the alien's contributions are of major significance to the field and its impact on subsequent work add value. Letters that lack specifics and simply use hyperbolic language do not add value, and are not considered to be probative evidence that may form the basis for meeting this criterion.</p>
<p>8 CFR 204.5(h)(3)(vi): Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade</p>	<p>1. Determine whether the alien has authored scholarly articles in the field.</p> <p>As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college, university, or research institution. In general, it should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article.</p>

<p>publications or other major media;</p>	<p>For other fields, a scholarly article should be written for learned persons in that field. ("Learned" is defined as "having or demonstrating profound knowledge or scholarship"). Learned persons include all persons having profound knowledge of a field.</p> <p>2. Determine whether the publication qualifies as a professional publication or major trade publication or a major media publication.</p> <p>Evidence of published material in professional or major trade publications or in other major media publications should establish that the circulation (on-line or in print) is high compared to other circulation statistics and who the intended audience of the publication is.</p>
<p>8 CFR 204.5(h)(3)(vii): <i>Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;</i></p>	<p>1. Determine whether the work that was displayed is the alien's work product.</p> <p>The description of this type of evidence in the regulation provides that the work must be <u>the alien's</u>.</p> <p>2. Determine whether the venues (virtual or otherwise) where the alien's work was displayed were <u>artistic</u> exhibitions or showcases.</p> <p>Webster's online dictionary defines:</p> <p><i>Exhibition</i> as a public showing.</p> <p>(See: http://www.merriam-webster.com/dictionary/exhibition)</p> <p><i>Showcase</i> as a setting, occasion, or medium for exhibiting something or someone especially in an attractive or favorable aspect.</p> <p>(See: http://www.merriam-webster.com/dictionary/showcase)</p>
<p>8 CFR 204.5(h)(3)(viii): <i>Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;</i></p>	<p>1. Determine whether the alien has performed in leading or critical roles for organizations or establishments.</p> <p>In evaluating such evidence, USCIS officers must examine whether the role is (or was) leading or critical.</p> <p>If a leading role, the evidence must establish that the alien is (or was) a leader. A title, with appropriate matching duties, can help to establish if a role is (or was), in fact, leading.</p> <p>If a critical role, the evidence must establish that the alien has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities. A supporting role may be considered "critical" if the alien's performance in the role is (or was) important in that way. It is not the title of the alien's role, but rather the alien's performance in the role that determine whether the role is (or was) critical.</p> <p>This is one criterion where letters from individuals with personal knowledge of the significance of the alien's leading or critical role can be particularly helpful to USCIS officers in making this determination as long as the letters contain detailed and probative information that specifically addresses how the alien's role for the organization or establishment was leading or critical. Note: 8 CFR</p>

	<p>204.5(g)(1) states that evidence of experience "shall" consist of letters from employers.</p> <p>2. Determine whether the organization or establishment has a distinguished reputation.</p> <p>USCIS officers should keep in mind that the relative size or longevity of an organization or establishment is not in and of itself a determining factor. Rather, the organization or establishment must be recognized as having a distinguished reputation. Webster's online dictionary defines <i>distinguished</i> as 1: marked by eminence, distinction, or excellence <distinguished leadership> and 2: befitting an eminent person <a distinguished setting>.</p> <p>(See http://www.merriam-webster.com/dictionary/distinguished)</p>
<p>8 CFR 204.5(h)(3)(ix): <i>Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field;</i></p>	<p>1. Determine whether the alien's salary or remuneration is high relative to the compensation paid to others working in the field.</p> <p>Evidence regarding whether the alien's compensation is high relative to that of others working in the field may take many forms. If the petitioner is claiming to meet this criterion, then the burden is on the petitioner to provide appropriate evidence. Examples may include, but are not limited to, geographical or position-appropriate compensation surveys and organizational justifications to pay above the compensation data. Three websites that may be helpful in evaluating the evidence provided by the petitioner are:</p> <p>The Bureau of Labor Statistics (BLS): http://www.bls.gov/bls/blswage.htm</p> <p>The Department of Labor's Career One Stop website: http://www.careeronestop.org/SalariesBenefits/Sal_default.aspx</p> <p>The Department of Labor's Office of Foreign Labor Certification Online Wage Library: http://www.flcdatacenter.com</p> <p>Note: Aliens working in different countries should be evaluated based on the wage statistics or comparable evidence in that country, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States.</p>
<p>8 CFR 204.5(h)(3)(x): <i>Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.</i></p>	<p>Determine whether the alien has enjoyed commercial successes in the performing arts.</p> <p>This criterion focuses on volume of sales and box office receipts as a measure of the alien's commercial success in the performing arts. Therefore, the mere fact that an alien has recorded and released musical compilations or performed in theatrical, motion picture or television productions would be insufficient, in and of itself, to meet this criterion. The evidence must show that the volume of sales and box office receipts reflect the alien's commercial success relative to others involved in similar pursuits in the performing arts.</p>
<p>8 CFR 204.5(h)(4): <i>If the standards</i></p>	<p>Determine if the evidence submitted is comparable to the evidence required in 8 CFR 204.35(h)(3).</p>

do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary's eligibility, if it is determined that the standards described in 8 CFR 204.5(h)(3) do not readily apply to the alien's occupation. When evaluating such "comparable" evidence, consider whether the 8 CFR 204.5(h)(3) criteria are readily applicable to the alien's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation.

General assertions that any of the the ten objective criteria described in 8 CFR 204.5(h)(3) do not readily apply to the alien's occupation are not probative and should be discounted. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive. The petitioner should explain why it has not submitted evidence that would satisfy at least three of the criteria set forth in 8 CFR 204.5(h)(3) as well as why the evidence it has submitted is "comparable" to that required under 8 CFR 204.5(h)(3).

On the other hand, the following are examples of where 8 CFR 204.5(h)(4) might apply.

(1) An alien beneficiary who is an Olympic coach whose athlete wins an Olympic medal while under the alien's principal tutelage would likely constitute evidence comparable to that in 8 CFR 204.5(h)(3)(v).

(2) Election to a national all-star or Olympic team might serve as comparable evidence for evidence of memberships in 8 CFR 204.5(h)(3)(ii).

Note: There is no comparable evidence for the one-time achievement of a major, international recognized award.

Part One Note: Objectively meeting the regulatory criteria in part one alone does not establish that the alien in fact meets the requirements for classification as an Alien of Extraordinary Ability under section [203\(b\)\(1\)\(A\)](#) of the INA.

For example:

Participating in the judging of the work of others in the same or an allied field of specialization alone, regardless of the circumstances, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's participation should be evaluated to determine whether it was indicative of the alien being one of that small percentage who have risen to the very top of the field of endeavor and enjoying sustained national or international acclaim.

Publishing scholarly articles in professional or major trade publications or other major media alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's publications should be evaluated to determine whether they were indicative of the alien being one of that small percentage who have risen to the very top of the field of endeavor and enjoying sustained national or international acclaim.

The issue related to whether the alien is one of that small percentage who have risen to the very top of the field of endeavor and enjoys sustained national or international acclaim should be addressed and articulated in part two of the analysis, not in part one where the USCIS officer is only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement of providing required initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of extraordinary ability under [section 203\(b\)\(1\)\(A\)](#) of the INA. As part of the final merits determination, the quality of the evidence also should be considered, such as

whether the judging responsibilities were internal and whether the scholarly articles (if inherent to the occupation) are cited by others in the field.

In Part Two of the analysis in each case, USCIS officers should evaluate the evidence together when considering the petition in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise, indicating that the alien is one of that small percentage who has risen to the very top of the field of endeavor.

If the USCIS officer determines that the petitioner has failed to demonstrate these requirements, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an alien of extraordinary ability under section 203(b)(1)(A) of the INA.

(B) Self-Petitioners .

An I-140 petition filed on behalf of an alien with extraordinary ability does not need to be supported by a job offer; therefore, the alien may “self-petition” for the classification. See [8 C.F.R. 204.5\(h\)\(5\)](#). The alien must demonstrate, however, that he or she intends to continue work in the field of his or her extraordinary ability. *Id.* Section [203\(b\)\(1\)\(A\)](#) of the INA, which defines an alien of extraordinary ability, also requires that the alien’s work substantially benefit prospectively the United States. Although the regulations do not specifically define this statutory term, it has been interpreted broadly. See e.g. [Matter of Price](#), 20 I&N Dec. 953 (Assoc. Comm. 1994) (golfer of beneficiary’s caliber will substantially benefit prospectively the United States given the popularity of the sport). Whether the petitioner demonstrates that the alien’s employment meets this requirement requires a fact-dependent assessment of the case. There is no standard rule as to what will substantially benefit the United States. In some cases, a request for additional evidence may be necessary if you are not yet satisfied that the petitioner has satisfied this requirement. See Memorandum from William R. Yates, Associate Director, Operations, HQOPRD 70/2, “Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)” (February 16, 2005). In all cases, however, the petitioner must show that the beneficiary intends to continue work in his or her area of expertise. See [8 CFR 204.5\(h\)\(5\)](#).

(C) Additional Adjudication Guidelines .

The following provides further guidelines for adjudicating E11 petitions. While not presenting hard and fast rules, it may help you evaluate evidence submitted in support of E11 petition. Whether or not a petition is approvable will depend on the specific facts presented.

The evidence provided in support of the petition need not specifically use the words “extraordinary.” Rather the material should be such that it is readily apparent that the alien’s contributions to the field are qualifying. Also, although some items in the regulatory lists occasionally use plurals, as indicated above, it is entirely possible that the presentation of a single piece of evidence in that category may be sufficient. On the other hand, the submission of voluminous documentation may not contain

sufficient persuasive evidence to establish the alien beneficiary's eligibility. The evidence provided in support of the petition must establish that the alien beneficiary "is one of that small percentage who have risen to the very top of the field of endeavor." See [8 CFR 204.5\(h\)\(2\)](#) .

Remember that an alien may be stronger in one particular evidentiary area than in others; however, the overall impression should be that he or she is extraordinary. Remember also that you cannot predetermine the kind of evidence you think the alien should be able to submit, and deny the petition if that particular type of evidence (whether one of the types listed in [8 CFR 204.5\(h\)\(3\)](#) or "comparable evidence" under [8 CFR 204.5\(h\)\(4\)](#)) is not there. For example, you may think that if an alien is extraordinary, there should be published articles about the alien and his or her work. However, you cannot deny the petition because no published articles were submitted, if evidence meeting three qualifying criteria has been submitted that demonstrates he or she is in fact extraordinary. Approval or denial of a petition must be based on the type and quality of evidence that is submitted, not on evidence that you think should be there.

If you need to request additional evidence, you should provide some explanation of the deficiencies in the evidence already submitted and if possible, examples of persuasive evidence that the petitioner might provide to corroborate the statements made in the petition. If a petitioner has submitted evidence that he or she believes establishes the alien's extraordinary ability, merely restating the evidentiary requirements or saying that the evidence submitted is not sufficient will not give the petitioner any clear guidance in overcoming the deficiencies.

As noted above, under [8 CFR 204.5\(h\)\(5\)](#) , the beneficiary must intend to continue in the area of his or her expertise. Note though that there are instances where it is difficult to determine whether the alien's intended employment falls sufficiently within the bounds of his or her area of extraordinary ability. Some of the most problematic cases are those where the beneficiary's sustained national or international acclaim is based on his or her abilities as an athlete, but the beneficiary's intent is to come to the United States and be employed as an athletic coach or manager. Competitive athletics and coaching rely on different sets of skills and in general are not in the same area of expertise. However, many extraordinary athletes have gone on to be extraordinary coaches. In general, if a beneficiary has clearly achieved *recent* national or international acclaim as an athlete and has sustained that acclaim in the field of coaching/managing at a national level, adjudicators can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability such that we can conclude that coaching is within the beneficiary's area of expertise. Where the beneficiary has had an extended period of time to establish his or her reputation as a coach *beyond the years* in which he or she had sustained national or international acclaim as an athlete, depending on the specific facts, adjudicators may place heavier, or exclusive, weight on the evidence of the beneficiary's acclaim as a coach or a manager.

(D) Letters of endorsement.

Many E11 petitions contain letters of endorsement. Letters of endorsement, while not without weight, should not form the cornerstone of a successful claim for the E11 classification. The statements made by the witnesses should be corroborated by documentary evidence in the record. The letters should explain in specific terms why the witnesses believe the beneficiary to be of E11 caliber. Letters that merely reiterate USCIS' E11 definitions or make general and expansive statements regarding the beneficiary and his or her accomplishments, are generally not persuasive. The relationship or affiliation between the beneficiary and the witness is also a factor to consider when evaluating the significance of

the witnesses' statements. It is generally expected that an individual whose accomplishments have garnered sustained national or international acclaim would have received recognition for his or her accomplishments well beyond the circle of his or her personal and professional acquaintances. You may find that certain testimonials written by other individuals working in the alien's field of endeavor may be submitted as evidence. In some cases, such testimonials merely make general assertions about the alien, and at most, indicate that the alien is a competent, respected figure within the field of endeavor, but the authors fail to support such statements with sufficient concrete evidence. These letters should be considered, but do not necessarily show the beneficiary's claimed extraordinary ability.

(E) Sustained National or International Acclaim . [Introductory paragraph revised 12/22/2010, AD 11-14; PM-602-0005.1]

Under 8 CFR 204.5(h)(3), a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that the alien's achievements have been recognized in the field of expertise. In determining whether the beneficiary has enjoyed "sustained" national or international acclaim, bear in mind that such acclaim must be maintained. (According to Black's Law Dictionary, 1585 (9th Ed, 2009), the definition of sustain is "(1) to support or maintain, especially over a long period of time; 6. To persist in making (an effort) over a long period of time.") However, the word "sustained" does not imply an age limit on the beneficiary. A beneficiary may be very young in his or her career and still be able to show sustained acclaim. There is also no definitive time frame on what constitutes "sustained." If an alien was recognized for a particular achievement, the USCIS officer should determine whether the alien continues to maintain a comparable level of acclaim in the field of expertise since the alien was originally afforded that recognition. An alien may have achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter.

Note:

Section 22.2(i)(1)(A) of this chapter describes the limited determinations that should be made in Part One of the analysis to determine whether the alien has met any of the evidentiary criteria claimed by the petitioner at 8 CFR 204.5(h)(3). However, the evidence evaluated in Part One is also reviewed in Part Two to determine whether the alien is one of that small percentage who has risen to the very top of the field of endeavor, and that he or she has sustained national or international acclaim.

(F) [Reserved] [Paragraph removed and reserved: 8/18/2010; AD 10-41; PM-602-0005]

(G) _ Evaluating E11 petitions filed on behalf of O-1 nonimmigrants :

Revised 12/22/201 In some cases an E11 petition may be filed on behalf of an alien who was previously granted the O-1, alien of extraordinary ability nonimmigrant classification. Though the prior

approval of an O-1 petition on behalf of the alien may be a relevant consideration in adjudicating the E11 petition, you are not bound by the fact that the alien was previously accorded the O-1 classification if the facts do not support approval of the E11 petition; eligibility as an O-1 nonimmigrant does not automatically establish eligibility under the E11 criteria for extraordinary ability. Each petition is separate and independent, and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions. Moreover, the O-1 nonimmigrant classification includes different standards and criteria for aliens in the arts, athletics, and the motion picture industry. In such cases, there would be nothing inconsistent about finding that an alien in the arts has "distinction" according to the nonimmigrant criteria, but not "national or international acclaim" according to the immigrant criteria.

You should be aware that, some courts, notwithstanding the fact that each petition must be adjudicated on its own merits, have asked USCIS to provide an explanation as to why, if the alien had previously been classified in a roughly analogous nonimmigrant category, USCIS has determined that the alien is not eligible for classification in the employment-based immigrant visa classification in question. For this reason, where possible, it would be appropriate to provide a brief discussion, *geared to the specific material facts of the underlying I-140 petition*, as to why, notwithstanding the previous nonimmigrant visa petition approvals, the petitioner has failed to meet its burden to establish eligibility for approval of the I-140 petition.

(2) E12 Outstanding Professors and Researchers - Section 203(b)(1)(C) of the INA .

(A) Evaluating Evidence Submitted in Support of a Petition for an Outstanding Professor or Researcher. [Revised 12/22/2010; AD 11-14; PM-602-0005.1]

[8 CFR 204.5\(i\)\(3\)](#) describes the evidence that must be submitted in support of an I-140 petition for an outstanding professor or researcher. The evidence that must be provided in support of E12, outstanding professor or researcher petitions must demonstrate that the alien is recognized *internationally* as outstanding in the academic field specified in the petition. [8 CFR 204.5\(i\)\(2\)](#) defines academic field as "a body of specialized knowledge offered for study at an accredited United States university or institution of higher education." By regulatory definition, a body of specialized knowledge is larger than a very small area of specialization in which only a single course is taught or is the subject of a very specialized dissertation. As such, it would be acceptable to find the alien is an outstanding professor or researcher in the claimed field (e.g., particle physics vs. physics in general), as long as the petitioner has demonstrated that the claimed field is "a body of specialized knowledge offered for study at an accredited United States university or institution of higher education." In addition, the petition must be accompanied by an offer of permanent, tenured, or tenure-track employment (limited to "permanent positions" in the case of research positions) from a qualifying prospective employer and evidence that the alien has had at least three years of experience in teaching or research in the "academic field" in which the alien will be engaged. See [8 CFR 204.5\(i\)\(3\)\(ii\)](#) and [\(iii\)](#). The definitions for "permanent" and "academic field" can be found at [8 CFR 204.5\(i\)\(2\)](#).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under [203\(b\)\(1\)\(B\)](#) of the INA. First, USCIS officers should evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence objectively meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the immigrant classification.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of at least two of the six regulatory criteria listed at [8 CFR 204.5\(i\)\(3\)\(i\)](#) as discussed below, applying a preponderance of the evidence standard.

Note: While USCIS officers should objectively consider the quality and caliber of the evidence as required by the parameters of the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination relative to the alien's claimed international recognition in Part One of the case analysis. See the table below for guidance on the limited determinations that should be made in Part One of the E12 analysis:

Part One Analysis of Evidence Submitted Under 8 CFR 204.5(i)(3)(i)	
Note: In some cases, evidence relevant to one criterion may be relevant to other criteria set forth in 8 CFR 204.5(i)(3).	
Regulation	Limited Determination
<p>8 CFR 204.5(i)(3)(i)(A): <i>Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;</i></p>	<p>1. Determine if the alien was the recipient of prizes or awards.</p> <p>The description of this type of evidence in the regulation provides that the focus must be on <u>the alien's</u> receipt of the major prizes or awards, as opposed to his or her employer's receipt of the prizes or awards.</p> <p>2. Determine whether the alien has received major prizes or awards for outstanding achievement in the academic field.</p> <p>Relevant considerations regarding whether the basis for granting the major prizes or awards for outstanding achievement in the academic field include, but are not limited to:</p> <ul style="list-style-type: none"> • The criteria used to grant the major prizes or awards; and, • The number of prize recipients or awardees as well as any limitations on competitors (a prize or award limited to competitors from a single institution, for example, may not rise to the level of major).
<p>8 CFR 204.5(i)(3)(i)(B): <i>Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;</i></p>	<p>1. Determine if the association for which the alien claims membership requires outstanding achievements in the academic field.</p> <p>The petitioner must show that membership in the associations is based on the alien's outstanding achievements in the academic field.</p> <p>Associations may have multiple levels of membership. The level of membership afforded to the alien must show that it requires outstanding achievements in the academic field for which classification is sought.</p> <p>Relevant factors that may lead to a conclusion that the alien's membership in the association was <u>not</u> based on outstanding achievements in the academic field include, but</p>

	<p>are not limited to, instances where the alien's membership was based:</p> <ul style="list-style-type: none"> • Solely on a level of education or years of experience in a particular field; or • On the payment of a fee or by subscribing to an association's publications.
<p>8 CFR 204.5(i)(3)(i)(C): <i>Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;</i></p>	<p>1. Determine whether the published material was about the alien's work.</p> <p>The published material should be about the alien's work in the field, not just about his or her employer or another organization that he or she is associated with. Articles that cite the alien's work as one of multiple footnotes or endnotes are not generally "about" the alien's work.</p> <p>2. Determine whether the publication qualifies as a professional publication.</p> <p>Evidence of published material in professional publications about the alien should establish the circulation (online or in print) and the intended audience of the publication, as well as the title, date, and author of the material.</p>
<p>8 CFR 204.5(i)(3)(i)(D): <i>Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;</i></p>	<p>Determine whether the alien has participated either individually or on a panel, as the judge of the work of others in the same or an allied academic field.</p> <p>The petitioner must show that the alien has not only been invited to judge the work of others, but also that the alien actually participated in the judging of the work of others in the same or allied academic field.</p> <p>For example:</p> <ul style="list-style-type: none"> • Peer reviewing for a scholarly journal, as evidenced by a request from the journal to the alien to do the review, accompanied by proof that the review was actually completed. • Serving as a member of a Ph.D. dissertation committee that makes the final judgment as to whether an individual candidate's body of work satisfies the requirements for a doctoral degree, as evidenced by departmental records.
<p>8 CFR 204.5(i)(3)(i)(E): <i>Evidence of the alien's original scientific or scholarly research contributions</i></p>	<p>Determine whether the alien has made original scientific or scholarly research contributions to the academic field.</p> <p>As a reminder, this regulation does not require that the alien's contributions be of "major significance." That said, the description of this type of evidence in the regulation does not simply require original research, but an original scientific or scholarly research contribution. Moreover, the</p>

to the academic field;

description of this type of evidence in the regulation requires that the contribution must be "to the academic field" rather than an individual laboratory or institution.

The regulations include a separate criterion for scholarly articles at 8 CFR 204.5(i)(3)(i)(F). Therefore, contributions are a separate evidentiary requirement from scholarly articles.

Possible items that could satisfy this criteria, include but are not limited to:

- Citation history/patterns for the alien's work, as evidenced by number of citations, as well as an examination of the impact factor for the journals in which the alien publishes. While many scholars publish, not all are cited or publish in journals with significant impact factors. The petitioner may use web tools such as Google Scholar, SciFinder, and the Web of Science to establish the number of citations and the impact factor for journals.
- Since scholarly work tends to be specialized and to be expressed in arcane and specialized language, USCIS officers should take into account the probative analysis that experts in the field may provide in opinion letters regarding the alien's contributions in order to assist in giving an assessment of the alien's original contributions. That said, not all expert letters provide such analysis. Letters that specifically articulate how the alien has contributed to the field and its impact on subsequent work add value. Letters that lack specifics and simply use hyperbolic language do not add value, and are not considered to be probative evidence that may form the basis for meeting this criterion.

8 CFR 204.5(i)(3)(i)(F):
Evidence of the aliens authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;

1. Determine whether the alien has authored scholarly articles in the field.

As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college or university. It should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article.

2. Determine whether the publication qualifies as a scholarly book or as a scholarly journal with international circulation in the academic field.

Evidence of published material in scholarly journals with international circulation should establish that the circulation (online or in print) is in fact, international, and who the intended audience of the publication is. Scholarly journals are typically written for a specialized audience often using technical jargon. Articles normally include an abstract, a description of methodology, footnotes, endnotes, and bibliography (see <http://www.nova.edu/library/help/misc/glossary.html#s>).

Part One Note: Objectively meeting the regulatory criteria in part one, alone does not establish that the alien in fact meets the requirements for classification as an outstanding professor or researcher under section 203(b)(1)(B) of the INA.

For example:

Participating in the judging of the work of others in the same or an allied academic field alone, regardless of the circumstances, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's participation should be evaluated to determine whether it was indicative of the alien being recognized internationally as outstanding in a specific academic area.

Authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's authorship of book or articles should be evaluated to determine whether they were indicative of the alien being recognized internationally as outstanding in a specific academic area.

The issue of whether the alien is recognized internationally as outstanding in a specific academic area should be addressed and articulated in part two of the analysis, not in part one where the USCIS officer is only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement by providing at least two types of initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an outstanding professor or researcher under section [203\(b\)\(1\)\(B\)](#) of the INA. The quality of the evidence also must be considered. In Part Two of the analysis in each case, USCIS officers should evaluate the evidence together when considering the petition in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien is recognized internationally as outstanding in a specific academic area.

If the USCIS officer determines that the petitioner has failed to demonstrate these requirements, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an Outstanding Professor or Researcher under section [203\(b\)\(1\)\(B\)](#) of the INA.

(B) Qualifying U.S. Employers in Connection with Adjudication of Form I-140 Petitions for Outstanding Professors or Researchers ("E12") under Section 203(b)(1)(B) of the Act . [Revised 09-14-2009]

Although a labor certification is not required for the E12 classification, [8 CFR 204.5\(i\)\(3\)\(iii\)](#) requires that the petitioner provide an offer of employment as initial evidence in support of a first preference petition filed on behalf of an outstanding professor or researcher. The offer of employment shall be in the form of a letter from the prospective U.S. employer to the beneficiary and the offer must state that the employer is offering the beneficiary employment in a tenured or tenure-track teaching position or a "permanent" research position in the alien's academic field. See [8 CFR 204.5\(i\)\(3\)\(iii\)\(A\)](#) - [\(C\)](#) .

Pursuant to [section 203\(b\)\(1\)\(B\)](#) of the Act, the alien beneficiary of a E12 petition must be seeking to work for a university, institution of higher education or a department, division, or institute of a

private employer if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field. *Id.* See also [8 CFR 204.5\(i\)\(3\)\(iii\)](#), which mirrors the language in the Act.

In general, government agencies at the federal, state, or local level will not fit within the definition of [section 203\(b\)\(1\)\(B\)](#) unless the government agency is shown to be a U.S. university or an institution of higher learning. Thus, USCIS may only approve an E12 petition in instances where the offer of permanent employment is from a government agency, if that agency can establish that it is a U.S. university or an institution of higher learning. Government agencies do not qualify as “private” employers.

Government agencies which do not fit the definition of [section 203\(b\)\(1\)\(b\)](#), may have other available immigration avenues for offers of permanent employment to professors or researchers. For example, assuming all of the eligibility requirements for that visa preference category have been met, a government agency may request the E11, Alien of Extraordinary Ability visa preference classification pursuant to [section 203\(b\)\(1\)\(A\)](#) of the Act.

(C) “Permanent” for Research Positions .

Adjudicators should not deny a petition where the employer is seeking an outstanding researcher solely because the actual employment contract or offer of employment does not contain a “good cause for termination” clause. The petitioning employer, however, must still establish that the offer of employment is intended to be of an indefinite or unlimited duration and that the nature of the position is such that the employee will ordinarily have an expectation of continued employment. For example, many research positions are funded by grant money received on a yearly basis. Researchers, therefore, are employed pursuant to employment contracts that are valid in one year increments. If the petitioning employer demonstrates, however, the intent to continue to seek funding and a reasonable expectation that funding will continue (such as demonstrated prior renewals for extended long-term research projects) such employment can be considered “permanent” within the meaning of 8 CFR 204.5(i)(2). Adjudicators should also consider the circumstances surrounding the job offer as well as the benefits attached to the position. A position that appears to be limited to a specific term, such as in the example above, can meet the regulatory test if the position normally continues beyond the term (i.e., if the funding grants are normally renewed).

(D) Tenure or Tenure-Track Positions .

The determination as to whether a position qualifies as a tenured or a tenure-track position is not linked to the regulatory requirement that the position be “permanent” as defined in 8 C.F.R. 204.5(i)(2). 8 C.F.R. 204.5(i)(2) applies only to “research positions.” Adjudicators do not need to evaluate whether the employment contract for a tenured or tenure-track position has a “good cause for termination” clause, and should not deny a petition seeking an outstanding professor for a tenured or tenure-track position on that basis alone. Adjudicators, however, should continue to evaluate whether the overall nature of the position is tenured or tenure-track. Note, USCIS will not equate tenured or tenured-track positions with those that are temporary, adjunct, limited duration fellowships or similar positions, where the employee has no reasonable expectation of long-term employment with the university.

(3) E13 Multinational Executives and Managers – Section 203(b)(1)(C) of the INA.

(A) Explanation of Terms .

Except as otherwise noted, terms pertaining to the certain multinational executives and managers have the same meanings as discussed in [Chapter 32.2](#) of this field manual.

As described in [8 CFR 204.5\(j\)\(3\)](#) , the petitioner must demonstrate that the:

- U.S. organization and the organization abroad maintain a qualifying relationship;
- U.S. organization and the organization abroad are both actively engaged in doing business; and
- U.S. organization has been actively engaged in doing business for at least one year.

In addition, under [8 CFR 204.5\(g\)\(2\)](#) , the petitioner must demonstrate that the U.S. organization has the ability to pay the beneficiary's salary.

(B) Qualifying relationship between the U.S. employer and the organization abroad .

When an employer wishes to transfer an alien employee working abroad to a U.S. company location as an E13 immigrant, a qualifying relationship must exist between the foreign employer and the U.S. employer. A qualifying relationship exists when the U.S. employer is an affiliate, parent or a subsidiary of the foreign firm, corporation, or other legal entity, as specified in [8 CFR 204.5\(j\)\(2\)](#) . To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e., a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally [section 203\(b\)\(1\)\(C\)](#) of the Act, 8 USC section 1153(b)(1)(C); see also 8 CFR 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). In this regard, "ownership" and "control" are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. See 8 CFR 204.5(j)(2)(definitions of "affiliate" and "subsidiary"). The foreign entity must own and control the U.S. entity. See [Matter of Church Scientology International](#) , 19 I&N Dec. 593 (BIA 1988); see also [Matter of Siemens Medical Systems](#) , Inc., 19 I&N Dec. 362 (BIA 1986); [Matter of Hughes](#), 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with

full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. Matter of Church Scientology International, 19 I&N Dec. at 595.

(1) Subsidiary and Parent:

Under [8 CFR 204.5\(j\)\(2\)](#), the term “subsidiary” means a firm, corporation, or other legal entity of which a parent: (a) owns, directly or indirectly, more than half of the entity and controls the entity; (b) owns, directly or indirectly, half of the entity and controls the entity; (c) owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or (d) owns, directly or indirectly, less than half of the entity, but in fact controls the entity. While the term “parent” is not directly defined by the regulations, it is the owner of a subsidiary.

(2) Affiliate:

8 CFR 204.5(j)(2)(A)–(C) sets forth three types of qualifying affiliate relationships: (1) One of two subsidiaries, both of which are owned and controlled by the same parent or individual; (2) One of two legal entities owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity; or (3) A partnership (or similar organization) that is organized outside the United States to provide accounting services to the U.S. partnership. Such a partnership shall be considered affiliated with a partnership organized within the United States if the foreign partnership markets its services under the same internationally recognized name acquired through an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or other similar organization) as the U.S. partnership.

(3) Branch Offices :

While the L-1 nonimmigrant visa regulations allow for a “branch office” to petition for a manager or executive, the E13 immigrant visa regulations do not provide for a foreign branch office as a petitioner. The nonimmigrant regulations define the term “branch” as “an operating division or office of the same organization housed in a different location.” [8 CFR 214.2\(l\)\(1\)\(ii\)\(J\)](#).

Neither an unincorporated branch office of a foreign employer nor a nonimmigrant alien is competent to offer permanent employment to a beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under [section 203\(b\)\(1\)\(C\)](#) of the Act. See Matter of Thornhill, 18 I&N Dec. 34 (Comm. 1981). The petitioner must be a U.S. citizen, corporation, partnership, or other legal entity to file this immigrant visa petition. Thus, a U.S. corporation with an overseas branch may file an E13 petition, but a foreign corporation with a branch office in the United States may not.

NOTE

Adjudicators should keep in mind the difference between a “self-incorporated” petitioner and a “sole proprietorship.” Although a self-incorporated individual may only have one owner or employee, a corporation is a separate and distinct legal entity from its owners or stockholders and may petition for that owner or employee. See [Matter of M-](#) , 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); [Matter of Aphrodite Investments Limited](#) , 17 I&N Dec. 530 (Comm. 1980); and [Matter of Tessel](#) , 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

A “sole-proprietorship,” on the other hand, is a business in which one person operates the business in his or her personal capacity. Black’s Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See [Matter of United Investment Group](#) , 19 I&N Dec. 248, 250 (Comm. 1984). A sole-proprietorship may not file an E13 petition on behalf of the alien owner, as such would be considered an impermissible self-petition.

(4) Limited Liability Corporations (LLCs) :

An LLC is deemed to be a separate entity from its members, and may therefore file an immigrant visa petition on behalf of a manager or executive. An LLC is a relatively new business structure allowed by state statute. LLCs are popular because, similar to a corporation, owners have limited personal liability for the debts and actions of the LLC. Other features of LLCs are more like a partnership, providing management flexibility and the benefit of pass-through taxation. LLCs may have one or more members. Generally, when an LLC has only one member, the IRS will disregard or ignore the fact that it is an LLC for the purpose of filing a federal tax return. Note though that this is only a mechanism for tax purposes, and does not change the fact that the LLC is legally a separate entity from the member. Similarly, even though most multiple member LLCs file a Form 1065 partnership tax return, the LLC is still, legally, a separate entity.

(C) Doing Business.

“ Doing business” means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization. Doing business does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. [See [8 CFR 204.5\(j\)\(2\)](#) .]

(1) Foreign employer must continue to do business.

Both the U.S. employer and at least one qualifying organization abroad must be doing business up until the time of visa issuance or adjustment of status. The mere presence of an office or an agent either in the United States or abroad is not considered to be doing business for E13 purposes.

Note

If the beneficiary’s overseas employer’s foreign operations cease entirely (e.g., the

company, together with all other otherwise qualifying related organizations, goes out of business or if the company, together with all other otherwise qualifying related organizations relocates completely to the United States) prior to the time of visa issuance or adjustment of status, the beneficiary will no longer be eligible for E13 immigrant visa classification.

(2) U.S. employer must have been doing business for at least one year :

The U.S. petitioner must be actively engaged in doing business for at least one year at the time of filing of the petition. (See [8 CFR 204.5\(j\)\(3\)\(i\)\(D\)](#)) There is no “new office” provision for persons seeking to immigrate under the E13 category as there is for certain aliens who seek admission as L-1 nonimmigrants in order to open or be employed in a new office in the United States. See [8 CFR 214.2\(l\)\(3\)\(v\)](#) . Note that because of the “doing business” requirement, a U.S. organization may have a legal existence in the United States for more than one year, but if it has not engaged in the continuous provision of goods and services for at least one year, then the organization is ineligible to file E13 petitions.

(D) Multinational Executive or Manager .

Since 1990, this group, which was formerly designated under the U.S. Department of Labor’s regulations as “Schedule A Group IV,” is now a separate visa classification under section [203\(b\)\(1\)\(C\)](#) of the INA. An I-140 filed on behalf of such an executive or manager must be accompanied by a permanent job offer in a primarily managerial or executive position with a qualifying U.S. employer. A labor certification is not required for this classification. See section [212\(a\)\(5\)\(D\)](#) of the INA; [8 CFR 204.5\(j\)\(5\)](#) . Under 8 CFR 204.5(j)(3)(i)(A), the petition must demonstrate that the beneficiary was employed abroad by a qualifying organization for one year out of the previous three years. Note that, unlike the L-1 nonimmigrant classification, the year of qualifying employment does not have to be “continuous.” Compare section [101\(a\)\(15\)\(L\)](#) (requiring that the alien have been employed “continuously” abroad for the one year period) with section [203\(b\)\(1\)\(C\)](#) of the Act (requiring that the alien be employed overseas for “at least one year.”

As noted, the regulations at [8 CFR 204.5\(j\)](#) (3)(i)(D) require that the petitioning U.S. employer have been doing business in the United States for at least one year before filing an I-140 petition for its managers and executives (a similar provision was in Schedule A Group IV). Also, as noted above, unlike the L-1A nonimmigrant classification, aliens seeking to enter the United States to open a new office are not eligible for the E13 immigrant classification. The regulations at 8 CFR 204.5(j)(3)(D) specifically require that the individual be coming to an existing business in the United States. This requirement was based in part on the pre-existing Schedule A, Group IV requirement. It was also based on the fact that, unlike the case of an L-1 new office petition, which, under [8 CFR 214.2\(l\)\(14\)\(ii\)](#) , may only be extended upon a showing that the U.S. entity has been doing business for the previous year, E13 immigrant visa classification is permanent in nature; there is no “conditional resident” status until a showing is made that the new business has in fact grown into an ongoing viable concern.

(E) Managerial Capacity :

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See [section 101\(a\)\(44\)\(A\)\(i\)](#) and [\(ii\)](#) of the Act.

As it relates to "personnel managers," managerial capacity means an assignment within an organization in which the beneficiary *primarily* :

- Manages the organization, department, subdivision, function, or component of the organization;
- Supervises and controls the work of other supervisory, professional, or managerial employees;
- Possesses authority to hire and fire or recommend those and other personnel actions (such as promotion and leave authorization) for employees directly supervised; and
- Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

Contrary to the common understanding of the word "manager" as any person who supervises others, the statute has a much more limited definition of the term "manager." Under section [101\(a\)\(44\)\(A\)](#) of the Act, a first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional. See also [8 CFR 204.5\(j\)\(4\)\(i\)](#) . Further, if staffing levels are used as a factor in determining whether the alien is functioning in a managerial or executive capacity, you should not merely rely on the number of employees the beneficiary is supervising, but should look at the beneficiary's role and function within the organization. (8 CFR 204.5(j)(4)(ii)).

(1) Function Managers :

The term "functional" or "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii).

The definition of the term "manager" includes functional managers. Section 101(a)(44)(A). A manager may qualify for E13 classification as a functional manager if the petitioner can show, among other things, that the beneficiary will be primarily managing or directing the management of a function of an organization, even if the beneficiary does not directly supervise any employees.

As it relates to “function managers,” managerial capacity means an assignment within an organization in which the beneficiary primarily :

- Manages the organization, or a department, subdivision, function, or component of the organization;
- Manages an essential function within the organization, or a department or subdivision of the organization;
- Functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

See [8 CFR 204.5\(j\)\(2\)](#) .

It must be clearly demonstrated, however, that the “essential function” being managed is not also being directly performed by the alien beneficiary. For example, an alien who claims to primarily direct the laboratory research on chemical compounds for a specialty chemical company cannot also be primarily performing the day-to-day laboratory research. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.* , 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995) (citing *Matter of Church Scientology International* , 19 I&N Dec. 593, 604 (Comm. 1988)).

In applying the statute and applicable regulations to determine whether the beneficiary meets the definition of a “manager” of a function, it is useful to turn to Barron's Dictionary of Business Terms , which defines functional authority as "staff ability to initiate as well as to veto action in a given area of expertise. Functional authority allows decisions to be implemented directly by the staff in question. Areas where functional authority is found are accounting, labor relations, and employment testing." A business textbook, *Management for Productivity* , by John R. Schermerhorn, Jr., defines functional authority as "[t]he authority to act within a specified area of expertise and in relation to the activities of other persons or units lying outside the formal chain of command." A functional manager is defined as a "manager who has responsibility for one area of activity such as finance, marketing, production, personnel, accounting, or sales."

An important, although not necessarily determinative, factor in determining whether an individual qualifies as a functional manager is the alien's authority to commit the company to a course of

action or expenditure of funds. Functional managers perform at a senior level in the organization and may or may not have direct supervision of other employees.

(2) Executive Capacity:

The statutory definition of the term "executive capacity," found at section [101\(a\)\(44\)\(B\)](#) of the Act, 8 U.S.C. § 1101(a)(44)(B), focuses on a person's position within an organization. To adjudicate an E13 petition properly, therefore, you should have a basic understanding not only of the position the beneficiary intends to fill, but also of the nature and structure of the organization itself.

Under section 101(a)(44)(B), the term "executive capacity" means an assignment within an organization in which the employee primarily :

- Directs the management of the organization or a major component or function of the organization;
- Establishes the goals and policies of the organization, component, or function;
- Exercises wide latitude in discretionary decision-making; and
- Receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

An individual will not be deemed an executive under the statute simply because they have an executive title or because some portion of their time is spent "directing" the enterprise as the owner or sole managerial employee; the focus is on the primary duties of the individual. In this regard, there must be sufficient staff (e.g., contract employees or others) to perform the day-to-day operations of the petitioning organization in order to enable the beneficiary to be primarily employed in the executive function. As discussed in detail below, the petitioner must also establish that the U.S. entity itself is in fact conducting business at a level that would require the services of an individual primarily engaged in executive (or managerial) functions. In making this determination, you should consider, as appropriate, the nature of the business, including its size, its organizational structure, and the product or service it provides.

(G) Evaluating Managerial or Executive Status :

When examining the executive or managerial capacity of the beneficiary, an adjudicator should look first to the petitioner's description of the job duties. See [8 CFR 204.5\(j\)\(5\)](#) . Specifics are an

important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Merely repeating or paraphrasing the language of the statute or regulations does not satisfy the petitioner's burden of proof.

If the beneficiary performs non-managerial administrative or operational duties, the description of the beneficiary's job duties must demonstrate what proportion of the beneficiary's duties is managerial in nature, and what proportion is non-managerial. A beneficiary that primarily performs non-managerial or non-executive duties will not qualify as a manager or executive under the statutory definitions.

Beyond the petitioner's description of the beneficiary's proposed job duties, adjudicators should review the totality of the evidence, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of other employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; in this regard, artificial tiers of subordinate employees and inflated job titles are not probative. For smaller organizations, it may be helpful to request a description of the overall management and executive personnel structure supported by position descriptions for the managerial and executive staff-members of the organization. For organizations that are substantial in size, it may be helpful to request comparable descriptions for the organizational unit where the alien beneficiary is to be employed. If you believe that the facts stated in the petition are not true, and can articulate why in your denial, then that assertion may be rejected. Section [204\(b\)](#) of the Act.

Note

If staffing levels are used to determine whether a beneficiary's job capacity is primarily "executive" or "managerial" in nature, the reasonable needs of the business enterprise in light of its overall purpose and stage of development shall be considered. See section [101\(a\)\(44\)\(C\)](#) of the Act; [8 CFR 204.5\(j\)\(4\)\(ii\)](#). However, in evaluating reasonable needs, an adjudicator should not hold a petitioner to his or her undefined and unsupported view of "common business practice" or "standard business logic." It is the petitioner's burden to demonstrate the company's reasonable needs with respect to staff or the organization's structure. See section 101(a)(44)(C) of the Act.

Note also

As indicated above, a single-person office is not precluded from being classified as an multinational manager or executive for E13 purposes, provided the requisite corporate affiliation exists and all other requirements are met. You should note, nevertheless, that it may be very difficult for a petitioner to establish that the sole employee will be engaged *primarily* in a managerial (or executive) function. While a sole employee or "self-employed" person will have some managerial (or executive) duties, simply to keep the business running, he or she will normally be spending the majority of his/her work time doing the day-to-day work of the business, that is, performing the type of duties that persons who would normally be employed in the business in question would perform, were the alien not self-employed.

(H) Evaluating E13 petitions filed on behalf of L-1A nonimmigrants :

In some cases, you may be required to adjudicate an E13 petition that was filed on behalf of a manager or executive who was previously granted L-1A nonimmigrant classification as a nonimmigrant manager or executive. Though the prior approval of an L-1A petition on behalf of the alien may be a relevant consideration in adjudicating the E13 petition, you are not bound by the fact that the alien was previously accorded the L-1A classification if the facts do not support approval of the E13 petition. Eligibility as a n L-1A nonimmigrant does not automatically establish eligibility under the E13 criteria for extraordinary ability; each petition is separate and independent, and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions.

You should be aware that some courts, notwithstanding the fact that each petition must be adjudicated on its own merits, have asked USCIS to provide an explanation as to why, if the alien had previously been classified in a roughly analogous nonimmigrant category, USCIS has determined that the alien is not eligible for classification in the employment-based immigrant visa classification in question. For this reason, where possible, it would be appropriate to provide a brief discussion, *geared to the specific material facts of the underlying I-140 petition* , as to why, notwithstanding the previous nonimmigrant visa petition approvals, the petitioner has failed to meet its burden to establish eligibility for approval of its [I-140](#) petition.

Note also

Unlike in the case of the L-1B nonimmigrant classification, there is no provision of law that allows an individual who was/is employed in a purely specialized knowledge capacity abroad to be classified as a “specialized knowledge” E13 immigrant. However, it should be noted that some E13 beneficiaries who are classified as L-1B nonimmigrants might qualify for the E13 classification because their specialized knowledge employment abroad also would have qualified as managerial or executive employment and because the petitioners intend to employ them in managerial or executive positions on a permanent basis.

(j) Special Considerations Relating to EB-2 Cases .

(1) Advanced Degree Professionals .

(A) Eligibility .

To qualify for this immigrant classification, two requirements must be satisfied: the alien must be a member of the professions holding an advanced degree or foreign equivalent; and the underlying position must require, at a minimum, a professional holding an advanced degree or the equivalent.

(B) Foreign Equivalent Degrees . **[Updated 06-17-2009]**

Pursuant to section [203\(b\)\(2\)\(A\)](#) of the INA certain “qualified immigrants who are members of the professions holding advanced degrees or their equivalent...” are eligible for the EB-2 immigrant classification. The Joint Explanatory Statement of the Committee of Conference, made at the time Congress adopted the Immigration Act of 1990, stated that the equivalent of an advanced degree is “a bachelor’s degree plus at least five years progressive experience in the professions.” See H.R. Rep. No. 101-955, 101st Cong., 2d Sess. 121 (1990). USCIS has incorporated this standard with respect to establishing equivalency to a *master’s* degree in its regulations at [8 CFR 204.5\(k\)\(3\)\(i\)\(B\)](#).

Under [8 CFR 204.5\(k\)\(2\)](#) an advanced degree is:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

An alien can satisfy the advanced degree requirement by holding either of the following:

- a U.S. master’s degree or higher, or a foreign degree evaluated to be the equivalent of a U.S. master’s degree or higher; **or**
- a U.S. bachelor’s degree, or a foreign degree evaluated to be the equivalent of a U.S. bachelor’s degree, plus five years of progressive, post-degree work experience.

An alien who does not possess at least a U.S. bachelor’s degree or a foreign equivalent degree will be ineligible for this classification.

(C) Education Credentials Evaluation . **[Updated 06-17-2009]**

In cases involving foreign degrees, ISOs may favorably consider a credentials evaluation performed by an independent credentials evaluator who has provided a credible, logical and well-documented case for such an equivalency determination that is based solely on the alien’s foreign degree(s). In addition, ISOs may accept a comparable evaluation performed by a school official who has the authority to make such determinations and is acting in his or her official capacity with the educational institution.

ISOs should consider the opinions rendered by an education credential evaluator in conjunction with a review of the alien beneficiary’s relevant education credentials, and other available credible resource material regarding the equivalency of the education credentials to college degrees obtained in

the U.S. Opinions rendered that are merely conclusory and do not provide a credible roadmap that would clearly lay out the basis for the opinions are not persuasive.

It is important to understand that any educational equivalency evaluation performed by a credentials evaluator or school official is solely advisory in nature and that the final determination continues to rest with the ISO. See [Matter of Caron International](#), 19 I&N Dec. 791 (Comm. 1988), [Matter of Sea, Inc.](#), 19 I&N Dec. 817 (Comm 1988), and [Matter of Ho](#), 19 I&N Dec. 582 (BIA 1988).

(D) United States Medical Degree (MD) Equivalency of Foreign Medical Degrees . **[Updated 06-17-2009]**

The United States is one of the few countries where medical school applicants are required to obtain a bachelor's degree as a requirement for admission to medical school. As a result, a United States MD degree is considered to be an advanced degree.

In many other countries a person may be admitted to medical school directly out of high school. In these instances, the program of study for the foreign medical degree is longer in length (generally 5-7 years in duration) than is required for a less specialized foreign bachelor's degree (generally 3-4 years in duration.) In some countries the name of the degree is "Bachelor of Medicine, Bachelor of Surgery," and the program of study may involve ONLY medicine, to include some limited basic sciences.

A foreign medical degree may qualify as the equivalent of a U.S. MD degree and thus an advanced degree for EB-2 purposes if, at the time of the filing of the labor certification application, Conditions 1 and 2 below are met:

Condition 1 . The alien beneficiary:

- Has been awarded a foreign medical degree from a medical school that requires applicants to obtain a bachelor's degree equivalent to a U.S. bachelor's degree as a requirement for admission; **or** ,

- Has been awarded a foreign medical degree and a foreign education credential evaluation is provided that comports to section (C) above, that credibly describes how the foreign medical degree is equivalent to a medical degree obtained from an accredited medical school in the United States; **or**,

- Has been awarded a foreign medical degree and has passed the National Board of Medical Examiners Examination (NBME) examination or an equivalent examination, such as the U.S. Medical Licensing Examination (USMLE), Steps 1, 2 & 3,

Condition 2 . The alien beneficiary was fully eligible for the position described on the labor certification application, on the date that it was filed, by establishing that:

- He or she had a full and unrestricted license to practice medicine in the state of intended employment and continues to hold such an unrestricted license; or ,
- His or her foreign medical degree is shown to meet the medical degree requirements to be eligible for full and unrestricted licensure specified by the medical board governing the place of intended employment.

See [Matter of Wing's Tea House](#) , 16 I&N Dec. 158 ; I.D. 2570 (BIA 1977); [20 CFR 656.17\(h\)](#) ; [20 CFR 656.10\(c\)\(7\)](#) .

Note

EB-3 Alien beneficiaries who are to be engaged in the provision of patient care must also show that they were fully eligible for the position described on the labor certification application on the date it was filed by meeting the licensure requirements in condition #2 above.

Each U.S. State, the District of Columbia, and the U.S. territories have a medical board which devises its own medical degree requirements that must be met in order to be licensed to practice medicine therein. See AFM [Chapter 22.2\(j\)\(5\)\(A\)](#) for further information regarding U.S. state and territorial U.S. medical degree requirements.

(E) Advanced Degree Position . **[Added] 06-17-2009]**

Mere possession of an advanced degree is not sufficient for establishing an alien's eligibility for EB-2 classification. Pursuant to [8 CFR 204.5\(k\)\(4\)](#) , the petitioner must demonstrate that:

- the position certified in the underlying labor certification application or set forth on the Schedule A application requires a professional holding an advanced degree or the equivalent; and ,
- the beneficiary not only had the advanced degree or its equivalent on the date that the labor certification application was filed, but also met all of the requirements needed for entry into the proffered position.

The petitioner must demonstrate that the position, and the industry as a whole, normally requires that the position be filled by an individual holding an advanced degree. In this regard, the key factors are not whether a combination of more than one of the foreign degrees or credentials is comparable to a single U.S. bachelor's degree or an advanced degree, but rather that a combination of foreign degrees or credentials:

- Meets the minimum education requirements for the position in the individual labor certification approved by the Department of Labor; and ,

- The minimum requirements for the position in the labor certification meet the definition of an advanced degree at [8 CFR 204.5\(k\)\(2\)](#) .

The requirement that the position requires, at a minimum, a person holding an advanced degree has resulted in a particular problem involving EB-2 petitions filed on behalf of registered nurses. Although many such nurses possess advanced degrees, they are filling nursing positions in the United States that generally do not require advanced degrees. Specifically, the Occupational Information Network (O-Net) at <http://online.onetcenter.org/> indicates that, in the nursing profession, only managerial jobs (director of nursing or assistant director of nursing) or advanced level jobs (clinical nurse specialist, nurse practitioner, etc.) generally require advanced degrees.

A registered nurse job, by contrast, usually does not require an advanced degree holder. ISOs should be aware that the long waiting periods currently required for issuance of third-preference employment-based immigrant visas has caused a "gap" between the available supply of visa eligible nurses and the high demand for nursing services. Nonetheless, adjudicators need to verify the actual minimum requirements for the nursing position offered in the petition. As stated, most nursing positions will not qualify for EB-2 classification.

(2) Aliens of Exceptional Ability.

Alternatively, an alien may qualify for E21 visa preference classification if: (a) he or she has exceptional ability in the sciences, arts, or business, (b) will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and (c) if the alien's services in one of those fields are sought by an employer in the United States. Note that the term "exceptional ability" is defined in 8 CFR 204.5(k)(i)(2) as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." This standard is of course lower than that for E11 aliens of extraordinary ability.

(A) Evaluation of Evidence Submitted in Support of a Petition for an Alien of Exceptional Ability.
[Revised 12/22/2010, AD 11-14; PM-602-0005.1]

8 CFR 204.5(k)(3)(ii) describes the various types of initial evidence that must be submitted in support of an I-140 petition for an alien of exceptional ability. The initial evidence must include evidence of at least three of the types of evidence listed in 8 CFR 204.5(k)(3)(ii).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under 203(b)(2) of the INA. First, USCIS officers should objectively evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the visa category.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of at least three of the six regulatory criteria listed at 8 CFR 204.5(k)(3)(ii) (as discussed below), applying a preponderance of the evidence standard.

Note:

While USCIS officers should consider the quality and caliber of the evidence when required by the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination regarding whether or not the alien is an alien of exceptional ability in Part One of the case analysis.

Following is a list of the types of evidence listed at 8 CFR 204.5(k)(3)(ii) applicable to this immigrant classification. Note that in some cases, evidence relevant to one criterion may be relevant to other criteria set forth in these provisions.

8 CFR 204.5(k)(3)(ii)

- (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
- (C) A license to practice the profession or certification for a particular profession or occupation;
- (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

Note:

To satisfy this criterion, the evidence must show that the alien has commanded a salary or remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field.

- (E) Evidence of membership in professional associations; or
- (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Additionally, [8 CFR 204.5\(k\)\(3\)\(iii\)](#), states, "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to

establish the beneficiary's eligibility."

Note: This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary's eligibility, if it is determined that the standards described in 8 CFR 204.5(k)(3)(ii) do not readily apply to the alien's occupation. When evaluating such "comparable" evidence, consider whether the 8 CFR 204.5(k)(3)(ii) criteria are readily applicable to the alien's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation.

General assertions that any of the six objective criteria described in 8 CFR 204.5(k)(3)(ii) do not readily apply to the alien's occupation are not probative and should be discounted. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive. The petitioner should explain why it has not submitted evidence that would satisfy at least three of the criteria set forth in 8 CFR 204.5(k)(3)(ii) as well as why the evidence it has submitted is "comparable" to that required under 8 CFR 204.5(k)(3)(ii).

Part One Note: Objectively meeting the regulatory criteria in part one alone does not establish that the alien in fact meets the requirements for classification as an Alien of Exceptional Ability under section 203(b)(2) of the INA.

For example:

Being a member of professional associations alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's membership should be evaluated to determine whether it is indicative of the alien having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

The issue of whether the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business should be addressed and articulated in part two of the analysis, not in part one where USCIS officers are only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement by providing at least three types of initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of exceptional ability under section 203(b)(2) of the INA. The quality of the evidence must be considered. In Part Two of the analysis, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

If the USCIS officer determines that the petitioner has failed to demonstrate this requirement, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an alien of exceptional ability under 203(b)(2) of the INA.

Note: The petitioner must demonstrate that the alien is above others in the field; qualifications possessed by most members of a given field cannot demonstrate a degree of expertise "significantly above that ordinarily encountered." Note that section 203(b)(2)(C) of INA provides that mere possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Therefore, formal recognition in the form of certificates and other documentation that are contemporaneous with the alien's claimed contributions and achievements may have more weight than letters prepared for the petition "recognizing" the alien's achievements.

(B) [Reserved] [Paragraph removed and reserved 8/18/2010, AD 10-41; PM-602-0005]

(C) Schedule A, Group II Labor Certification

Adjudicators should be careful not to confuse Schedule A, Group II labor certification under [20 CFR 656.15\(d\)](#) for aliens of "exceptional ability in the sciences or arts" with classification under section [203\(b\)\(2\)](#) of the Act as an alien of "exceptional ability in the sciences, arts, professions, or business." Under the Department of Labor's regulations at [20 CFR 656.15\(d\)](#), an employer seeking labor certification on behalf of an alien of "exceptional ability in the sciences or arts" may apply directly to USCIS for Schedule A, Group II labor certification in lieu of applying to the Department of Labor for issuance of a labor certification. The application for Schedule A, Group II is made in conjunction with the filing of the [Form I-140](#) petition for E21 classification. In order to obtain Schedule A, Group II certification, an employer must file documentary evidence showing "widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field" as well as evidence that the alien's work in that field during the past year and in the future will require "exceptional ability." In addition, the employer must present documentation from at least two of the seven groups listed in [20 CFR 656.15\(d\)\(1\)\(i\) - \(vii\)](#), or, in the case of an alien of exceptional ability in the performing arts, from the list in [20 CFR 656.15\(d\)\(2\)\(i\) - \(vi\)](#). Though both the regulations governing Schedule A, Group II certification and the E21 provisions of the Act refer to aliens of "exceptional ability", the term "exceptional ability" is defined differently by each. The requirement for Schedule A, Group II labor certification to submit evidence showing "widespread acclaim and international recognition" is clearly a higher standard than the E21 requirement to demonstrate "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business."

The standard for Schedule A, Group II labor certification is actually closer to, though not exactly the same as, that for E11 classification. Schedule A, Group II requires "widespread acclaim and international recognition," while the E11 classification requires "sustained national or international acclaim." Despite this similarity, the E11 standard is stricter than the Schedule A, Group II standard, as the E11 classification also requires that the alien establish that he or she "is one of that small percentage who have risen to the very top of the field of endeavor."

Note also that the granting of Schedule A, Group II labor certification is separate from the adjudication of the E21 petition. Eligibility for Schedule A, Group II labor certification therefore does not guarantee approval of the E21 petition itself, which must be adjudicated in accordance with the standards set forth in 8 CFR 204.5(k)(2) and/or (3).

Finally, note that an alien may not self-petition for Schedule A, Group II labor certification. Schedule A designation requires a job offer, and a petition that includes a request for such designation must be filed by a United States employer, rather than by a self-petitioning alien. See 8 CFR 204.5(k)(1) and (4)(i).

(3) E21 Professional Athletes . [Revised 09-14-2009]

Some E21 petitions are filed on behalf of professional athletes and are supported by a certified [Form ETA-750](#) or [Form ETA-9089](#) , requesting that the athlete be classified as an alien of exceptional ability in the arts. Prior to June 1, 2008, labor certification applications for professional athletes, unlike most other types of labor certification applications, were filed with DOL using the Form ETA-750 and were processed at the national office for OFLC in Washington, DC.

DOL provided notice on March 5, 2008. See [73 FR 11954](#) that as of June 1, 2008, employers filing such applications on behalf of aliens to be employed as professional athletes on professional sports teams will file PERM applications under special procedures for professional athletes directly with the Atlanta National Processing Center.

The precedent decision of *Matter of Masters*, 20 I&N Dec. 953 (Assoc. Comm. 1994), held that a professional golfer could, if he was otherwise qualified, qualify as an alien of exceptional ability in the arts under [section 203\(b\)\(2\)](#) of the Act. This holding has been interpreted to apply to E21 petitions filed on behalf of any athlete. However, the fact that the beneficiary has signed a contract to play for a major league team may not be sufficient to establish exceptional ability as a professional athlete.

The following are some general guidelines regarding the adjudication of E21 petitions filed on behalf of professional athletes, and are based on the standards governing the validity of labor certifications found in [section 212\(a\)\(5\)\(A\)](#) of the Act:

(A) In General .

A petition for classification of a professional athlete under [section 203\(b\)\(2\)\(A\)](#) of the Act, as well as the underlying labor certification filed on the alien's behalf, remains valid even if the athlete changes employers, as long as the new employer is a team in the same sport as the team which was the employer who filed the petition. See [section 212\(a\)\(5\)\(A\)\(iv\)](#) of the Act.

(B) Definition .

For purposes of AFM [Chapter 22.2\(j\)\(3\)\(A\)](#) above, the term "professional athlete" means an individual who is employed as an athlete by:

- A team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

· Any minor league team that is affiliated with such an association. See [section 212\(a\)\(5\)\(A\)\(iii\)](#) of the Act.

The petitioner must provide, as initial evidence, documentation, described in [8 CFR 204.5\(k\)\(3\)\(ii\)](#) or [\(iii\)](#), demonstrating that the alien qualifies as an alien of exceptional ability. This regulation sets forth the minimum evidence that must be presented in support of the petition. Submission of evidence may not necessarily establish that the alien is qualified for the classification. An adjudicator must assess the quality of such evidence, in addition to the quantity of the evidence presented, in determining whether the petitioner has met its burden.

However, an approved labor certification submitted on behalf of a professional athlete does not prove that the alien qualifies as an athlete of exceptional ability as defined in [section 203\(b\)\(2\)](#) of the Act. Adjudicators should look for evidence of exceptional ability beyond the mere existence of a contract with a major league team or an approved labor certification.

Many athletes, for example, enjoy substantial signing bonuses, but may not, thereafter, prove to be of "major league," let alone "exceptional" caliber. Similarly, the fact that an alien played for a portion of a season for a major league team does not automatically establish that the alien will continue to play at a major league level.

It would be incongruous to grant an immigrant visa petition on behalf of a major league player on the basis of [section 203\(b\)\(2\)](#) of the Act if the alien is unlikely to continue to perform the duties specified in the underlying petition for a reasonable period following a grant of lawful permanent resident status.

Further, an approved labor certification submitted on behalf of the alien does not bind USCIS to a determination that the alien is of exceptional ability. Notwithstanding the grant of a labor certification, the alien may, for any number of reasons, be unable to fulfill the underlying purpose of the [Form I-140](#), Immigrant Petition for Alien Worker.

Example

The alien could be cut from the major league roster, may announce his permanent retirement as a player in the sport, or suffer from a career-ending injury prior to adjudication of the petition, thereby removing the job offer that formed the basis of the I-140, thus, resulting in a denial of the petition.

(4) National Interest Waiver of Job Offer . Since 1990 the Act has provided that an alien of exceptional ability may obtain a "waiver of job offer" if such waiver is deemed by the agency to be in the "national interest." A subsequent technical amendment extended the job offer waiver to certain professionals. Since this waiver provision is included in section [203\(b\)\(2\)](#) of the Act, it applies only to

professionals holding advanced degrees and exceptional ability aliens. In fact, the regulations, at [8 CFR 204.5\(k\)\(4\)\(ii\)](#) provide that a waiver of a job offer also includes a waiver of the labor certification requirement. The petitioner may file [Form ETA-750](#) , Part B, or [Form ETA-9089](#) , in duplicate, in support of the petition. Either form is acceptable.

[Section 203\(b\)\(2\)](#) of the Act requires that all aliens seeking to qualify as having exceptional ability show that their presence in the United States would substantially benefit prospectively the national economy, cultural or educational interests or welfare of the United States and adds the additional test of "national interest" to those who wish the job offer waiver. Neither Congress nor legacy INS defined the term "national interest" in either the Act or the regulations in order to leave the application of this test as flexible as possible. However, an alien seeking to meet the national interest standard must show significantly more than "prospective national benefit" required of all aliens seeking to qualify as having exceptional ability. The burden rests with the petitioner to establish that exemption from, or waiver of, the job offer requirement will be in the national interest. Each case is to be judged on its own merit.

In 1998, the Administrative Appeals Office (AAO) issued a precedent decision, *Matter of In Re: New York State Department of Transportation* , 22 I&N Dec. 215 (Comm. 1998) ("NYSDOT"), which created a three-prong test for petitioners seeking a national interest waiver. You should remember that the purpose of these prongs is to set minimum requirements for activities that are in the national - not local - interest. These minimum requirements follow:

- Under the first prong of the [NYSDOT](#) test, the alien must seek employment in an area that has substantial intrinsic merit. In [NYSDOT](#) , the alien was a structural engineer working on highway bridges. This activity was found to have substantial intrinsic merit. It is obvious that the protection of motorists and the maintenance of a highway system are activities of substantial intrinsic merit. By contrast, a person who is a juggler and asserts that he or she wishes to perform at children's birthday parties, might not meet this requirement. While the alien's proposed activity is not deleterious, it would be difficult to claim that such a n activity has "substantial" intrinsic merit for purposes of establishing the "national" interest.

- The second prong of the [NYSDOT](#) test requires that the waiver applicant demonstrate that the proposed benefit to be provided will be national in scope. There are many activities which have positive effects, such as job creation for a local community, but may in fact have a limited, or even negative, national impact. For example, an alien may be sought as a loan officer for a regional bank. The alien's clients may come from various parts of the country, but the primary purpose of the alien's employment is to benefit the regional bank, not to benefit the nation as a whole. The principal aim of the alien's activities is to benefit the bank, not the nation. As another example, an alien may be sought to manage a waste disposal facility for a municipal government. That facility, however, may be contributing to pollution of a nearby river. While the alien's activities might result in the preservation of local jobs, his or her activities might in fact have a detrimental effect on other communities lying along the path of the stream or river , even those located in other states. Therefore, any interest in hiring this person would be local at best, and could not be deemed to be national in scope or in the "national" interest.

On a related note, the basis for the waiver may not be the existence of a local labor shortage. The mere fact that the alien might fill a locally needed position - irrespective of the positive effect of such activity - does not qualify the activity as being in the national interest. While there exists a generalized national interest in providing jobs to all work authorized persons, the national interest waiver is a waiver of the labor certification requirement - it is not a substitute for this requirement. Congress specific ally

created the labor certification process in order to test the domestic local labor market. A shortage of qualified workers in a given field does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. (As noted below, however, following issuance of the NYSDOT precedent, Congress created an exception for certain physicians who are working in medically underserved or needed areas).

- Finally, under the third prong of the NYSDOT test, it must be demonstrated that the national interest would be adversely affected if the employer is required to proceed with the labor certification process. In order to satisfy the third component of the test, therefore, it must be shown "that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making the position sought available to U.S. workers." In addition, NYSDOT further requires, as a condition of meeting the third prong, "that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications." This test recognizes that there can be two competing "national interests" - the national interest, as set forth by Congress in section 212(a)(5) of the INA, of requiring a test of the labor market versus the "national interest" in fulfilling a permanent need for the alien's services. Given the variety of occupations potentially covered by the waiver, a single set of standards applicable to all cases is impractical. Therefore each determination must be made on a case-by-case basis and will depend on an assessment of the specific facts presented.

To meet the third prong, the petitioner might be able to demonstrate that the need for the alien's services is so great that the national interest would not be properly served were the petitioner required to postpone employment of the alien until the labor certification process is completed. An example would be the need for an alien epidemiologist to work on prevention of an epidemic following a natural disaster. Obviously, time would be of the utmost essence in such a case.

It should be remembered that while the NYSDOT decision sets forth these three minimum criteria which must be met in order to establish eligibility for a national interest waiver, the presence of these factors, alone do not necessarily mean that you must grant the waiver. For example, an alien with a criminal background might meet the above criteria, yet still might not merit a discretionary grant of the waiver. You should consider all the facts presented in making your determination.

In addition to the above, you should also bear in mind the following general considerations with respect to adjudicating requests for national interest waivers:

- An alien seeking immigrant classification as an alien of exceptional ability or as a member of the professions holding an advanced degree cannot meet the threshold for a national interest waiver of the job offer requirement simply by establishing a certain level of training or education which could be articulated on an application for a labor certification.

- General arguments regarding the importance of a given field of endeavor, or the urgency of an issue facing the U.S., cannot by themselves establish that an individual alien benefits the national interest by virtue of engaging in the field or seeking an as yet undiscovered solution to the problematic issue.

In all cases, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit if the alien has few or no demonstrable achievements.

When a petition is denied because eligibility for the national interest waiver has not been established, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider, as required in Chapter [10.7\(b\)\(5\)](#) of this manual.

(5) Petition for a Physician Which Is Supported by Individual Labor Certification . **[Updated 06-17-2009]**

(A) Determining Whether a Physician Has Met the Minimum Requirements for the Practicing Physician Position .

ISOs must determine whether the alien physician met the minimum education, training and experience requirements of the labor certification as of the date of its filing with DOL in order to establish the alien's eligibility for the EB-2 classification. Although a given labor certification may not specify that an MD license is required for a physician position, physicians involved in patient care must obtain a license to practice medicine in the location where they are to be employed in the United States as a matter of state or territorial law.

Note

Any reference to state requirements is also intended to include U.S. territories and the District of Columbia.

Therefore, it follows that any candidate for such a position must either possess a permanent license to practice medicine or be eligible for such a license in the state of the intended employment in order to be qualified for entry into the position at the time of the permanent job offer. In the case of an EB-2 petition supported by a labor certification, the job offer is considered to have been made as of the date of the filing of the labor certification.

Each U.S. state has a medical board which devises its own educational, training, and experience requirements that must be met in order to be granted a permanent license, i.e. full and unrestricted license to practice medicine in that state. A full and unrestricted license to practice differs from a limited license to practice medicine. Limited licensure is typically granted for physicians who are still working towards obtaining the credentials required for full licensure, or who may be providing limited medical care, such as a physician who is working at a summer camp as a camp physician for a short period of time.

In general, there are two pathways to obtain permanent licensure to practice medicine as a physician; either as:

- An initial applicant for licensure, or ;
- An applicant for licensure by endorsement.

The initial applicant pathway is for medical school graduates who have never obtained a permanent license to practice medicine as a physician in the United States, or in some instances, Canada. An initial applicant must show that he or she has the requisite medical degree, post-graduate training, residency and/or board certifications, and has passed the medical examinations required by the state medical board.

All U.S. states require licensing candidates to make an application for licensure with their medical board to demonstrate that he or she meets the requirements of licensure regardless of previous licensure. This pathway is often referred to as an endorsement application and involves:

- A verification of the standing of the applicant's license(s) issued by another U.S. state or territory, and in some cases by a foreign country; and ,
- A review of the applicant's education, training and medical examinations to determine if the applicant meets the requirement of the state medical board.

U.S. states do not generally allow a physician to practice medicine within their jurisdictional boundaries based on a license issued by another state or territory, i.e. automatic reciprocity. Certain exceptions may exist for physicians practicing at federal medical facilities and in other very limited circumstances.

In some states, applicants must pass the medical examinations, such as the United States Medical Licensing Examination (USMLE), within a certain number of attempts or within a certain timeframe in order for the examination results to be considered valid for licensure. In addition, approximately 75 percent of the U.S. states require foreign medical school graduates to complete additional post-graduate medical training or residencies beyond that required for U.S. medical school graduates.

In order to approve a petition supported by a labor certification filed on behalf of a physician

seeking EB-2 classification, the petitioner must show that, at the time of the filing of the labor certification, the physician:

- Possesses a permanent license to practice medicine in the area of intended employment;
- or** ,
- Has met all of the requirements to be eligible to obtain such a license in the area of intended employment, notwithstanding eligibility requirements that are contingent upon his or her immigration status in the United States.

Note

Some state medical boards will not issue a license to practice medicine unless the applicant presents evidence that he or she is legally authorized to be employed in the United States, or has obtained a U.S. Social Security Number (SSN.) State licensure criteria relating to the applicant's U.S. immigration status, such as requirements that the applicant must be a lawful permanent resident, or must otherwise possess employment authorization or an SSN should not be considered relevant as the EB-2 petition is the means by which the alien will obtain lawful permanent resident status and eligibility to accept employment and obtain an SSN in the United States.

ISOs are instructed to review the evidence provided in support of petitions with labor certifications to determine if the alien physician had a permanent license to practice or was eligible to obtain such a license in the location of intended employment at the time of filing of the labor certification. Information regarding the licensure requirements for U.S. states can be obtained at <http://www.fsmb.org/> , and at the various U.S. medical board websites.

B. Determining whether the alien physician has overcome the “unqualified physician” inadmissible alien provisions of INA §212(a)(5)(B) . **[Updated 06-17-2009]**

See AFM **Chapter 22.2(j)(6)(F)(iv)** , as revised on June 17, 2009.

(6) Petition for a Physician Based on a National Interest Waiver for Physicians Serving in Medically Underserved Areas or at Department of Veterans Affairs Health Care Facilities . [Revised 01-27-2006]

(A) Background .

(i) Statutory and Regulatory Authority .

Section [203\(b\)\(2\)\(B\)\(ii\)\(I\)](#) of the Immigration and Nationality Act (the Act), as amended by the Nursing Relief for Disadvantaged Areas Act (Nursing Relief Act) of 1999, establishes a national interest waiver of the Department of Labor's labor certification process for alien physicians petitioning for EB-2 classification (aliens with advanced degrees or exceptional ability). See Pub. L. No. 101-649 (1990) codified as 8 USC 1153(b)(2)(B). Pub. L. No. 106-95 codified as 8 USC 1153(b)(2)(B).

Prior to 1999 Nursing Act, section 203(b)(2)(B) of the Act provided for a discretionary waiver whereby the qualified physician had to show that his or her admission to permanent residence would be in the national interest of the United States in order to be approved for the national interest waiver petition.

Pursuant to section 203(b)(2)(B)(ii)(I), the Attorney General, now the Secretary of Homeland Security, "shall grant a national interest waiver [of the job offer requirement] ... on behalf of any alien physician with respect to whom a petition for preference classification has been filed ... if:

(aa) the alien physician agrees to work full-time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and,

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

The physician may not receive lawful permanent resident status "until such time as the alien has worked full-time as a physician for an aggregate of 5 years" in the shortage area, or 3 years in the shortage area if the doctor petitioned for the national interest waiver before November 1, 1998. See section 203(b)(2)(B)(ii)(II) of the Act and (IV); 8 USC 1153(b)(2)(B)(ii)(II) and (IV).

On September 6, 2000, the former Immigration and Naturalization Service (INS), now USCIS, issued an interim rule implementing the NIW provisions which were codified in [8 CFR 204.12](#) and [245.18](#) . See [65 FR 53889](#).

The regulations implemented the statutory provision allowing filing of an NIW *AFM* and an adjustment application without the physician first completing the 3 or 5 years of service in shortage areas. The regulations include provisions that: (1) required NIW physicians to complete the minimum years of medical service within 4 to 6 years after the [I-140](#) approval before the physician could obtain lawful permanent resident status; (2) required physicians who had an NIW denied prior to November 12, 1999, to complete the 5-year rather than 3-year medical requirement; (3) required NIW physicians to comply with reporting requirements, submitting evidence within 120 days of the completion of the second year of the medical practice requirement and additional evidence within 120 days of completing the fifth year requirement to establish that they were still engaged in the area of medical practice which was the basis

for approval of the NIW; and (4) limited NIW eligibility to doctors who practiced in a medical specialty that was covered by the designated geographic area.

USCIS issued memoranda to supplement regulations, including National Interest Waiver for Second Preference Employment-based Immigrant Physicians Serving in Medically Underserved Areas or at Veterans Affairs Facilities , signed by William Aytes on October, 30, 2000, and National Interest Waiver for Second Preference Employment-based Immigrant Physicians Serving in Medically Underserved Areas or at Veterans Affairs Facilities and Section 214(l)(2)(B) of the Act , signed on October 1, 2001.

(ii) *Schneider v. Chertoff* .

Plaintiffs in *Schneider v. Chertoff* , 450 F.3d 944 (9th Cir. 2006) _ __ [http://www.ca9.uscourts.gov/coa/newopinions.nsf/8D6FA79CBF6F8F9B88257186004BF3D0/\\$file/0455689.pdf?openelement](http://www.ca9.uscourts.gov/coa/newopinions.nsf/8D6FA79CBF6F8F9B88257186004BF3D0/$file/0455689.pdf?openelement) , challenged specific provisions of the agency's NIW regulations and, in its decision issued on June 7, 2006, the Ninth Circuit found that the following three regulatory provisions were beyond the scope of the statutory language in section 203(b)(2)(B) of the Act. The court held that:

- Medical practice completed before the approval of the employment-based petition (except medical practice as a J-1 nonimmigrant) counts toward the service requirement;
- NIW physicians who had immigrant visa petitions filed on their behalf before November 1, 1998 but denied before November 12, 1999, need only fulfill the 3-year service requirement; and
- The regulatory 4/6 year period within which NIW physicians must complete the medical service requirement is *ultra vires* and not a permissible interpretation of the statute.

On the remaining two challenged provisions, the court held that USCIS has the authority to impose reporting requirements on NIW physicians to ensure compliance with the statutory scheme and declined to reach the merits of the question related to whether medical specialists should be covered under the statute. The plaintiff who raised the claim had his NIW and I-140 petition denied due to abandonment, thereby mooting the issue.

USCIS remains committed to advancing the congressional intent of providing quality medical care in designated underserved areas and also is mindful of the states' direct interest in obtaining necessary medical care in underserved areas and their critical role in coordinating with USCIS in the NIW process.

USCIS, however, is not required to allow a physician with an approved NIW and pending adjustment application to continue receiving interim work and travel authorization for an unlimited period without some evidence that the physician is pursuing or intends to pursue the type of medical service that was the basis for the NIW approval. Therefore, while USCIS will amend NIW procedures to meet the *Schneider* decision (i.e. not impose a specific timeframe within which the required medical service must be performed), USCIS officer may exercise discretion to deny employment authorization or an adjustment application if he or she believes that the physician is using the pending adjustment of status application solely as a means for employment in areas or occupations other than medical service in the designated shortage areas.

(B) Eligibility .

USCIS regulation at [8 CFR 204.12](#) establishes the basic eligibility requirements for the alien physician, namely that:

- A petition has been filed under section [203\(b\)\(2\)](#) of the Act, accompanied by the national interest waiver request;
- The physician agrees to work full-time in a clinical practice providing primary or specialty care in an underserved area or at a VA health care facility for an aggregate of 5 years (not counting any time in J-1 status, but including such time that may have preceded the [I-140](#)), or, if the petition was filed prior to 11/1/98, an aggregate of 3 years (not counting any time in J-1 status); and
- A Federal agency or a State Department of Public Health, with jurisdiction over the medically underserved area, has determined that the physician's work in the underserved area or the VA facility is in the public interest (and, to the extent that past work is presented, that it was in the public interest).

(C) _ Primary or Specialty Care :

As of the January 23, 2007, NIW petitions may be submitted on behalf of primary and specialty care physicians who agree to work full-time in areas designated by HHS as having a shortage of specialty care health professionals, i.e. Health Professional Shortage Area (HPSA), Medically Underserved Area (MUA), Medically Underserved Population (MUP), and Physician Scarcity Areas (PSA).

Prior to January 23, 2007, based on HHS' criteria published in 2000, INS limited its definition of qualified physicians in designated shortage areas to those who practiced primary care medicine. [8 CFR 204.12\(a\)\(2\)\(i\)](#) . Primary care medicine is defined as family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry. Since 2000, INS, and now USCIS, has given state departments of health more flexibility to sponsor waivers for physicians willing to work in medically underserved areas. For instance, under the Conrad waiver program, state departments of health may

sponsor waivers for J-1 specialist physicians who will provide service to medically underserved populations (MUP). The Conrad program is similar to the national interest waiver program as they both have a medical service requirement under which the physician must work in a medically underserved area.

In 2004, HHS considered specialists in its listing of specialist care scarcity areas under the Physician Scarcity Area (PSA) bonus payment program. While HHS did not make a declaration of an absolute shortage area, it did define geographic areas as scarcity areas based on the ratio of physicians to the population of Medicare beneficiaries. The Nursing Relief Act requires USCIS to recognize HHS designations of health professionals without limitation to primary care. In following HHS' designations of MUP and PSA, USCIS will now recognize NIW physicians in primary care and specialty care. A specialty physician is defined as other than a general practitioner, family practice practitioner, general internist, obstetrician, or gynecologist. Dentists, chiropractors, podiatrists, and optometrists do not qualify for the physician scarcity bonus as specialty physicians, and therefore, cannot qualify for the national interest waiver.

Note

A physician or employer must submit evidence showing that a geographic area is or was designated by the HHS as having a shortage of health care professionals. The designation must be valid at the time the NIW waiver employment began. If the area loses its HHS' designation after the physician starts working, a physician can remain at the facility and the time worked henceforth will qualify as NIW employment so long as the employment continues to satisfy all other national interest waiver requirements.

(D) Medically Underserved Areas .

In designating areas of the country as "underserved," the Secretary of Health and Human Services (HHS) addresses the shortage of family or general medicine and sub-specialist physicians (designations include Health Professional Shortage Areas (HPSA), Medically Underserved Population (MUP), Medically Underserved Area (MUA), and Physician Scarcity Areas (PSAs)). For work that preceded the [I-140](#) , the area must have been a designated shortage area at the time the work commenced but need not have retained such designation. For shortage designations, see these sources:

- Access HHS' Health Resources and Services Administration website at <http://bhpr.hrsa.gov/shortage/muaguide.htm> to determine if a geographic area is a MUA or MUP.

- Access HHS' Centers for Medicare and Medicaid Services website at <http://www.cms.hhs.gov/HPSAPSAPhysicianBonuses> and search under Specialty Care PSA Zip Codes to determine if a geographic area is a PSA.

Doctors serving at VA facilities are not bound by the HHS categories noted above. The VA may

petition for doctors that specialize in various fields of medicine, and the location of the work need not be in an underserved area.

(E) Time Limit to Complete the Required Medical Service .

The physician has no set time limitation to complete the 3 or 5 years of aggregate service, which may include periods of service prior to the filing or approval of the I-140 NIW petition. While there is no set time limitation, a NIW physician must submit interim evidence of compliance with the medical service requirement prior to the approval of the adjustment of status application.

(i) If a physician's adjustment of status application was denied and the [I-140](#) revoked on or after September 6, 2000 but before January 23, 2007 (effective date of *Schneider* policy memo) solely because the physician did not complete the 3/5 years of medical service within the 4/6 year time limit, USCIS will allow such aliens to file, with appropriate fees, a motion to reopen the immigrant petition and/or application to adjust to permanent resident status. The motion to reopen will only be accepted if the physician: (1) is currently in the United States pursuant to a lawful admission; (2) is maintaining a lawful immigration status; (3) has not been the subject of removal proceedings or a final order of removal; and (4) has not already acquired lawful permanent resident status. The motions to reopen must be submitted within one (1) year of the effective date of this memorandum. In conjunction with the motion to reopen, physicians must submit evidence of progress towards or actual completion of the 3/5 years of medical service in addition to any other filing requirements prescribed in 8 CFR 245.18.

(ii) While USCIS adjudicators cannot issue notices of intent to revoke (NOIR) or revoke the [I-140](#) petition, or deny adjustment applications for physicians solely because the physician did not complete the 3/5 year service requirement within a time limit, adjudicators, however, may deny an application for adjustment of status as a matter of discretion if the physician appears to be using the pending adjustment of status application solely as a means for employment in areas or occupations other than medical service in the designated shortage areas.

(F) Required Supplemental Evidence .

In addition to the evidence necessary to support the [I-140](#) petition, physicians seeking a national interest waiver based on service in an underserved area or at a VA facility must submit supplemental documentation with the petition. A complete list and detailed explanation of this supplemental evidence is found at [8 CFR 204.12\(c\)](#) .

(i) Employment contract or employment commitment letter .

Physicians must provide a contract or letter covering required period of clinical medical practice that was issued and dated within six months prior to the filing date of the petition.

(ii) Public Interest Letter .

Physicians must provide a letter issued and dated within six months prior to filing date of petition from the federal agency or from the state department of public health attesting that the physician's work is or will be in the public interest.

(iii) Physicians with Foreign Residency Requirement .

The physician must satisfy any of the other requirements for EB-2 classification, other than that of the labor certification. In particular, a physician needing a waiver of the J-1 foreign residency requirement must still obtain such a section [212\(e\)](#) waiver and satisfy all the waiver conditions set forth in section [214\(I\)](#) of the Act (including 3 years of service) before the physician's adjustment of status application may be approved. See [8 CFR 204.12\(g\)](#) .

(iv) Admissibility Requirements Established by Section [212\(a\)\(5\)\(B\)](#) of the Act.
[Updated 06-17-2009]

The physician must meet the admissibility requirements established by section [212\(a\)\(5\)\(B\)](#) of the Act, relating to examinations that immigrant physicians must pass in order to immigrate.

Evidence must be provided that the physician has passed parts I and II of the National Board of Medical Examiners Examination (NBME) or an equivalent examination as determined by the Secretary of Health and Human Services (HHS), and evidence that the beneficiary is competent in oral and written English. The examination that is currently being administered is the U.S. Medical Licensing Examination (USMLE).

The NBME, also known as the NBME, ceased to be administered in 1992. Examinations that are equivalent to the NBME are:

- Visa Qualifying Examination (VQE), which was administered from 1977 through 1984;
or _ ,
- Comprehensive Foreign Medical Graduate Examination in the Medical Sciences (FMGEMS), which was administered from 1984 through 1993; **or** _ ,
- U.S. Medical Licensing Examination (USMLE), which was first administered in 1992 and

continues to be administered today.

In addition to having passed either the NBME or one of its equivalents, the beneficiary is also required to provide evidence of competency in oral and written English. An Educational Commission for Foreign Medical Graduates (ECFMG) certification showing the beneficiary has passed the English language proficiency test to demonstrate the alien physician's English proficiency meets this requirement. Information regarding the ECFMG certification is available at <http://www.ecfm.org/>.

Note

EB-2 alien physicians seeking a National Interest Waiver (NIW) must provide documentation in accordance with [8 CFR 204.12\(c\)\(4\)](#) to establish eligibility relative to section [212\(a\)\(5\)\(B\)](#) of the INA at the time of filing of the NIW I-140 petition. In contrast, a physician petition filed with an individual labor certification, must establish eligibility under section 212(a)(5)(B) of the INA at the time of the filing of the labor certification.

(G) Effective Dates for Filing .

All physician petitions with accompanying national interest waiver requests based on service in a underserved area filed on or after November 12, 1999, shall be adjudicated in accordance with the regulatory provisions found at [8 CFR 204.12\(d\)\(1\)](#) . Petitions pending at a service center on November 12, 1999, shall also be adjudicated pursuant to the revised regulatory provisions. See [8 CFR 204.12\(d\)\(2\)](#) .

(i) Cases filed and final decision prior to November 1, 1998 .

For petitions in which a decision to deny became final prior to November 1, 1998, the petitioners can file a new petition accompanied by a national interest waiver request and the required supporting evidence. Officers shall not accept any motions to reopen or reconsider previously denied cases on behalf of physicians requesting national interest waivers based on service in an underserved area in these cases.

(ii) Cases filed but no final decision before November 1, 1998 :

Officers must remember that the Nursing Relief Act makes a special provision for petitions filed prior to the November 1, 1998. For these "grandfathered" cases, the physician need only satisfy 3 years of qualified medical service (not including time in J-1 status) to be eligible for permanent residency status .

Prior to January 23, 2007, USCIS regulations required doctors who were denied a national interest waiver prior to November 12, 1999, to file a new immigrant visa petition under the provisions of [8 USC 1153\(b\)\(2\)\(B\)\(ii\)](#), which contains the five-year medical practice requirement instead of the three-year requirement. The *Schneider* Court found these regulations to be *ultra vires*. Therefore, the physicians with cases filed before November 1, 1998 are eligible to obtain permanent resident status after only 3 years of service rather than 5 years, even if the initial NIW petition was denied prior to November 12, 1999, since these cases should have been treated as a “grandfathered” case. USCIS will issue revised regulations in the future.

Any physician who wishes to be considered a “grandfathered alien” must submit evidence that a Form [I-140](#) for national interest waiver filed on his or her behalf was pending as of November 1, 1998. If such petition was denied (regardless of the date of denial), such grandfathered alien must establish eligibility for a national interest waiver through a subsequent NIW petition and must satisfy the 3-year service requirement in addition to any other requirements prescribed in [8 CFR 245.18](#). The burden is on the applicant to establish that a NIW immigrant visa petition was filed on their behalf before November 1, 1998.

USCIS will only accept a motion to reopen in these cases if the physician: (1) is currently in the United States pursuant to a lawful admission; (2) is maintaining a lawful immigration status; (3) has not been the subject of removal proceedings or a final order of removal; and (4) has not already acquired lawful permanent resident status. The motions to reopen must be submitted within one (1) year of the effective date of the *Schneider* policy memorandum, dated January 23, 2007. In conjunction with the motion to reopen, physicians also must submit evidence of a pending Form I-140 for national interest waiver as of November 1, 1998, and satisfaction of the 3-year service requirement in addition to any other filing requirements prescribed in [8 CFR 245.18](#).

(H) Requests to Practice in a Different Underserved Area .

USCIS regulations allow a physician to practice medicine in a different underserved area, or a different VA facility. See [8 CFR 204.12\(f\)](#) for a complete explanation of the procedure physicians must follow, including an amended petition, in order to request to practice medicine in a different underserved area.

(I) Adjudication of Adjustment Applications .

See Chapter 23.5(e)(3) for instructions on adjudicating adjustment of status applications.

(7) Scientists from the Former Soviet Union and Baltic States .

Reserved.

(k) Special Considerations Relating to EB-3 Cases .

(1) Determining Whether a Beneficiary is a Skilled Worker or Professional .

A total of 40,000 visas are available each fiscal year for third preference workers, of which not more than 10,000 may be issued to “other” (unskilled) workers. The visas for skilled workers (requiring at least two years training or experience) and professionals (persons holding a bachelor’s degree or its equivalent in the specific field in which they are to be engaged) are deducted from the same 30,000 number allotment. In all cases, the alien must have the minimum education and work experience requirements that are specified on the individual labor certification. Therefore, if the labor certification specifies that a bachelor’s degree in a given field is the minimum requirement for entry in to the position, the alien must possess a minimum of a U.S. bachelor’s degree or its foreign equivalent degree in the field. On the other hand, if the labor certification states a requirement of “two years college and two years experience,” mere possession of a bachelor’s degree, without such experience, would not qualify.

(A) Shepherders .

A Department of Labor approved Application for Alien Employment Certification is not required for an alien shepherd who has been legally employed as a nonimmigrant shepherd in the United States for at least 33 of the preceding 36 months. Instead, the Application for Alien Employment Certification is filed directly with the USCIS District Office or the Department of State. This procedure relates only to the labor certification process and has no bearing on the amount of training or experience needed to perform the job. A shepherd is an unskilled worker.

(B) Armed Forces .

The Department of Defense has requested that, before a decision is made on any visa petition filed by a field commander of a military post or installation in behalf of an alien member of the Armed Forces, the views of the appropriate branch of service be obtained, as follows:

· Army - When the petition is on behalf of a (prospective) member of the U.S. Army, the petition shall be returned to the petitioner with the advice that the assistant Secretary of the Army (Manpower and Reserve Affairs) informed the Service on November 1, 1973, that the initiation of petitions in behalf of aliens who are seeking status as lawful permanent residents is not authorized and that, therefore, the petition cannot be accepted unless the Secretary of the Army specifically authorizes the Bureau, in writing, to do so.

· Coast Guard - When the petition is on behalf of a (prospective) member of the U.S.

Coast Guard, the inquiry as to whether there is any objection to the filing of the petition shall be addressed to the Commandant (PE), U.S. Coast Guard, Washington, DC 20591.

- Navy (including Marine Corps) or Air Force - When the petition is on behalf of a (prospective) member of the U.S. Navy or the U.S. Air Force, the views of the Secretary of the Navy or the Secretary of the Air Force, as appropriate, shall be solicited as to whether there exists any objection to filing of the petition.

- Branch of Service Unknown - Where the military department involved (Army, Navy, or Air Force) is not readily apparent, the inquiry shall be made to the Assistant Secretary of Defense (Manpower), Department of Defense, Washington, DC 20301.

(l) Closing Actions .

(1) Approval .

(A) Processing Steps .

Complete the following steps upon approval of an I-140 petition:

- Affix the approval stamp on the petition and sign it.
- Check the block for the classification for which the petition is approved.
- Enter the priority date in the appropriate block.
- Determine where to send the petition. If the petition will be sent to the NVC, write the appropriate consulate on the petition. If the beneficiary will apply for adjustment, write "245 Adj." in the consulate block. (See paragraph (B)). If the adjustment application was filed concurrently with the visa petition, refer the case to the appropriate office or unit for adjudication of that adjustment application.
- Call the case up in the CLAIMS system and make sure the information entered is correct. Update the CLAIMS system with the approval, using the appropriate approval phrase. **In most cases you will have to change the priority date in the system.**

- Place a clerical hold on the approval notice only if there are original documents to be returned. **This is very important.**

- If the beneficiary will apply for adjustment, notify Records to create a file and house on main file shelf. The petition will be held at the Service Center until requested by another office.

(B) Determining Eligibility to Apply for Adjustment of Status .

After a petition has been approved, you must determine its disposition. A beneficiary may go to an American Consulate abroad to obtain an immigrant visa or, in some cases, he or she may apply to adjust status in the United States. If the petitioner does not specifically indicate that the beneficiary will apply for adjustment, forward the petition to the Department of State's National Visa Center (NVC). If the petitioner indicates that the beneficiary will apply for adjustment of status, you must determine whether the alien is prima facie eligible to apply for adjustment. If the adjustment application has already been filed under the concurrent filing procedure, refer the case to the appropriate office or unit for adjudication of the adjustment application.

[Section 245](#) of the Act governs adjustment of status. An alien must have been inspected and admitted or paroled into the United States in order to be eligible for adjustment of status. Crewmen, aliens who have engaged in unauthorized employment or who have failed to maintain lawful nonimmigrant status continuously, and those who were admitted in transit without a visa (TWOV) are not eligible to adjust status. Therefore, if the beneficiary of a petition entered without inspection or falls into one of the precluded classes, you must send the petition to the NVC.

If the alien is not barred from adjustment for one of the reasons mentioned above, but his or her priority date is not current (or within 60 days of being current), you should determine if there is a reasonable chance that he or she will be able to maintain lawful status until the priority date becomes current. For example, if an alien is in H or L status, and has several years to go before reaching the limit in that status, the petition can be held for adjustment. If, however, the alien is an otherwise qualified B-2 visitor and the State Department Visa Bulletin shows it will be months or years before the priority date becomes current, it is unlikely that he or she would be able to maintain status long enough to adjust. In that case, the petition would be sent to the NVC.

There are many reasons why an alien may not actually be able to adjust status; however, you are determining only whether the alien is prima facie eligible to apply for adjustment of status. You do not, at this stage, have to look beyond the information given on the petition about his or her nonimmigrant status nor do you have to verify that information is correct. You also do not have to determine whether the alien is inadmissible for any of the grounds in [section 212](#) of the Act, requires a waiver of the two-year foreign residence requirement, has engaged in unauthorized employment, or is otherwise ineligible for adjustment.

(2) Denial of Petitions . The denial should be written in clear and comprehensive language, and all grounds for denial should be covered. Refer in your denial to the controlling statute or regulations and to any relevant precedent decisions. As required in [Chapter 10.7\(b\)\(5\)](#) of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The denial decision may be appealed to the Administrative Appeals Office (AAO). The denied petition should then be held locally until the time period for an appeal or motion has passed.

Note: A petitioner may not appeal a denial decision that is based upon lack of labor certification. A petitioner may appeal a case that is denied because the alien does not qualify for the Schedule A designation or for the waiver of the job offer in the national interest, or because you determine that a successor in interest does not exist.

A copy of the denial must be forwarded to the Employment and Training Administration in Washington, DC, in the case of a petition denied because a petitioner does not desire or intend to employ the alien in the position for which certification was issued.

If an appeal is filed, that appeal must be reviewed to see if the grounds of denial have been overcome. If so, the appeal should be treated as a motion and the case approved. If the grounds of denial have not been overcome, an A-file is created to house the record of proceeding and the case must be forwarded to the AAO in accordance with [8 CFR 103.3](#) .

(3) Revocation .

An employment-based visa petition may be revoked, in the agency's discretion, "for good and sufficient cause" under [section 205](#) of the Act. A petition may also be withdrawn upon a written request for withdrawal of the petition filed by the petitioner (who in some cases may also be the beneficiary). The regulations governing revocation of immigrant visa petitions are found at [8 CFR 205.1](#) and [8 CFR 205.2](#) .

Note

Under section [203\(g\)](#) of the Act, the Department of State may also terminate the registration of an alien with an approved I-140 petition if such alien fails to apply for an immigrant visa within one year of notification of availability of a visa number. The same statutory provision provides for reinstatement of registration in certain cases.

Also see the adopted decision in Matter of V-S-G- Inc. As a result of this decision, USCIS will provide a notice of intent to revoke (NOIR) and/or a notice of revocation (NOR) to a beneficiary who has an approved Immigrant Petition for Alien Worker (Form I-140), an Application to Register Permanent Residence or Adjust Status (Form I-485) that has been pending for 180 days or more, and has properly requested to port. The porting request is proper when it has been reviewed and favorably adjudicated by USCIS prior to the issuance of a NOIR or NOR. Prior to January 17, 2017, a beneficiary requested to port by submitting a request in writing. Beginning on January 17, 2017, a beneficiary must request to port by submitting Form I-485 Supplement J.

(m) Precedent Decisions .

Listed below are some precedent decisions that relate to employment-based immigrants. These cases were decided under previous law and regulations and the principles involved may or may not be applicable to the current situation. They are offered as a guide to previous ways of thinking about the issues involved in employment-based petitions and may be helpful in your consideration of those same issues under current regulations. For example, before 1965 a professional did not need a job offer but had to establish that he or she intended to engage in his or her profession in the United States. Decisions related to that issue may have a bearing on the current provision that an alien of extraordinary ability must establish that he or she intends to continue work in the area of expertise in the United States. This list is not all inclusive; in your research you may find other cases that are just as helpful.

- [Matter of Semerjian](#) , 11 I. & N. Dec. 751 (R.C. 1966). Qualified engineer must have bona fide intent to engage in profession in the United States.

- [Matter of Imondi and Constantini](#) , 12 I. & N. Dec. 261 (R.C. 1967). Petition to accord beneficiaries sixth preference classification as sample stitchers denied because evidence did not establish that the beneficiaries, although experienced as tailors, possessed the requisite experience in the particular duties described on the labor certification.

- [Matter of Vittore](#) , 12 I. & N. Dec. 402 (R.C. 1967). Petition for a house painter is approved where labor certification attested to a shortage of like labor in the United States notwithstanding the only requirement was that the beneficiary have experience painting houses.

- [Matter of Din](#) , 12 I. & N. Dec. 413 (Acting R.C. 1967). Notwithstanding beneficiary has a bachelors and masters degree as well as experience as a forester, he is not eligible for third preference because he intends to be in the United States only during vacation periods and does not intend to be employed in the United States.

- [Matter of Bozdogan](#) , 12 I. & N. Dec. 492 (R.C. 1967). Sixth preference petition approved to work as hairdresser since state requirements that a license or permit be obtained to practice or work in a trade or occupation does not affect eligibility for preference classification.

- [Matter of Sonegawa](#) , 12 I. & N. Dec. 612 (RC. 1967). Petition approval not precluded by the fact that the petitioner's net profit for the previous year is not commensurate with the proffered salary where the petitioner's business has increased, expectations of continued increase in business and profits are reasonable, and it has been established that she has the ability to meet the wage given on the labor certification.

- [Matter of Maher](#) , 12 I. & N. Dec. 680 (R.C. 1968). Alien graduate of a foreign dental school

with full and unrestricted license to practice in his country is eligible for third preference notwithstanding he will not be immediately eligible to practice dentistry in the United States.

- **Matter of Romano** , 12 I. & N. Dec. 731 (R.C. 1968). Petition for a live-in maid denied where the evidence does not establish that the beneficiary (petitioner's mother) is physically able to do the work, that the petitioner is able to pay the wage offered or that he intends to actually employ her to perform all the duties set forth in the job offer.

- **Matter of Smith** , 12 I. & N. Dec. 772 (D.D. 1968). A temporary help agency can offer permanent employment if it acts as the actual employer and the employment offer is not of a temporary or seasonal nature.

- **Matter of Sun** , 12 I. & N. Dec. 800 (R.C. 1968). The petitioner, an alien against whom an order of deportation is outstanding, cannot offer "permanent" employment since his status is not settled or stabilized.

- **Matter of Klein** , 12 I. & N. Dec. 819 (BIA 1968). Beneficiary granted admission with immigrant visa even though at the time of his arrival there was not a job available as specified in the job offer. Change in the petitioner's circumstances unknown to the beneficiary when he departed abroad and the fact that the beneficiary has found similar employment in the same position in the same geographic area, coupled with an absence of fraud on part of beneficiary judged not an impediment to his immigration. (Note: Today a waiver under section 212(k) of the Act would be available.)

- **[Matter of Kim](#)** , 13 I. & N. Dec. 16 (R.C. 1968). Alien is denied third preference classification despite his qualification as a pharmacist because he does not intend engage in the profession of pharmacist.

- **Matter of Ling** , 13 I. & N. Dec. 35 (R.C. 1968). An alien with a degree in business administration is denied third preference because he failed to establish in what area, if any, in the field of business administration he intends to engage or is qualified.

- **Matter of Yau** , 13 I. & N. Dec. 75 (R.C. 1968). Alien denied third preference as an engineer where his B.S. degree in electronic engineering was obtained from a non-accredited school and the combination of his degree and practical training do not constitute the equivalent of a baccalaureate degree (under present regulations, equivalence is not allowed).

- **[Matter of Chu](#)** , 13 I. & N. Dec. 122 (R.C. 1969). For purposes of the former third preference immigrant visa classification (superseded by the Immigration Act of 1990, or "IMMACT90"), an alien physician who graduated from a medical school in the United States is a qualified member of the professions notwithstanding he has not completed his internship. Further, there is no requirement that the

alien must be able to engage in the qualifying profession immediately if admitted to the United States; it is sufficient or if the alien can show a bona fide purpose or intent to work here in the qualifying endeavor.

- *Matter of Zang*, 13 I. & N. Dec. 290 (Acting D.D. 1969). With respect to petition filed for classification under the former sixth preference immigrant visa category (superseded by IMMACT 90), such petition was denied for licensed contractor where no labor certification has been issued despite the fact that the beneficiary, as an immigrant investor, would have been exempt from the labor certification requirement were he to have instead applied for immigrant status as an investor.

- *Matter of Katigbak*, 14 I. & N. Dec. 45 (R.C. 1971). Alien beneficiary must be fully qualified for preference status at the time of filing the immigrant visa petition. Education or experience acquired subsequent to the filing date of the visa petition (if required for visa classification) may not be considered in support of such petition, since doing so would unfairly provide the alien with a priority date at a time when he or she was not qualified for the preference status sought.

- *Matter of Tamayo*, 15 I. & N. Dec. 426 (BIA 1975). Subject denied admission as immigrant with sixth preference petition where he knew at the time he obtained his immigrant visa and departing his country for the United States that the job offer had been withdrawn even though he had obtained other employment in the same occupation. A labor certification is valid only for the particular job for which it is issued. (Compare with *Matter of Klein* above.)

- *Matter of Great Wall*, 16 I. & N. Dec. 142 (R.C. 1977). Petition denied where the record revealed that at the time the petition was filed the petitioner did not and could not pay the proffered wage and the petitioner did not establish that he would be able to pay the salary offered in the future.

- *Matter of Wing's Tea House*, 16 I. & N. Dec. 158 (Acting R.C. 1977). The beneficiary must possess all of the qualifications on the labor certification as of the date it was accepted for processing by any office of the DOL; experience acquired after the filing date cannot be considered because to do so would accord the beneficiary a priority date as of a date when he was not qualified for the benefit sought.

- *Matter of Danquah*, 16 I. & N. Dec. 191 (BIA 1975). Beneficiary denied adjustment of status where premised upon an approved visa petition on the ground that the labor certification (and therefore the visa petition) was no longer valid since she was unable to assume the position specified in the certification prior to obtaining adjustment of status. An applicant for adjustment of status is assimilated into the position of an applicant for an immigrant visa. Since an application for an immigrant visa must be denied if the job offer has been withdrawn at the time the alien applies for the visa, the beneficiary's application for adjustment must also be denied, irrespective of the alien's good faith or her intention to accept such employment were it to be made available again.

- *Matter of Medical University of South Carolina*, 17 I. & N. Dec. 266 (R.C. 1978). To qualify under the U.S. Department of Labor's Schedule A, Group II (exemption from normal labor certification

requirements, currently set forth at 20 CFR 656.5(b)), the alien must be of exceptional ability in the sciences or arts (except performing arts) and be so far above the average member of his field that he will clearly be an asset to the United States.

- **Matter of Sunoco Energy Development Co.**, 17 I. & N. Dec. 283 (R.C. 1979). Petition denied because labor certification issued for a specific geographic area other than the one where the beneficiary was to be employed. Immigrant visa petition must be supported by a labor certification for the particular job opportunity and be premised upon a shortage of workers in the area where employment actually will take place.

- **Matter of Allan Gee, Inc.**, 17 I. & N. Dec. 296 (R.C. 1979). A corporation is a separate legal entity existing independently of its stockholders; therefore, the sole stockholder may be the beneficiary of a petition filed by a viable corporation sponsoring the alien as an executive/manager of the U.S. entity. (No labor certification was involved in this case.)

- **Matter of United Investment Group**, 19 I. & N. Dec. 248 (Commr 1984). For a visa petition, the actual partnership which existed when the job offer was made and certified must continue and intend to employ the beneficiary as certified. A separately entered partnership or newly constituted partnership may not be a successor in interest to the original partnership.

- **Matter of A. Dow Steam Specialties, Ltd.**, 19 I. & N. Dec. 389 (Commr 1986). A foreign company, that is, one having no location or status in the United States cannot offer to permanently employ an alien in the United States. Only a U.S. based branch, affiliate, or subsidiary of the foreign organization may file such a petition.

- **[Matter of Silver Dragon Chinese Restaurant](#)**, 19 I. & N. Dec. 401 (Commr 1986). An occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation. The prospective employee's interest in the company, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants.

- **[Matter of Harry Bailen Builders](#)**, Inc., 19 I. & N. Dec. 412 (Commr 1986). An alien who abandons residence after being admitted for permanent residence to take up a certified job offer cannot subsequently be the beneficiary of an employment-based immigrant visa petition without the petitioner first seeking a new labor certification. Once the job offer was filled initially, it ceased to exist, and the petitioner and alien cannot use the same labor certification again, even if the job to be filled is the same as that previously held by the alien.

- **Matter of Dial Auto Repair Shop, Inc.**, 19 I. & N. Dec. 481 (Commr 1986). Where successorship-of-interest is recognized, the petitioner bears the burden of proof to establish eligibility in all respects as of the date the application for labor certification was originally accepted for processing by the DOL, including ability to pay the proffered wage. The predecessor's ability to pay the proffered wage at that time, and not the successor's subsequent ability to pay the proffered wage, is relevant. (At the time of this decision, DOL had to determine successorship.)

\ afm \ Adjudicator's Field Manual \ Chapter 22 Employment-based Petitions, Entrepreneurs and Special Immigrants [Updates all of Chapter 22 as of 09-12-2006] \ 22.2 Employment-based Immigrant Visa Petitions (Form I-140)

[Previous Document](#) | | [Next Document](#)