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Washington, DC 20529

U.S. Citizenship and Immigration Services

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Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFIT CENTER
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, GLYNCO
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, ARTESIA

FROM: Michael Aytes /s/
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U.S. of Citizenship and Immigration Services
Department of Homeland Security

Date: September 12, 2006

SUBJECT: *AFM* Update: Chapter 22: Employment-based Petitions (AD03-01).

This memorandum revises Chapter 22 to the *Adjudicator's Field Manual* (*AFM*) by adding several new chapters and by revising and re-designating the existing chapters. Chapter 22 pertains to the adjudication of employment-based (EB) immigrant visa petitions for EB-1 through EB-5 classification.

Questions regarding this memorandum should be directed through channels to Alexandra Haskell in the Business and Trade Branch of Service Center Operations. This new *AFM* Chapter will be included in the next "I-Link" release. Accordingly, the *AFM* is revised as follows:

☞ 1. The *AFM* **Table of Contents** for Chapter 22 is revised to read:

Chapter 22. Employment-based Petitions, Entrepreneurs and Special Immigrants.

22.1 Prior Law and Historical Background
22.2 Employment-based Petitions (Forms I-140)
22.3 Special Immigrant Cases
22.4 Employment Creation Entrepreneur Cases

☞ 2. Chapter 22 of the *AFM* is revised to read:

Chapter 22. Employment-based Petitions, Entrepreneurs and Special Immigrants.

22.1 Prior Law and Historical Background
22.2 Employment-based Petitions (Forms I-140)
22.3 Special Immigrant Cases
22.4 Employment Creation Entrepreneur Cases

References:
Law: 203(b) and 204(a), (b), and (c)
Regulations: 8 CFR 204.5, 205.1, 205.2, and 20 CFR 656

22.1 Prior Law and Historical Background.

(a) <u>Pre-1952 Act</u>. The requirement of filing a petition to bring workers into the U.S. evolved out of a legislative desire to exercise control over immigration that might negatively affect the American labor market. Restriction of immigration to protect the American labor market is a relatively recent concern of the legislature. In fact, initial federal controls over immigration formulated in 1875 sought to do no more than bar the admission of certain types of "undesirable" persons. In general, no numerical restraints of any kind were enacted until the quota acts of 1921 and 1924. Even with major revisions of the immigration laws in 1924 and as recently as 1952, with certain exceptions, there was still no firmly established policy of "protecting the job market."

(b) <u>The Act of June 27, 1952</u>. Under the Act of 1952, aliens subject to the labor exclusion of 212(a)(14) of the Act were admissible *unless* the Secretary of Labor made a prescribed disqualifying certification. At that time, the control was meant as an emergency measure that could be invoked in a time of economic stress or crisis.

In the original 1952 Act, section 203(a)(1) stated: "to qualified quota immigrants whose services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the United States." Ch. 477, Title II, Ch. 1, section 203, 66 Stat. 178 (June 27, 1952)(as amended).

(c) <u>The 1965 Amendments</u>. By legislative amendment in 1965, the Act of 1952 was dramatically altered, abandoning the "national origins" concept and instituting separate numerical limits for Eastern and Western Hemisphere immigrants, dividing immigrants into:

- immediate relatives,
- special immigrants, and
- other immigrants - including all the "preference" classifications.

Immediate relative and certain special immigrants were not restricted by numerical limitations, but all preference immigrants were numerically limited. The 1965 amendments introduced a new control barring the entry of certain classes of immigrants unless they first obtain a certification from the Department of Labor (DOL) that their coming to the United States would not adversely affect American labor.

1965--Subsec. (a). Pub. L. 89-236 substituted provisions setting up preference priorities and percentage allocations of the total numerical limitation for the admission of qualified immigrants, consisting of unmarried sons or daughters of U.S. citizens (20 percent); husbands, wives, and unmarried sons or daughters of alien residents (20 percent plus any unused portion of class 1); members of professions, scientists, and artists (10 percent), married sons or daughters of U.S. citizens (10 percent plus any unused portions of classes 1-3); brothers or sisters of U.S. citizens (24 percent plus any unused portions of classes 1 through 4); skilled or unskilled persons capable of filling labor shortages in the United States (10 percent); refugees (6 percent); otherwise qualified immigrants (portion not used by classes 1 through 7); and allowing a spouse or child to be given the same status and order of consideration as the spouse or parent, for provisions spelling out the preferences under the quotas based on the previous national origins quota systems. Subsec. (b). Pub. L. 89-236 authorized issuance of quota immigrant visas under the previous national origins quota system in the order of filing in the first calendar month after receipt of notice of approval for which a quota number was available.

(d) <u>1976 Amendments</u>. Subsec. (a)(27). Pub. L. 94-571, enacted on 10/10/1976, struck out the subparagraph (A) provision defining the term ”special immigrant" to include an immigrant born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him and restricting issuance of an immigrant visa until consular officer was in receipt of a determination made by the Secretary of Labor pursuant to former provisions of section 1182(a)(14) of this title; and redesignated as subparagraphs (A) to (D) and former subparagraphs (B) to (E).

Prior to this change all natives of the Western Hemisphere had to be special immigrants or immediate relatives. They were not eligible for preference immigrant status until this change. The change was effective January 1, 1977 (the first month more than 60 days from date of enactment-10/20/1976). [**<u>Historical note</u>**: under the Act and Regulations in effect from 1965 until 1977, an exemption from the labor certification requirement for Western Hemisphere would be obtained by establishing that one had a child who was a U.S. citizen. One established a priority date for IV issuance by filing a form that verified the existence of the U.S. citizen child (Note: adjustment of status was prohibited for Western Hemisphere natives even as immediate relatives).]

(e) <u>IMMACT 90 and Subsequent Legislation</u>. The Immigration Act of 1990 (IMMACT 90) divided the preference categories into 2 groups (family-based and employment-based) and expanded the number of employment-based categories from two (the former third and sixth preferences) to three classifications. Those three classifications were further divided into subcategories dealing with specific groups of immigrant workers. IMMACT 90 also placed numerical limits on several special immigrant classifications and added new provisions for entrepreneurs. The classifications under IMMACT 90 include:

- First preference or "priority workers" under section 203(b)(1) of the Act (discussed in Chapter 22.2(b) of this field manual)
  - Aliens with extraordinary ability
  - Outstanding professors and researchers
  - Certain multinational executives and managers

- Second preference under section 203(b)(2) of the Act (discussed in Chapter 22.2(c) of this field manual)
  - Members of the professions holding advanced degrees
  - Aliens of exceptional ability

- Third preference under section 203(b)(3) of the Act (discussed in Chapter 22.2(d) of this field manual)
  - Skilled workers
  - Professionals
  - Other workers

- Fourth preference or "certain special immigrants" under section 203(b)(4) of the Act (discussed in Chapter 22.3 of this field manual)
  - Ministers of religion & other religious worker cases as defined in section 101(a)(27)(C) of the Act
  - Employees of U.S. Government Abroad defined in section 101(a)(27)(D) of the Act
  - Panama Canal Zone Employees defined in sections 101(a)(27)(E), (F) and (G) of the Act
  - Foreign Medical Doctors defined in section 101(a)(27)(H) of the Act
  - International Organization Employees defined in section 101(a)(27)(I) of the Act
  - Juvenile Court Dependents defined in section 101(a)(27)(J) of the Act
  - U.S. Armed Forces Members defined in section 101(a)(27)(K) of the Act
  - NATO personnel defined in section 101(a)(27)(L) of the Act; and
  - International broadcast personnel defined in section 101(a)(27)(M) of the Act.

  Note 1: Although not included in section 101(a)(27) of the Act at the time of the enactment of IMMACT 90, the "L" and "M" special immigrant classifications are

subject to the numerical limitation of section 203(b)(4) of the Act.

Note 2: The Special Immigrant classifications defined in sections 101(a)(27)(A) (returning lawful permanent residents) and 101(a)(27)(B) (certain former citizens of the U.S.) of the Act are not numerically restricted and are not included in the fourth preference categories. Because these classifications do not require a petition, they are not discussed in this field manual chapter, but are instead included in the discussions in Chapter 23 of this field manual.

- Fifth Preference or "employment creation immigrants" under section 203(b)(5) of the Act (discussed in Chapter 22.4 of this field manual)
  - Entrepreneurs or investors

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, the employer must demonstrate that the alien beneficiary is qualified for the position certified by the Department of Labor (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.

(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 Adjudication Issues. The issues discussed in this subchapter pertain to the adjudication of I-140 petitions in general. Additional information on section 203(b)(1) (first employment-based preference) issues is contained in subchapter 22.2(c) of this field manual; additional information on section 203(b)(2) (second employment-based preference) issues is contained in subchapter 22.2(d) of this field manual; and additional information on section 203(b)(3) (third employment-based preference) issues is contained in subchapter 22.2(e) of this field manual.

(1) [5 USC 552(b)(2) and 5 USC 552(b)(7)(E)]

(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 similarly 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 page 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.

Implementation of PERM Labor Certification System DOL's permanent labor certification system (PERM) implemented on March 28, 2005 effectively eliminated 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 Form ETA-9089, which can be filed electronically or by mail, replaced the Form ETA-750, and is designed to expedite the labor certification process. DOL's National Processing Centers strive to adjudicate electronically filed PERM applications in approximately 30 – 45 days (please note that not all PERM applications are processed within this timeframe, and in certain cases, processing takes substantially longer than the 30 – 45 day period); those applications filed by mail may take significantly longer to process. At the time of the implementation of the PERM system, DOL had approximately 365,000 pending labor certification applications that were filed under the old paper-based permanent labor certification process, some of which were filed as long ago as April of 2001. DOL devised the following backlog reduction strategy to address the backlog of Form ETA-750 labor certifications still pending as of March 28, 2005:

- DOL created Backlog Reduction Centers tasked with collecting and processing all of the Form ETA-750 labor certification applications that were pending with the State Workforce Agencies (SWAs) and DOL Regional Offices on or before March 27, 2005. The applications were shipped to the backlog reduction centers where information from the Form ETA-750 was entered into a national tracking system for labor certifications (a process that is still on-going) in order to process them according to DOL guidelines set forth in 20 CFR 626 prior to March 28, 2005. To every extent possible, the pending Form ETA-750 labor certification applications are processed on a first-in-first-out principal; however, due to a variety of factors, DOL processes some cases out of turn.

- U.S. employers who have not already had a job order placed by the SWA for the original application may withdraw the pending Form ETA-750 labor certification application and re-file under the new PERM system. The PERM filing will retain the priority date of the original filing if DOL determines that 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.) If the new PERM application is not "identical" to the original filing, the PERM application will be assigned a new priority date.

(D) Labor Certifications filed with DOL on or after March 28, 2005. Pursuant to 20 CFR 656.17, the Application for Permanent Employment Certification (Form ETA-9089) replaced the Application for Alien Employment Certification (Form ETA-750) on March 28, 2005. Form ETA-9089 contains all of the pertinent information detailing the specifics of the job offer and the alien beneficiary that were contained in the ETA-750 Part A and Part B. The ETA-9089 may be filed with DOL through the mail or it may be filed electronically. To be valid, the Form ETA-9089 must be signed by the U.S. employer in Section N, the alien beneficiary in Section L, and the form Preparer, if any, in Section M; contain the DOL certification stamp; and be signed and dated by the DOL certifying officer in Section "O." of the form.

Exception: Employers filing applications on behalf of aliens to be employed as professional athletes on professional team sports will continue to use special procedures that were put in to place prior to the implementation of the PERM regulations. They will continue to file their applications using the Form ETA-750 and must file the applications at DOL-ETA's national office in Washington, DC. The Form ETA-750 is still available on the DOL-ETA website.

U.S. employers commonly, and mistakenly, believe that an approved labor certification means that DOL has also certified that the alien beneficiary named on the labor certification qualifies for the position. This is not accurate, as the authority to determine qualifications for nonimmigrant and immigrant classifications rests with USCIS. 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. DOL requires a statement of qualifications of the alien and supporting documentation to:

- Help ensure that the procedure for seeking labor certification is actually based on a need for the services of a specific individual, thereby eliminating the possibility that petitioners or agents will apply for "blanket type" certifications in advance for unknown individuals, just in case an actual need for someone arises, and

- Help guarantee that the proposed job description on the offer of employment submitted by the petitioner is not tailored to the specific skills, education, or experience of the alien beneficiary, thereby calling into question whether a bona fide job opportunity actually exists.

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. Dec. 45 (R.C. 1971) and *Matter of Wing's Tea House*, 16 I. & N. Dec. 158 (Acting R.C. 1977).

(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 supercedes 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.

<u>Labor Application Notice:</u> 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.

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 as a customer service convenience. 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.

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: _____

This notice is provided in compliance with 20 CFR 656.10(d). Any person may provide documentary evidence bearing on the application to the Certifying Officer of the U.S. Department of Labor holding jurisdiction over the location of the proposed employment. Contact information for these offices can be found on the Internet at www.foreignlaborcert.doleta.gov/foreign/contacts.asp.

This notice is being provided to workers in the place of intended employment by the following means:

☐ 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) <u>Successor in Interest</u>.

On March 17, 1992, the Agency entered into an agreement with the DOL that the Agency (now USCIS) will make determinations regarding successor in interest on I-140s when a labor certification has already been issued. Successor in interest occurs when the prospective employer of an alien (and the entity that filed the certified labor certification application form) has undergone a change in ownership, such as an acquisition or merger, or some other form of change such as corporate restructuring or merger with another business entity, and the new or merged, or restructured entity assumes substantially all of the rights, duties, obligations, and assets of the original entity. The petitioner must submit evidence of the change in ownership, the restructuring of the organization, or merger (usually by the submission of a contract or agreement). The petitioner must also submit evidence that the predecessor company had the ability to pay the wage at the time the application for labor certification was filed and, of course, that the successor company continues to have that ability.

Some corporate changes that occur may not involve a successor in interest. For example, a mere change in a Company's name or physical location without other organizational changes might not require the filing of a new or amended petition. However, when the physical location of proposed employment appears to have moved beyond the metropolitan statistical area (MSA) of the employment location specified on the labor certification application, if necessary, you may request advice from the Employment and Training Administration regarding the application of the definition of "area of intended employment" for purposes of continued validity of an approved labor certification.

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:

(a) The petitioner has not established that it is a successor in interest;

(b) The predecessor company did not have the ability to pay the proffered wage as of the time of filing the labor certification application;

(c) The successor company does not have the ability to pay the proffered wage; or

(d) The labor certification is not valid for the new physical location 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.

Adjudicators should issue an RFE to the petitioner if the petitioner has failed to satisfy in its petition that it is in fact a qualified successor in interest. 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. If the petitioner does not provide a new original labor certification or sufficient evidence to overcome the concerns outlined in the RFE, then the petition should be denied.

(6) <u>Request for Substitution</u>.

On occasion, employers will request that a new alien be substituted for the alien listed on an individual labor certification because, for example, the original beneficiary named on the approved labor certification application no longer intends to work for the petitioning employer. In such substitution filings, the petitioning employer will file 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 certifications substitutions are allowed ONLY if the original beneficiary named on the approved labor certification, or any previously substituted alien, have 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 Part A of 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-750, 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.

Note: [5 USC 552(b)(2) and 5 USC 552(b)(7)(E)]

(7) <u>Submission of a Photocopy of Labor Certification</u>. 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: DOL will only provide duplicate labor certifications at the written request by USCIS for labor certifications filed prior to March 28, 2005. You should only make the request to DOL if it is in conjunction with an I-140 petition being 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. (For example, you 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, you should be alert to the possibility that the original was not, in fact, lost or destroyed, but rather used on behalf of another alien. If another alien has 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 made on USCIS letterhead and should include:

1. Attorney name;
2. Petitioner's name;
3. Beneficiary's name;
4. ETA case number;
5. Priority Date;
6. An annotation reflecting that the case was filed on Form ETA-750;
7. Proper fee, signature and all required supporting documents;
8. A print screen showing that the case has been certified.
9. 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 labor certification request should be sent to the DOL Backlog Reduction Center with jurisdiction over the location where the beneficiary is to be employed, (either the Philadelphia Processing Center or the Dallas Processing Center.) A list of each processing center's area of jurisdiction, mailing address, and phone/fax numbers can be accessed at http://atlas.doleta.gov/foreign/contacts.asp.

(10) <u>Duplicate Labor Certification Requests for Labor Certifications Filed on or after March 28, 2005</u>:

DOL will provide duplicate labor certifications at the request of a Consular or Immigration officer, an alien, employer, or an alien's or employer's attorney or agent for labor certifications filed on or after March 28, 2005. The written request for a duplicate labor certification must be made to the DOL National Processing Center where the labor certification was issued, (either the Atlanta Processing Center or the Chicago Processing Center), and 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 or Immigration officer, regardless of who makes the request. (See 20 CFR 656.30(e)) A list of each national processing center's area of jurisdiction, mailing address, and phone/fax numbers can be accessed at http://atlas.doleta.gov/foreign/contacts.asp.

A request for duplicate Form ETA-9089 labor certification should be made on USCIS letterhead and should include:

1. Attorney name;
2. Petitioner's name;
3. Beneficiary's name;
4. ETA case number;
5. Priority Date;
6. An annotation reflecting that the case was filed on Form ETA-9089;
7. Proper fee, signature and all required supporting documents;
8. A print screen showing that the case has been certified.
9. 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."

(11) <u>Invalidation of a Labor Certification</u>.

DOL regulations at 20 CFR 656.30(d) provide:

> "(d) After issuance labor certifications are subject to invalidation by the INS [now 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 a RA [DOL Regional Administrator] or to the [DOL] director, the RA or Director, as appropriate, shall notify in writing the INS [now USCIS] 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."

The 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, and you should apply the same standards here as you would in a removal case. If you invalidate the labor certification under this provision, you should then deny the corresponding I-140 petition due to the lack of a valid labor certification.

> **Note 1:** You do not need to issue a separate notice of invalidation of the labor certification; the inclusion of the reasons for, and the finding of, invalidation in the denial of the I-140 petition is sufficient. In other words, you must explain what fraud or willful misrepresentation of a material fact is contained in the labor certification. You 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 the appropriate DOL processing center. The mailing addresses for the DOL processing centers are posted at the www.doleta.gov website.

Invalidated Form ETA-750 applications should be sent to the appropriate DOL Backlog Elimination Centers based on the location of the employment opportunity specified on the form as follows:

Philadelphia Backlog Processing Center: Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Vermont, Virgin Islands, Virginia, Washington, DC, West Virginia.

Dallas Backlog Processing Center: Alaska, Arizona, Arkansas, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana,

Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming.

Invalidated Form ETA-9089 applications should be sent to the appropriate DOL Perm National Processing Centers based on the location of the employment opportunity specified on the form as follows:

Atlanta National Processing Center: Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Vermont, Virgin Islands, Virginia, Washington, DC, West Virginia.

Chicago National Processing Center: Alaska, Arizona, Arkansas, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming.

Note 2: Although you cannot invalidate a labor certification due to inaccuracies which do not rise to the level of fraud or willful misrepresentation, before you approve an I-140 petition you must be satisfied that all of the information contained in the petition (which includes the supporting labor certification) is true. If you find that the labor certification contains significant inaccuracies, you may deny the petition due to the petitioner's failure to meet his or her burden of proof, even if you cannot establish fraud or willful misrepresentation.

(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) <u>Priority Dates</u>.

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) [5 USC 552(b)(2) and 5 USC 552(b)(7)(E)]

(f) <u>Section 204(c) Fraudulent Marriage Prohibition</u>

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 discuss 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. 8 CFR 204.5(h)(3) and (4) describe various types of evidence which 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 204.5(h)(3). Submission of the types of evidence noted in 8 CFR section 204.5(h)(3), while a minimum requirement 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. There may be cases, however, where the petitioner may in fact be able to establish the beneficiary's eligibility by submitting the minimum types of evidence

required. In such cases, there is no need to request additional evidence. In short, in adjudicating a petition seeking to have a person classified as an alien of extraordinary ability, the general rule applies: look at the quality, rather than the mere quantity of the evidence. In making your determination, bear in mind, again, that 8 CFR 204.5(h)(3) represents the *minimum* evidence that may be submitted, and that meeting this minimum evidentiary requirement will not automatically establish eligibility. In all cases, the evidence must be evaluated to determine if it in fact establishes that the alien is extraordinary by demonstrating that he or she has garnered sustained national or international acclaim in the field of endeavor.

Certain evidence submitted in support of a petition may overlap with two or more of the ten criteria set forth in 8 CFR 204.5(h)(3). You must evaluate the quality of the evidence submitted on a case-by-case basis to determine whether the evidence submitted satisfies the minimum required to establish eligibility for E11 classification.

Note that 8 CFR 204.5(h)(4) provides that petitioners may submit "comparable evidence" to establish a beneficiary's eligibility in cases where the standards set forth in 8 CFR 204.5(h)(3) do not apply. In cases where such comparable evidence is submitted, it is reasonable to require the petitioner to explain why 8 CFR 204.5(h)(3) does not apply. Examples of such comparable evidence are provided later in this section.

(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. 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 uninterrupted and ongoing. If an alien

was recognized for a particular achievement several years ago, you must determine whether the alien has maintained a comparable level of acclaim in the field of expertise since the alien was originally afforded that recognition. An alien may have achieved extraordinary ability in the past but then failed to maintain a comparable level of acclaim thereafter. On the other hand, depending on the nature of the acclaim, a one-time major achievement, such as a Nobel Prize, might satisfy this requirement, provided it is probative of the fact that the alien has reached the summit of his occupation. In the absence of such a major, international recognized award, however, the petitioner may not rely solely on the alien beneficiary's past achievements to establish the alien's eligibility for classification as an alien of extraordinary ability under section 203(b)(1)(A) of the INA. As noted in paragraph (A) above, the regulations allow the petitioner to provide evidence that the alien beneficiary has the requisite sustained acclaimed and recognition by submitting evidence of *at least three* of the following ten criteria set forth in 8 CFR 204.5(h)(3).

1. Alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the alien's field (8 CFR 204.5(h)(3)(i)). In evaluating evidence submitted in support of this criterion, the focus should be on the alien beneficiary's receipt of the award, as opposed to his or her employer's receipt of the award. In addition, you should determine whether the prize or award itself meets the requisite standard of national or international recognition for excellence. In determining the nature of the award or prize, relevant considerations would include, but not be limited to, the number of awardees or prize recipients as well as any regional limitations on competitors (a provincial award limited to competitors in that province, for example, might have little national significance.) Another relevant consideration is that awards with national recognition will probably be reported in the media. While such media reports may not focus on the alien, they might be relevant to the degree of recognition of the award itself.

Note: Scholarships, fellowships and competitive postdoctoral appointments generally are not the type of "nationally or internationally prizes or awards for excellence" that would establish that the alien has achieved sustained national or international acclaim and recognition in the alien's field of expertise. Similarly, most academic or junior athletic/music awards would not satisfy this criterion

2. Membership in Associations (8 CFR 204.5(h)(3)(ii)). In order to satisfy 8 CFR 204.5(h)(3)(ii), the petitioner must present persuasive evidence to establish that the alien’s significant achievements in the field were the basis for granting the alien’s membership in the association. Membership in an organization that is based solely on a level of education or years of

experience in a particular field is not sufficient. Paying a fee or subscribing to an association's publications is also not sufficient. Similarly, you should note that membership in certain associations can be a requirement of an occupation, such as union membership or guild affiliation for actors. Compulsory membership in an association is not indicative of the alien's advanced standing in the field. Thus, for example, mere membership in a State bar, in the American Bar Association (ABA), or in the American Immigration Lawyers Association (AILA) should not be considered sufficient, as lawyers are generally required to be members of a State bar, most members of the bar are eligible to become ABA members, and most immigration lawyers may be eligible to join AILA. Rather, to satisfy 8 CFR 204.5(h)(3)(ii), the petitioner must show that the association's membership is exclusive, in the sense that membership is limited solely to those who have been judged by their peers as having attained outstanding achievements in the field for which classification is sought. An alien's election by her professional peers and colleagues to the National Academies of Sciences and Engineering, an honorific society that currently generally bases membership nominations on original research and accomplishment in the field, therefore would likely be sufficient to satisfy 8 CFR 204.5(h)(3)(ii).

3. Published Material About the Alien (8 CFR 204.5(h)(3)(iii)). To satisfy 8 CFR 204.5(h)(3)(iii), the petitioner should submit evidence of published material in professional or major trade publications or in other major media publications about the alien's contributions to the field that clearly identifies the circulation and the intended audience of the publication. Regional publications or publications aimed at a particular ethnic or language group generally will be sufficient only if the publications are considered the top publications in the field, or the publications enjoy national or international circulation and reputation beyond that of the publications' intended audience and the material about the alien beneficiary is published in a section of the publication that is national in scope. Examples of such qualifying regional publications might include The Wall Street Journal, the New York Times, the New England Journal of Medicine, or the Christian Science Monitor. The burden is on the petitioner to establish that a particular publication is covered by this regulatory provision.

In addition, in order to satisfy 8 CFR 204.5(h)(3)(iii), the evidence should establish the significance of the published material submitted as it relates to the alien's contributions and how the alien is one of that small percent who have risen to the very top of his or her field. Articles about the organizations and projects that the alien beneficiary is affiliated with or involved in, but that do not mention the alien or only mention him or her in

passing, generally are not persuasive. The alien and his or her accomplishments should be the focal point of the published material. In addition, 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. Please note that, absent further documentation establishing how the alien is extraordinary in a particular field, mere citations to an alien's work are not sufficient to satisfy 8 CFR 204.5(h)(3)(iii).

4. Judge of the work of others (8 CFR 204.5(h)(3)(iv)). Evidence that the beneficiary has been, or is judging the dissertation work as an external referee, particularly of a Ph.D. in an area of prominent research or study, could also be probative of the alien's outstanding ability as a judge of the work of others for purposes of satisfying 8 CFR 204.5(h)(3)(iv). In addition, evidence that an alien has been asked to review scientific or scholarly articles written by others in the field prior to their acceptance for publication in journals or periodicals that enjoy widespread circulation and readership in the field of endeavor may satisfy this criteria. You should bear in mind; however, when evaluating such evidence, that it is being submitted to establish that the alien has sustained national or international acclaim as well as recognition in the alien's field of expertise. It is therefore reasonable for the petitioner to submit an explanation of the significance of the alien's experience in judging the work of others in the field.

5. Alien's contributions to the field. (8 CFR 204.5(h)(3)(v). To satisfy 8 CFR 204.5(h)(3)(v), the petitioner must submit evidence of the beneficiary's original contributions of major significance to the alien's field of endeavor. Although funded and published work may be "original," this alone is insufficient; you must evaluate whether the work constitutes a major, significant contribution to the field. Note that, in evaluating such evidence, a footnoted reference to the alien's work without evaluation, an unevaluated listing in a subject matter index, or a negative or neutral review of the alien's work would be of little or no value. On the other hand, peer-reviewed presentations at academic symposia or peer-reviewed articles in scholarly journals that have provoked widespread commentary and/or received acclaim from others working in the field, unsolicited requests for copies of the alien's scientific abstracts or published research papers, entries (particularly a goodly number) in a citation index which cite the alien's work as authoritative in the field, or participation by the alien as a reviewer for a peer-reviewed scholarly journal would very likely be probative of the beneficiary's ability.

Scientific Citations: In the scientific community, citations are generally

required when a researcher uses the research findings of another scientist as part of their own research. Such citations are, therefore, not considered to be particularly probative as to whether the alien has extraordinary ability in the field of endeavor, unless shown otherwise. When evaluating citations to an alien beneficiary's work, you must determine the significance of the alien beneficiary's original contribution to the field that resulted in the citation. In some cases, inclusion of a lengthy list of referenced articles that often accompany published articles might be probative of the alien's ability because the alien's contributions served as a significant, original "find" that spurred the subsequent references and citations. Similarly, frequent citation by independent researchers may demonstrate widespread interest in, and reliance on, the beneficiary's work and may serve as persuasive evidence that the beneficiary is authoritative in the field. For example, published research by others in the field that is based on, and consistently references and cites, an advanced technology for monitoring environmental ecosystems developed by the alien beneficiary would likely be relevant to a finding of extraordinary ability. On the other hand, published research by others in the field that cites to the alien beneficiary's similar research techniques (i.e., cites confirming that the alien beneficiary's previous research was also conducted using a 4 ml vial), without accrediting any significant research findings to the alien, may not be probative.

Bear in mind that scientific researchers live constantly under the cloak of potential plagiarism and so must always give credit to other investigators involved in the same small area of investigation. Such credit may or may not say anything to the merits of the other scientists' work. Some of the listings that you may see are simply aids to finding literature available in the field and not an evaluation of the work. It is for you to evaluate the evidence submitted to determine whether such citations are an indication that the alien has the requisite ability.

6. Scholarly Articles. To satisfy 8 CFR 204.5(h)(3)(vi), the petitioner must present evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media. The evidence should establish the significance or value of the published material and how it has set the alien apart as one of the small percent who has risen to the very top of his or her field. The most persuasive evidence in this regard is unsolicited contemporaneous documentation that shows that independent experts or organizations in the field consider the published material to be significant or that the beneficiary's findings or methodologies have been widely cited or adopted by the industry or professional community at large. For example, peer-reviewed

presentations at academic symposia or peer-reviewed articles in scholarly journals that have provoked widespread commentary and /or received acclaim from others working in the field of endeavor, might satisfy this criterion. On the other hand, a book by the alien that was published by a "vanity" press, or a poster or abstract presentation at an academic symposium that garnered little or no commentary from others involved in the field would be of little or no value. Likewise, the alien's internal work product that was created for his or her employer or its clients as part of the scope of the alien's employment is not generally considered to be significant for purposes of satisfying 8 CFR 204.5(h)(3)(vi) (which requires publication of material in professional or trade publications or major media), unless shown otherwise through corroborative, independent documentary evidence.

Note: It is significant to note that the March 31, 1998 Report and Recommendations of the Association of American Universities' Committee on Postdoctoral education, set forth (on page 5 of its report) recommended definition of a postdoctoral appointment. Among the factors in this definition were the acknowledgement that the "appointment is viewed as preparatory for a full-time academic and/or research career" and that "the appointee has the freedom, *and is expected*, to publish the results of his or her research or scholarship during the period of the appointment." (emphasis added) Thus, this national organization considers publication of a researcher's work to be "expected," rather than a mark of distinction, among postdoctoral researchers. Note: When scientific citations are presented as evidence of the alien's publications, please refer to the discussion in the section on 8 CFR 204.5(h)(3)(v), above.

Note also: Articles that were published in foreign language periodicals should be accompanied by an English translation sufficient to demonstrate that the alien beneficiary authored the piece. See 8 CFR 103.2(b)(3). Obtaining full English translations of published material can be burdensome, thus you should not request complete translations unless absolutely necessary to evaluate to quality of the material. In many cases, such an evaluation of the material can be sufficiently conducted without a complete translation. The evidence should also show the date that the article was published and the circulation and readership of the periodical.

Note also: In some cases, such as those involving scientists, this criterion might be satisfied by a showing of conference presentations, provided such evidence is indicative of the requisite sustained national or international acclaim.

7. Display of the alien's work in the field at artistic exhibitions or showcases. (8 CFR 204.5(h)(3)(vii)). In evaluating evidence submitted to meet this criterion, the mere fact that the alien has had his or her work exhibited does not necessarily establish the alien's extraordinary ability within the field. The petitioner must demonstrate the exhibition or showcase is itself of distinction and that the alien beneficiary's exhibited work at such an exhibition or showcase was itself of such significance as to be probative of the fact that the alien has sustained national or international acclaim in his or her field of expertise. On the other hand, where the evidence submitted shows merely that an artist or performer had a "bit part" role in a significant artistic performance or that the alien's overall contribution to an exhibit displayed at a distinguished venue was very minor, such evidence may not be very persuasive in terms of establishing that this criterion has been met.

8. Performance in a critical or leading role for organizations or establishments having a distinguished reputation. (8 CFR 204.5(h)(3)(viii)). Pursuant to 8 CFR 204.5(h)(3)(viii), evidence must show that the alien has performed in a "leading or critical role" within a distinguished organization or establishment. The evidence must establish that the alien has played more than just a supporting role and that the organization or establishment has a distinguished reputation or has hosted other distinguished productions in the recent past. In evaluating such evidence, you must examine the position that the alien was hired or appointed to fill on behalf of the organization or establishment and determine whether the alien's position therein is (or was), a "leading" or "critical" one. You must also determine whether the organization or establishment itself is in fact distinguished.

Note: In evaluating the alien's position, the key question is whether the alien's role was leading or critical to the entire organization, as opposed to a mere department within the organization.

Note also: Documentation about the organization or establishment that does not specifically refer to the beneficiary and his or her contributions is not persuasive evidence of the significance of the role played by the beneficiary on behalf of the organization; it merely goes to the reputation of the organization or establishment itself.

9. High salary or remuneration (8 CFR 204.5(h)(3)(ix)). To satisfy this criterion, the petitioner must show that the alien beneficiary has commanded a significantly high salary or remuneration for services, in relation to others in the field. In this regard, evidence that the alien has commanded a salary or other remuneration significantly higher than others at the alien's workplace would not be sufficient to establish the alien's

outstanding role within his or her field without further, objective additional evidence. Additionally, the submission of official U.S. Department of Labor prevailing wage rate information for the alien's field of endeavor, without other corroborative evidence, generally would not meet this criterion, as it might not establish whether the salary or other remuneration is "significantly" higher than that of others in the field. Such prevailing wage rate information should normally be accompanied by other documentation satisfactorily explaining why the petitioner believes the alien beneficiary's salary or remuneration is significantly higher than that of others in the alien's specific field.

10. Commercial success in the performing arts (8 CFR 204.5(h)(3)(x)). This criterion focuses on volume of sales and box office receipts. 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 establish eligibility under this provision.

(F) Comparable evidence (8 CFR 204.5(h)(4). This regulatory provision, as noted above, provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary's eligibility, if 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 criteria are readily applicable to the alien's occupation and, if not, whether the evidence provided is really comparable to the objective criteria listed in the regulations. General assertions that 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 clearly 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 principal tutelage of the alien might provide support to a petitioner's argument that the success of this athlete is evidence comparable to that in 8 CFR 204.5(h)(3)(i), since that section might not readily apply to certain types of athletic coaches, if coaches in their field do not typically receive nationally recognized coaching awards.

2) A bestselling author might be able to demonstrate evidence comparable to the specific evidence required for commercial success in 8 CFR 204.5(h)(3)(x) even though he or she is not a performing artist.

3) Election to a national all-star 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.

Note also: As discussed above, in certain cases, one type of evidence may be sufficient to satisfy more than one of the criteria set forth in 8 CFR 204.5(h)(3). Similarly, in some cases, one type of "comparable" evidence submitted in connection with 8 CFR 204.5(h)(4) might satisfy more than one of the criteria set forth in 8 CFR 204.5(h)(3).

(G) Evaluating E11 petitions filed on behalf of O-1 nonimmigrants: 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. 8 CFR 204.5(i) describes the evidence which must be

submitted in support of an I-140 petition for an outstanding professor or researcher. The same general guidelines discussed in the preceding section relating to the adjudication of a petition for an alien of extraordinary ability apply to the adjudication of a petition for an outstanding professor or researcher. However, unlike the requirement for the E11, alien of extraordinary ability petition, that the alien must have garnered sustained *national or international* acclaim in the field of endeavor, 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. See 8 CFR 204.5(i)(3)(i). In addition the petition must be accompanied by an offer of permanent, tenured, or tenure-track employment (in the case of research positions, the offer must be for a "permanent" research position) 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. 8 CFR 204.5(i)(3)(ii) and (iii). The definitions for "permanent" and "academic field" can be found in 8 CFR 204.5(i)(2).

(B) Employment Offer. Although a labor certification is not required for the E12 classification, 8 CFR 204.5(j)(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 may be in the form of a letter from the petitioning employer (i.e., U.S. university or institution of higher learning or a department, division, or institute of a private employer) stating that the employment is a tenured or tenure-track teaching position or a “permanent” research position in the alien’s academic field. See 8 C.F.R. § 204.5(i)(3)(iii)(A)-(C).

The word “Permanent”, in reference to a research position, is defined as:

> “either tenured, tenure-track, or for an indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.”
> 8 C.F.R. § 204.5(i)(2).

Note: Many research positions may be permanent, but not be tenure-track. As noted below, such a position may still qualify for E12 classification.

(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 § 203(b)(1)(C) of the Act, 8 U.S.C. § 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 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 an 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) <u>Special Considerations Relating to EB-2 Cases</u>.

(1) <u>Advanced Degree Professionals</u>.

(A) <u>Eligibility</u>. 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) <u>Foreign Equivalent</u>. 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 E21 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)(B). If a doctorate is customarily required for the profession, however, the regulations reflect that the alien must have the doctorate or a foreign equivalent degree. 8 CFR 204.5(k)(2).

An alien can satisfy the advanced degree requirement by holding any of the following: (1) 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 (2) 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 bachelor's degree or a foreign equivalent degree will be ineligible for this classification.

(C) Credentials Evaluation: In cases involving foreign degrees, you may favorably consider a credentials evaluation performed by a certified independent credentials evaluator who has provided a credible, logical and well-documented case for such an equivalency determination that is based solely on the foreign degree(s). In addition, you may accept an evaluation performed by a school official that has the authority to make such determinations and is acting in his or her official capacity with the educational institution. Nevertheless, 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 final determination continues to rest with the adjudicator.

(D) Advanced degree position. Mere possession of an advanced degree is not sufficient for establishing eligibility for E21 classification. Pursuant to 8 CFR 204.5(k)(4)(i), the petitioner must also 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. The petitioner must demonstrate that it, 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 factor is not whether a combination of more than one of the foreign degrees or credentials is comparable to a single U.S. bachelor's degree, but rather that a combination of foreign degrees or credentials meets the educational requirements that have been specified by the employer on individual labor certification approved by the Department of Labor.

The requirement that the position require, at a minimum, a person holding an advanced degree has resulted in a particular problem involving E21 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 DOL's Occupational Outlook Handbook 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. Because of the long waiting periods currently required for issuance of

third-preference employment-based immigrant visas, a “gap” between the available supply of visa eligible nurses and the high demand for nursing services has developed.

(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) Evidence - 8 CFR 204.5(k)(3)(ii) provides that, in order to show the requisite exceptional ability, the petition must be accompanied by at least three of six criteria (set forth in 8 CFR 204.5(k)(3)(ii)). This evidence must be indicative of or consistent with a degree of expertise significantly above that ordinarily encountered. Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria; qualifications possessed by every member of a given field cannot demonstrate a degree of expertise "significantly above that ordinarily encountered." Note that section 203(b)(2)(C) of the Act 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. To meet the criterion set forth in 8 CFR 204.5(k)(3)(ii)(F), formal recognition in the form of certificates may have more weight than letters prepared for the petition "recognizing" the alien's achievements.

(B) Comparable Evidence - 8 CFR 204.5(k)(3)(iii) allows for the submission of evidence "comparable" to that set forth in 8 CFR 204.5(k)(3)(ii) if the criteria set forth in 8 CFR 204.5(k)(3)(ii) do not readily apply to a petition filed on behalf of an "alien of exceptional ability."

(C) Schedule A, Group II Labor Certification - Adjudicators should be careful not 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) <u>E21 Professional Athletes</u>.

Some E21 petitions are filed on behalf of professional athletes and are supported by a certified Form ETA-750 requesting that the athlete be classified as an alien of exceptional ability in the arts. (Labor certification applications for professional

athletes, unlike most other types of labor certification applications, are still filed with DOL using the Form ETA-750 and are processed at DOL-ETA's national office in Washington, DC.) 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 INA. This holding has been interpreted to apply to E21 petitions filed on behalf of any athlete. However, as noted below, in determining such eligibility, 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 INA:

(A) In General. A petition for classification of a professional athlete under section 203(b)(2)(A) of the INA, 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 212(a)(5)(A)(iv) of the INA.

(B) Definition. - For purposes of paragraph (A), the term "professional athlete" means an individual who is employed as an athlete by -

> (1) 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
>
> (2) any minor league team that is affiliated with such an association. See section 212(a)(5)(A)(iii).

The petitioner must provide, as initial evidence, certain 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 such 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.

> Note: An approved labor certification filed on behalf of a professional athlete does not necessarily mean that the alien qualifies as an athlete of exceptional ability as defined in section 203(b)(2) of the INA and 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 filed 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 I-140 petition. For example, the alien could be cut from the major league roster prior to adjudication of the petition, thereby removing the job offer that formed the basis of the I-140 and resulting in a denial of the petition. Similarly, a player may suffer a career-threatening injury while in the middle of a multi-year contract, thereby precluding him from playing in the sport for the foreseeable future. Even if the player remains under contract and on a major league roster as of the date of the I-140 filing, he or she may have a marginal record at best (such as a lower than average batting record or substantially higher percentage of incomplete passes) with no other compensating skills or achievements to offset the deficiency. As a result, he or she would not likely meet the standard for an exceptional alien.

(4) <u>National Interest Waiver of Job Offer</u>.

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.

Legacy INS initially proposed limiting the national interest waiver to occupations where self-employment is common or traditional or to an occupation in the DOL's pilot program. However, commenters to the proposed rule questioned whether the waiver of job offer really meant waiver of labor certification. Therefore, the final regulation deleted the requirement of self-employment or listing in the pilot program and states only that it must be shown that the waiver would be in the national interest.

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 an 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 specifically 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, you must give the petitioner the right to appeal that decision.

(5) Petition for a Physician Which Is Supported by Individual Labor Certification.

Section 212(a)(5)(B) excludes alien physicians who are coming to the United States principally to perform services as a member of the medical profession unless they have passed parts I and II of the National Board of Medical Examiners Examination (NBME exam) or an equivalent exam as determined by the Secretary of Health and Human Services and they are competent in written and oral English. However, this exclusion ground only applies to alien physicians seeking admission as an alien classified under section 203(b)(2) or section 203(b)(3) of the Act. In addition, the definition of "graduates of a medical school" in section 101(a)(41) excepts aliens who are of national or international renown in the field of medicine. Therefore, if a physician qualifies under section 203(b)(1) as an alien of extraordinary ability or an outstanding professor or researcher, passage of the NBME exam is not necessary.

Physicians who are immigrating under sections 203(b)(2) or 203(b)(3) are required to pass the NBME exam. However, the DOL regulations require passage of the exam to obtain a labor certification. Therefore, if the alien has an individual labor certification, he has already demonstrated compliance with this requirement to the DOL and does not have to submit evidence of it with the I-140.

That leaves the physician immigrating under section 203(b)(2) who is requesting a waiver of the job offer requirement in the national interest. Such an alien does not have an individual labor certification and, therefore, must submit evidence of passage of the examination with the I-140. Remember, this only applies if the physician will be involved in patient care. Researchers, teachers, etc. are not subject to this requirement. In addition, the exclusion ground does not apply if the alien was fully and permanently licensed to practice medicine in a State of the U.S. on January 9, 1978, and was practicing medicine in a State of the U.S. on that date.

(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. Reserved.

(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) Sheepherders. A Department of Labor approved Application for Alien Employment Certification is not required for an alien sheepherder who has been legally employed as a nonimmigrant sheepherder 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 sheepherder 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 is 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 and/or regulations and to any relevant precedent decisions. The denied petition should then be placed in "call-up" to await appeal. The denial decision may be appealed to the Administrative Appeals Office (AAO), unless the denial is based upon lack of labor certification. Remember that cases which are 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, may be appealed.

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.

(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 is 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 provided 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.)

22.3 Special Immigrants.

References: Section 101(a)(27)(C) and section 203(b)(4) of the Act; 8 CFR 204.5(m).

(a) General.

Special Immigrant classifications are defined in section 101(a)(27) of the Act. Other than section 101(a)(27)(A) (LPR returning from a temporary visit abroad) and section 101(a)(27)(B) (former U.S. citizen), each of these classifications requires an immigrant visa petition. Special immigrant classifications are subject to the numerical limitations on admissions set forth in section 203(b)(4) of the Act:

- An overall limitation of 7.1 percent of the annual worldwide level for employment-based immigrants (but special immigrants under sections 101(a)(27)(A) and (B) and not included);
- An annual limit of 5,000 on the number of religious workers described under section 101(a)(27)(C)(ii)(I) and (II) (which does not include ministers of religion); and
- An annual limit of 100 on the number of broadcasters who may be admitted as principal immigrants under section 101(a)(27)(M) (i.e., the spouses and children of such broadcasters are not included in the limitation).

(b) Ministers of Religion & Other Religious Worker Cases.

(1) General.

An alien, or any person in behalf of the alien, may file an I-360 visa petition for classification under section 203(b)(4) of the Act. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years **immediately** preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States. The alien must have also been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for the two-year period **immediately** preceding the filing of the petition.

The alien must be coming to the United States for the purpose of:

- Working solely as a minister for a religious denomination;
- Working in a professional capacity in a religious vocation or occupation for the organization; or
- Working in a religious vocation or occupation for the organization or a bona fide organization which is affiliated with the religious denomination.

(A) Minister of Religion. A minister of religion is defined as an individual authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized clergy of that religion. There must be a reasonable connection between the activities performed and the religious calling of the minister. This term does not include lay ministers not authorized to perform such duties. Evidence that would establish a person qualifies as a minister of religion would be a certificate of ordination, license, or formal letter of conferral. In addition to those generally thought of as ministers (ministers, priests, rabbis), the following individuals have also been found to be ministers of religion:

- Commissioned officers of the Salvation Army;
- A deacon of any recognized religious denomination if ordination or similar authorization has taken place which confers the power to:
  – Lead a congregation and preach;
  – Administer the sacraments (baptism, communion, etc.) or their equivalents; and
  – Give benedictions.
- Practitioners and nurses (not readers and lecturers) of the Christian Science Church (Church of Christ, Scientist); and
- Buddhist monks, if coming for the sole purpose of acting as a minister of the Buddhist religion, to conduct religious worship and to provide other traditional religious services.

(B) Worker in a Professional Capacity. The definition of professional capacity is an activity in a religious vocation or occupation for which the minimum requirement is the possession by the beneficiary of a U.S. baccalaureate degree or a foreign equivalent degree in the field of endeavor or a closely related field.

(C) Worker in a Religious Vocation or Occupation.

- Religious vocation is defined as a calling to religious life as evidenced by the demonstration of commitment practiced in the religious denomination, such as the taking of vows. Examples of persons with religious vocations include, but are not limited to, nuns, monks, and religious brothers and sisters.

- Religious occupation is defined as an activity which relates to a traditional religious function. As such, it should be distinguished from someone who will be employed by a religious organization to perform purely non-religious functions.

  For example, even though churches (like all other buildings) occasionally need the services of a plumber, a plumber does not perform a religious function, even while he or she is fixing leaky pipe at a church. Examples of persons in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. Examples of positions that do not qualify as religious occupations include janitors, maintenance workers, clerks, fund raisers, or persons involved solely in the solicitation of donations.

(2) Religious Organizations.

In order to sponsor or employ a religious worker, an organization must be a bona fide nonprofit religious organization in the United States, or if the proposed position is in a religious vocation or occupation, a bona fide organization which is affiliated with the religious denomination. The denomination must be one that the beneficiary has been a member of for at least the two years immediately preceding the time of application for classification as a religious worker.

- Religious denomination is defined as a religious group or community of believers having some form of ecclesiastical government, a creed, or a statement of faith. Some form of worship, a code of doctrine and discipline, and religious services and ceremonies are required. There must be established places of worship and religious congregations or comparable indications of the existence of a bona fide religious denomination by the religious denomination. An interdenominational religious organization which is exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code of 1986 will be defined as a religious denomination as well.

- A bona fide nonprofit religious organization in the U.S. is defined as an organization exempt from taxation pursuant to section 501(c)(3) of the Internal

Revenue Code of 1986, or an organization which has never sought such exemption but establishes to the satisfaction of USCIS that, if it had applied, would be eligible for tax exempt status.

- A bona fide *organization which is affiliated with the religious denomination* is defined as an organization which is both closely associated with the religious denomination and exempt from taxation pursuant to section 501(c)(3).

(3) Evidence Requirements.

The burden is upon the alien seeking classification as a special immigrant religious worker to provide the required documentation to establish eligibility.

(A) The applicant must establish through documentation that the organization for which the alien intends to work qualifies as a non-profit organization. This evidence must be in the form of either:

- Documentation showing that the organization is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations; or

- Documentation which is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3).

  Note 1: The religious organization does not necessarily have to be already exempt from taxation; it merely has to establish that it is eligible for such exemption.

  Note 2: According to the IRS, all organizations listed in the Official Catholic Directory are tax exempt. Therefore, a copy of the directory page which lists the organization would be considered acceptable evidence.

- If the alien is to work in a non-ministerial and nonprofessional capacity for a bona fide organization which is affiliated with a religious denomination, a letter from the authorized official must explain how the affiliation exists. A tax-exempt certificate indicating that the affiliated organization is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 is also required in this instance. In addition, an affiliated organization may submit its articles of incorporation, brochures, flyers and other documentation to establish its close association with the religious denomination. An affiliated organization need not establish that it was classified as a “church” by the

Internal Revenue Service under section 101(b)(1)(A)(i) of the Internal Revenue Code.

(B) A letter from an authorized official of the religious organization in the United States which establishes:

- If the alien's religious membership was maintained, in whole or in part, outside the United States, and that the foreign and domestic religious organizations belong to the same religious denomination;

- That the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work; and

- As appropriate:

  (i) If the alien is a minister, he or she is authorized to conduct religious worship for that denomination and to perform other duties usually performed by authorized members of the clergy of that denomination, including a detailed description of those duties; or

  (ii) If the alien is a religious professional, he or she has at least a U.S. baccalaureate degree or its foreign equivalent and that such a degree is the least required for entry into the religious profession; or

  (iii) If the alien is to work in a religious vocation or occupation, that he or she is qualified in the religious vocation or occupation. Evidence of such qualifications may include, but are not limited to, evidence that the alien is a monk, nun, or religious brother or sister, or that the type of work to be done relates directly to a traditional religious function;

- The arrangements made, if any, for remuneration for services to be rendered by the alien. This must include the amount and source of any salary, a description of any other types of remuneration to be received (including housing, food, clothing, and any other benefits to which monetary value may be affixed), and a statement whether such remuneration shall be in exchange for services rendered;

(C) Any appropriate additional evidence which the examining officer may request relating to the religious organization, the alien, or the affiliated organization. Such additional documentation may include, but is not limited to, diplomas, degrees,

financial statements, or certificates of ordination. No prior petition, labor certification, or prior approval notices shall be required.

(4) <u>Qualifying Employment and Permanent Employment</u>.

The two years of prior qualifying employment dates back from the date the petition is filed and must be continuous. The employment to be undertaken permanently must be full-time. The prior employment also had to be with the same religious denomination, as defined in 8 CFR 204.5(m)(2). Two years of part-time prior employment will not qualify an alien for this classification. Continued study by a minister of religion during the two-year period will not be considered disqualifying provided that the petitioner can demonstrate that such study is consistent with the alien's ministerial vocation and provided that the alien continues to perform the duties of a minister of religion. Continued study by an alien in a religious vocation will not be considered disqualifying if it can be demonstrated that the study is consistent with the alien's vocation. Any breaks in carrying on the religious vocation or occupation for the two-year period will be evaluated on a case-by-case basis. Usually such breaks are only excusable if they are for reasons beyond the alien's control.

(5) <u>Job Offer</u>.

The offer of employment in the United States need not be for paid services. In the religious context, individuals often do not receive pay, but rather remuneration in the form of board, room, and incidental expenses. Regardless of the type, remuneration should be for full-time services. The alien should not be dependent upon supplemental employment and solicitation of funds for support.

(6) <u>Closing Action</u>.

(A) <u>Approval</u>. The examiner places his/her approval stamp in the Action Block on the petition and signs his/her name. The examiner then annotates the proper classification and consulate. The **SR1** classification is for an alien working in a professional capacity, a religious vocation or occupation, while the **SD1** classification is for an alien working as a minister of religion. The petition will be forwarded to the Department of State's Processing Center. If the petition indicates that the alien will apply for adjustment to permanent residence in the United States, the approved petition will be retained for consideration with the application for permanent residence (Form I-485).

(B) <u>Denial</u>. If the petition is denied, the petitioner shall be informed of the reasons for denial and of his/her right to appeal. The denial may be appealed to the Administrative Appeals Office.

(7) Validity of Approved Petitions. A petition is valid indefinitely, unless revoked under Section 203(e) or 205 of the Act.

(8) Precedent Decisions.

The following list of precedent decisions involving Special Immigrants employed in religious occupations can provide some guidance:

- ***Matter of Varughese***, 17 I&N Dec. 399 (BIA 1980). In determining whether or not one has been ordained as a minister and has carried on the vocation of a minister of a recognized religious denomination, acceptable evidence includes a letter or other appropriate statement signed by the Superior or Principal of the religious denomination. An alien has not carried on the vocation of minister of the church as defined by section 101(a)(27)(C) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(27)(C), when only 9 hours per week are devoted to church activities, and the position is of a voluntary nature (delegated by the minister).

- ***Matter of Rhee***, 16 I&N Dec. 607 (BIA 1978). Ordination by a recognized religious organization is not conclusive as to who qualifies as a minister for purposes of the Act. The alien's training, experience and duties were in the field of music, not theology.

- ***Matter of Faith Assembly Church*,** 19 I&N Dec. 391 (Commissioner 1986). Any minister, who for the previous 2 years has been or will be engaged in part-time ministerial employment is precluded from the special immigrant classification, which requires the minister to have been and intend to be engaged solely as a minister of the religious denomination.

- ***Matter of N***, 5 I&N Dec. 173 (Central Office 1953). The Salvation Army is a religious denomination having a bona fide organization in the United States within the meaning of section 101(a)(27)(F) of the Act. Its commissioned officers are ministers of a religious denomination within the meaning of that section. The following are guidelines which should be considered in arriving at a determination as to whether the a petitioner is a bona fide religious denomination within the contemplation of section 101(a)(27)(F)(i):
    (1) Is the petitioner a worldwide religious organization having a distinct legal existence; a recognized creed and form of worship?
    (2) Does the petitioner have a definite and distinct ecclesiastical government?
    (3) Does the petitioner have a formal code of doctrine and discipline?

(4) Does the petitioner have a distinct religious history?
(5) Does the petitioner have a membership, not associated with any other church or denomination?
(6) Does the petitioner have officers ministering to its congregation, ordained by a system of its own?
(7) Does the petitioner have established places of religious worship?
(8) Does the petitioner have religious congregations and religious services?
(9) Does the petitioner operate a Sunday school for the religious instruction of the young? and
(10) Does the petitioner operate schools for the preparation of its ministers, who in addition to conducting religious services, perform marriage ceremonies, bury the dead, christen children, and advise and instruct the members of their congregations?

- ***Matter of Sinha***, 10 I&N Dec. 758 (Regional Commissioner 1964). A petitioner has failed to establish that it is a religious denomination within the meaning of section 101(a)(27)(F)(i) of the Act if: (1) its members may be associated with other religious denominations; (2) there are no prescribed standards for the selection, training and ordination of its ministers; and (3) the society does not have a distinct form of worship. The petitioning organization is financially unable to pay the beneficiary a salary for his services as minister and therefore failed to establish that the beneficiary will be engaged solely in carrying on the vocation of minister of a religious denomination as required by the statute.

- ***Matter of Church of Scientology International***, 19 I&N Dec. 593 (Commissioner 1988). A detailed comparison between the Roman Catholic Church and the Church of Scientology with regards to a qualifying relationship between the foreign and U.S. organization for nonimmigrant intra-company transferees. Personnel of religious organizations who meet labor certification and L-1 visa requirements may be granted these benefits.

- ***Matter of Bennett***, 19 I&N Dec. 21 (BIA 1984). An alien who is admitted to the U.S. as a nonimmigrant visitor, who without permission of USCIS engages in purely religious activities on behalf of a church, and who is compensated for those activities, is deportable for failure to maintain status. That he now qualifies as a special immigrant minister and intends to work for the same church which has been employing him, does not affect his status.

- ***Matter of Hall***, 18 I&N Dec. 203 (BIA 1982). The respondent, who engages in fund-raising activities as part of his missionary work for the Unification

Church, is employed within the contemplation of section 245(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1255(c)(2). Therefore, his employment without the permission of USCIS bars him from adjusting his status in the United States to that of a lawful permanent resident. In considering the applicability of section 245(c)(2) of the Act, the Government does not improperly dictate to the Unification Church the permissible scope of its missionaries' duties by isolating the respondent's fund-raising activities from his purely ministerial duties. Determining the status or duties of an individual within a religious organization is a distinct question from determining whether that individual qualifies for status or benefits under our immigration laws, and authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States.

- ***Matter of Dupka***, 18 I&N Dec. 282 (District Director 1981). Where an alien, prior to applying for the benefits of section 245 of the Act, and without USCIS authorization, performs duties and receives remuneration identical to the alien's anticipated duties and remuneration as a special immigrant minister under section 101(a)(27)(C)(i) of the Act, 8 U.S.C. § 1101(a)(27)(C)(i), the alien is employed within the meaning of section 245(c) of the Act, 8 U.S.C. 1255(c) , and is barred from the benefits of this section. But see *Matter of Bennett*, 19 I. & N. Dec. 21 (BIA 1984).

(m) Employees of U.S. Government Abroad.

Section 101(a)(27)(D) of the Act allows for special immigrant status for an alien and his or her spouse and children who is an employee or is an honorably retired employee of the U.S. Government outside the United States. Fifteen (15) years of employment is required. The principal officer of a Foreign Service establishment must first recommend the grant of such status. Such recommendations are to occur only in exceptional circumstances. The Secretary of State must ratify the recommendation and must find it in the national interest to grant such status, upon which the alien may petition to the Department of State for special immigrant status. The USCIS plays no role on the adjudication of this petition.

An approved petition is valid for six months but may be extended for up to an additional year by the Department of State.

(n) Panama Canal Zone Employees.

Under Section 101(a)(27)(E) of the Act, certain former employees of the Panama Canal Zone and their spouses and children may receive special immigrant status. Such employees include those employed for at least one year by the Zone or Zone government and who were employees on the date the treaty transferring the Canal to Panama took effect, June 16, 1978. Retired former employees who were employed for fifteen years

are also eligible, or five years in the case of an employee whose personal safety is endangered because of such employment.

(o) Foreign Medical Doctors. Reserved

(p) International Organization Employees. Reserved

(q) Juvenile Court Dependents.

(1) General.

Adjustment of status based on designation as a Special Immigrant Juvenile (SIJ) is a humanitarian form of relief available to foreign-born minors who enter the US child welfare system due to abuse, neglect, or abandonment. It provides eligible juveniles with a means of legalizing their immigration status in the United States.

(2) Background.

The Immigration Act of 1990 (IMMACT 90) created section 101(a)(27)(J) of the Immigration and Nationality Act (the Act), establishing a special immigrant classification for juvenile aliens (juveniles) who were declared dependent upon a juvenile court in the United States where the court found them eligible for long-term foster care, and where the court or an administrative agency found it would not be in the juvenile's best interest to be returned to his/her (or his/her parents') country of nationality or last habitual residence. Classification as a Special Immigrant Juvenile allowed this individual to apply for adjustment of status to that of lawful permanent resident.

Later amendments (the Miscellaneous and Technical Immigration and Nationality Amendments of 1991) exempted special immigrant juveniles from inadmissibility provisions restricting the admission of aliens who are likely to become public charges, aliens without labor certification, and aliens who entered the United States without proper documents.

The amendments provided waivers of most other grounds of exclusion. The amendments also provided that all special immigrant juveniles shall be deemed, for the purposes of section 245(a) of the Act, to have been paroled into the United States and exempted them from compliance with any of the requirements of section 245(c) of the Act.

Additionally, the amendments provided that neither section 101(a)(27)(J) of the Act nor section 245(h) of the Act could be construed as authorizing an alien to apply for admission or be admitted to the United States in order to obtain special immigrant status under section 101(a)(27)(J) of the Act.

The 1998 Appropriations Act took effect on November 26, 1997. Section 113 of that act amended the special immigrant juvenile provision of section 101(a)(27)(J) of the Act in three ways.

- First, Congress amended this provision to limit eligibility for this status to juveniles declared dependent on juvenile courts *on account of abuse, neglect, or abandonment* (emphasis added).
- Second, Congress provided that juveniles are eligible for the status only if the Secretary (formerly the Attorney General) expressly consents to the dependency order serving as a precondition to the grant of status.
- Third, Congress amended the provision to prohibit juvenile courts from determining the custody status or placement of a juvenile who is in the actual or constructive custody of the federal government unless the Secretary specifically consents to the court's jurisdiction to make the determination. Policy guidance has governed implementation of the 1997 legislation. *See* Memorandum from William R. Yates, Memorandum #3-Field Guidance on Special Immigrant Juvenile Petitions (May 27, 2004).

(3) <u>Filing Requirements</u>.

Although current regulations allow for separate filing of the Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant) and the Form I-485 (Application To Register Permanent Residence or Adjust Status), USCIS strongly encourages concurrent filing of both forms.

(A) <u>Form I-360</u>. The Form I-360 must be supported by:

(i) Court order declaring dependency on the juvenile court or placing the juvenile under (or legally committing the juvenile to) the custody of an agency or department of a State;

(ii) Determination from an administrative or judicial proceeding that it is in the juvenile's best interest not to be returned to his/her country of nationality or last habitual residence (or the juvenile's parents' country of nationality or last habitual residence) (the "home country"); and

(iii) Proof of the juvenile's age in the form of documents such as birth certificate, passport, official foreign identity document issued by a foreign government, such as a cedula or cartilla.

(B) <u>Form I-485</u>. The Form I-485 must also be supported by documentation:

(i) Birth certificate or other proof of identity in compliance with 8 CFR 103.2;

(ii) A sealed medical examination (Form I-639);

(iii) Two full-frontal passport-style color photographs, taken within 30 days;

(iv) Evidence of inspection, admission or parole (if available; but, remember, SIJ applicants are, by law, deemed to be paroled);

(v) If the applicant is over 14, s/he must also submit a Form G-325A (Biographic Information);

(vi) If the juvenile has an arrest record, s/he must also submit certified copies of the records of disposition; and

(vii) If the juvenile is seeking a waiver of a ground of inadmissibility that is not otherwise automatically waived under section 245(h)(2)(A) of the Act, s/he must submit a Form I-601 (Application for Waiver of Ground of Excludability) and supporting documents establishing that waiver is warranted for humanitarian purposes, family unity, or in the public interest (supporting documents could include affidavits, letters, press clippings, etc.).

(C) Form I-765. Applicants may also submit a Form I-765 (Application for Employment Authorization) based on the pending Form I-485, if needed.

(D) Applicants may also submit a request for a fee waiver, pursuant to 8 CFR 103.7(c). SIJ applicants may be eligible for fee waivers for Forms I-360, I-485 and I-765. Requests for fee waivers should be adjudicated expeditiously, and consistent with prevailing policy guidance. *See* Memorandum from William R. Yates Memorandum #3-Field Guidance on Special Immigrant Juvenile Petitions (May 27, 2004). In considering the applicant's inability to pay the fee, adjudicators should pay particularly close attention to fee waiver guidance relating to consideration of humanitarian or compassionate reasons in support of a request. *Id.* at 4. Recommendations on fee waiver requests must be forwarded to the appropriate supervisor for decision.

(4) Adjudication of Form I-360.

(A) Threshold Eligibility Criteria.

(i) The threshold eligibility criteria are as follows. On the date the application is adjudicated, the applicant must be:

- under 21 years of age
- unmarried; and
- the subject of a dependency order, or have been adopted or placed in guardianship after being subject to a dependency order. Note that a child adopted or placed in guardianship after receiving a dependency order continues to be considered eligible for long-term foster care under 8 CFR 204.11(a), and, necessarily, remains considered a juvenile court dependent based on the prior dependency order.

(ii) The applicant must also be eligible to adjust status to lawful permanent resident, subject to section 245(h) of the Act.

(B) Substantive Eligibility Requirements.

(i) The dependency order:

- Must be issued by a juvenile court, which could include any court whose jurisdiction includes determinations as to juvenile dependency. Examples (depending on the state jurisdiction): Juvenile Court; Family Court; Probate Court
- Must deem the juvenile eligible for long term foster care
- Must be based on a finding that the child suffered abuse, neglect or abandonment, as defined in the specific jurisdiction.
  - The order must reflect a determination of "abuse, neglect, or abandonment," but the language of the order may vary based on individual state law, *e.g.*, a juvenile who becomes eligible for long term foster care due to the death of his/her parents might be considered by a court to have suffered abandonment. Specific legal definitions of these terms for the purposes of juvenile dependency proceedings vary from state to state. As such, the determination of whether a child is eligible for long term foster care due to abuse, neglect, or abandonment is a matter for determination by the juvenile court, applying relevant state law.
  - While the court order must include a finding of abuse, abandonment or neglect, it does not need to include the basis for that finding. Ordinarily, the order and findings of fact will be contained in the same document. If not, the adjudicator may need to look at alternative evidence (discussed below) to determine whether the court order is sufficient.
  - If the order does not include reference to specific facts in support of the determination, it may be supplemented by specific findings of fact.
- Includes or is supplemented by a finding that it is in the best interest of the juvenile not to be returned to the juvenile's actual or ancestral home country.

(ii) Alternative evidence in support of application. If an order alone does not establish that it is based on a finding of abuse, neglect, or abandonment, the adjudicator must consider other evidence. The task of the adjudicator is not to determine whether the order was properly issued. Rather, the adjudicator must review additional evidence to determine whether the

order was based on a finding of abuse, neglect, or abandonment. Alternative evidence of abuse, neglect, or abandonment would include the following:

- A separate Findings of Fact will normally be sufficient to establish a foundation of abuse, neglect, or abandonment if the Order lacks such findings;
- If the Order lacks sufficient findings, and there are no separate findings of fact in support of the order, the adjudicator should request that the applicant submit actual records from the judicial proceeding, or a summary of the evidence presented as it related to a finding of eligibility for long term foster care based on abuse, neglect, or abandonment.

  Adjudicators must be mindful of confidentiality rules that may restrict disclosure of records from juvenile-related proceedings. In most cases, when the order alone does not suffice, an affidavit from the Court, or the state agency or department in whose custody the child has been placed summarizing the evidence presented to the court, will be sufficient.

(iii) Consent to the dependency order.

- The addition of requiring USCIS "express" consent to the dependency order serving as a precondition to a grant of special immigrant juvenile status is required by the 1997 amendment to section 101(a)(27)(J) of the Act. USCIS consent to a dependency order may be based on the order itself, findings accompanying the order, or other evidence that establishes that the order was based on a determination that the juvenile was abused, neglected or abandoned. The extent to which a court order can also establish eligibility for consent depends on the content of the order. Orders that include or are supplemented by specific findings of fact as to its foundation on abuse, neglect, or abandonment are sufficient to establish eligibility for consent, and the adjudicator need not review any additional material. Orders lacking specific factual findings are not sufficient to establish eligibility for consent, and adjudicators should review supplemental materials to determine whether consent is appropriate.
- USCIS Action to Consent to an Order.
  - The District Director shall consent to dependency orders that establish that the juvenile was deemed eligible for long term foster care due to abuse, neglect, or abandonment, as described above, when that order is the basis for an approved adjustment of status based on a SIJ determination. Such consent is positive, direct, and unequivocal. Consent to an order is reflected in the approval of the application. Lack of sufficient evidence establishing the consent elements, either

through the order itself or through supporting documents, shall result in withholding of consent and denial of the SIJ petition.

– Consent may only be granted to orders that are the basis for an approved self-petition. Self-Petitions may be denied for failure to meet the definition of a special immigrant juvenile or for ineligibility to adjust status to lawful permanent resident.

(iv) Limitation on Additional Evidence. Generally, no other documentary evidence, other than what is noted above, is required for SIJ applications. In particular, adjudicators should not seek documents such as school or employment records, confirmation of compliance with the Vienna Convention on Consular Relations, or other information not directly related to SIJ status or required for adjustment of status (as described above).

(C) Adjudication of the Form I-485. *See* AFM Ch. 23. Remember, pursuant to section 245(h) of the Act, SIJ beneficiaries are deemed to have been paroled for the purpose of adjustment. Also note that SIJ petitioners who are age 14 and over must also comply with fingerprinting and other agency background check requirements. *See* Memorandum for Regional Directors, Fingerprint Waiver Policy for All Applicants for Benefits under the Immigration and Naturalization Act and Procedures for Applicants Whose Fingerprint Responses Expire after the Age Range During Which Fingerprints Are Required (July 20, 2001).

(D) Interview Requirements. Current regulations regarding interview requirements for SIJ applicants are based on the general interview requirements for section 245 of the Act. *See* 8 CFR 245.6. Pursuant to those general requirements, adjudicators may waive the interview of SIJ petitioners who are under age 14.

(E) Age-Out Prevention.

(i) Current regulations require that an applicant for SIJ adjustment must be under 21 years of age, not only at the time of application, but also at the time of adjustment. Failure to adjust prior to age 21 results in denial of the application, regardless of the merits of the underlying dependency order; this is known as "aging out." Applicants are strongly encouraged to submit petitions and applications in a timely fashion and to notify the agency when the risk of aging out is strong. In addition, District Offices should assess new applications to avoid the risk of SIJ age outs, and take the following precautions to prevent it:

- Schedule SIJ adjustment interviews well in advance of the petitioner's 21st birthday, or in jurisdictions where court dependency terminates before age 21, *e.g.*, age 18, well in advance of that birth date.

- Ensure proper completion of background checks, including biometric information clearances and name-checks.
- Provide for expedited processing of cases at risk of aging out, *e.g.*, in-person filing for applicants who age out within a year; priority interviews and capturing of biometric information; other appropriate administrative relief.
- Officers are also reminded that, in many circumstances, Section 424 of the USAPATRIOT Act provides SIJ beneficiaries limited age-out protection by extending benefits eligibility for 45 days beyond the 21st birthday. Pursuant to Section 424(2), an alien who is the beneficiary of a petition or application filed on or before September 11, 2001, whose 21st birthday occurs after September 2001 is considered to be a child for 45 days after the alien's 21st birthday for purposes of adjudicating such petition or application. This necessarily extends age out protection on all grounds for 45 days.

(ii) Adjudicators should also be sensitive to the effect aging out has on appeals, and should seek to ensure sufficient time for appeals processing.

(r) U.S. Armed Forces Members.

(1) General.

The purpose of the *Armed Forces Immigration Adjustment Act of 1991* is to provide special immigrant status to a limited number of foreign nationals who have served honorably on active duty status in the Armed Forces of the United States.

(2) Filing Procedure.

An alien Armed Forces enlistee or veteran may file the petition for Armed Forces special immigrant status in his/her own behalf. The petitioner must file Form I-360, with fee, with the Service office having jurisdiction over the place of the alien's current or intended place of residence in the United States, or with the overseas Service office having jurisdiction over the alien's residence abroad.

(3) Eligibility Requirements.

In order to be eligible for classification under section 101(a)(27)(K), the petition must establish that:

(A) He or she served honorably on active duty after October 15, 1978;

(B) His or her original lawful enlistment was outside the United States;

(C) The service period or periods of active duty amount to an aggregate of a minimum of 12 years **or**, in the case of an applicant currently on active duty, a minimum of 6 years with proof of re-enlistment for the required number of years to incur a total active duty service obligation of 12 years;

(D) If now separated from service, he or she was honorably discharged;

(E) He or she is a national of an independent state which maintains a treaty or agreement allowing nationals of that state to enlist in the U.S. Armed Forces (currently, this only applies to nationals of the Philippines, the Federated States of Micronesia, and the Republic of the Marshall Islands); and

(F) The appropriate military department has recommended the granting of special immigrant status.

(2) Supporting Documentation.

The petitioner must submit the following documentation with the petition for classification in order to establish eligibility for the benefit sought:

(A) His or her birth certificate which establishes that he or she is a national of an independent state which maintains a treaty or agreement allowing nationals of that state to enlist in the U.S. Armed Forces;

(B) Either:

(i) Certified proof of his or her re-enlistment (after 6 years of active duty service); or

(ii) Both:

- Certification of his or her past honorable active duty status of 12 years from the appropriate military official, who is at the local command level or higher (**Note:** see paragraph (5) for a discussion on revocation); and

- The recommendation from the appropriate military official (local command level or higher) that he or she (the applicant) be granted special immigrant status. (**Note:** USCIS will accept a letter issued by the command under

which the alien is serving or has served. Such a letter shall include all required information: dates of service and place of enlistment, type of discharge (if applicable), and the recommendation of special immigrant status by the authorizing official.)

(3) Closing Action.

(A) Approval. If the alien meets the eligibility requirements set forth above, endorse the petition by placing your approval stamp in the Action Block and signing your name, annotating the petition (classification **SM1**), and preparing an approval notice to advise the petitioner of the director's decision.

(B) Denial. If the petitioner has failed to establish eligibility for the benefit sought, deny the petition, and prepare a formal decision to inform the petitioner of the reasons for denial and of his/her right to appeal. The denial is appealable to the Administrative Appeals Office.

(4) Derivative Beneficiaries.

A spouse or child accompanying or following to join a principal immigrant who has requested benefits under this section may be accorded the same special immigrant classification as the principal alien.

(5) Revocation.

If an applicant ceases to be a qualified enlistee by failing to complete the required active duty service obligation for reasons other than an honorable discharge prior to entering or adjusting, the petition can be automatically revoked under Section 205 of the Act. In order to do so, USCIS must, however, obtain a current Form DD-214 (Certificate of Release or Discharge from Active Duty) from the appropriate military office to verify that the applicant is no longer eligible for special immigrant status.

(s) NATO Civilian Employees or Family Members. Reserved

22.4 Employment Creation Entrepreneur Cases.

(a) General.

In 1990, Congress created the Employment Creation Immigrant Visa Category (EB-5). Section 121(a) of Public Law 101-649 (Nov. 29, 1990). Section 203(b)(5) of the Immigration and Nationality Act, as amended, allows for admission to permanent residence on a two-year conditional basis to qualified aliens who will contribute to the

economic growth of the United States by investing in U.S. businesses and creating needed employment opportunities. In 2002, Congress amended the EB-5 statute. Those amendments are discussed in paragraph (h), below.

(1) Basic (Non-Pilot Program) Provisions.

Section 203(b)(5) of the Act authorizes up to 10,000 visas each fiscal year to alien entrepreneurs (along with their spouses and unmarried minor children) who have invested or are actively in the process of investing in a new commercial enterprise.

The new commercial enterprise may take any lawful business form, including a limited partnership, and must both benefit the U.S. economy and directly create full-time employment for not fewer than 10 "qualifying employees," defined as U.S. citizens, lawful permanent residents, or certain other immigrants lawfully authorized to be employed. Noncommercial activities, including home ownership, do not qualify. In general, the Act established a threshold investment amount of one million U.S. dollars ($1,000,000.00). In order to encourage the investment in new enterprises located in areas that would most benefit from employment creation, section 203(b)(5)(B) of the Act sets aside on an annual basis 3,000 of the available 10,000 EB-5 visas for qualified aliens who have made investments in "targeted employment areas." Such targeted employment areas are defined in the Act to include rural areas and areas which have experienced high unemployment. The investment amount for investing in a targeted employment area is currently set at five hundred thousand dollars ($500,000.00).

(2) Regional Center Pilot Program.

Under a Pilot Program first instituted in 1992, up to 3,000 visas (of the 10,000 total available EB-5 visas) are set aside for aliens who invest in a "regional center" (as designated by DHS) in the United States set up "for the promotion of economic growth, including improved regional productivity, job creation, and increased domestic capital investment. Section 610 of Pub. L. No. 102-395, as amended by section 116(a)(l) of Public Law 105-119 and section 402(a) of Pub. L. No. 106-396. In addition, a regional center may, but need not, be set up for the purpose of increasing export sales.

Under the Pilot Program, aliens investing in new commercial enterprises located in regional centers are not required to demonstrate that the new commercial enterprise itself employs ten U.S. workers; a showing of indirect job creation and improved regional productivity will suffice. Implementing regulations for the Pilot Program are found at 8 CFR 204.6(m).

Note: Other than the ability to demonstrate indirect creation of ten full-time

jobs, all other requirements applicable to other EB-5 investors must be met.

(b) Governing Factors.

8 CFR 204.6(a) cites several governing factors which you must consider. They are:

- A visa petition must be filed;
- A fee for filing the petition is required;
- Before the petition is considered properly filed, the petition must be signed by the petitioner and the initial supporting documentation required by this section must be attached;
- The petition must be filed with the Service Center having jurisdiction over the area in which the new commercial enterprise is or will be principally doing business. For EB-5 petition filing purposes, the Texas Service Center has jurisdiction over its own territory and the territory of the Vermont Service Center; the California Service Center has jurisdiction over its own territory and the territory of the Nebraska Service Center;
- The appeal of a denial of this petition is to the Administrative Appeals Office; and
- The approval of the petition is valid indefinitely, provided that the investment remains qualifying.

(c) Preliminary Action. (after petition has been accepted and fee paid).

(1) When to Create a File. If the alien petitioner is in the United States, search for an existing "A" file. If none exists, create one. If the beneficiary is not in the United States, no file should be created, unless the petition is to be denied.

(2) Priority Date. The priority date of a petition for classification as an alien entrepreneur is the date the petition is properly filed with USCIS.

(3) General Review. Review the petition for completeness and signature of the petitioner.

- Verify that the name given in Part 1 (Information about you) is identical to the signature in Part 7 (Signature block).
- Remember that the petition can only be signed by the petitioner and not by his or her authorized representative.

(4) Review of Supporting Documents. When reviewing the documentation submitted in support of the petition you should keep in mind the following factors:

(A) Investment in a New Commercial Enterprise.

- Whether the alien creates an original business, purchases an existing business, expands an existing business, or joins with a pool of investors who have already invested in an existing business, his or her action must be taken after November 29, 1990. The statute requires it, and the definition of the word "new" means created after November 29, 1990.

  Note: [5 USC 552(b)(2) and 5 USC 552(b)(7)(E)]

If the petitioner submits evidence that the new commercial enterprise was a result of simultaneous or subsequent restructuring or reorganization of an existing business, the commercial enterprise that is the result of this action must be a new legal entity. Thus, there are three ways to invest in a new commercial enterprise: creation of brand new business, purchase of an existing business, or expansion of an existing business. You must keep in mind that in order for the business to qualify as a new commercial enterprise, any of the above actions must have taken place after November 29, 1990.

- You must look at the evidence presented to demonstrate the date of creation of the business to determine whether it is a “new” commercial enterprise. In general, the business must have been created AFTER November 29, 1990. If the business was created BEFORE November 29, 1990, it cannot qualify, unless the petitioner can demonstrate expansion of the business after November 29, 1990. If the business was created prior to November 29, 1990, issue a RFE explaining this requirement, and requesting evidence relating to post-November 29, 1990, expansion.

- To qualify for creation based on expansion, the petitioner must invest the required capital in the existing business, and demonstrate that the investment has increased, by 40 percent, either the number of employees or the net worth of the business. The petitioner will still be required to employ ten additional employees before the conditional basis of his or her EB-5 permanent resident status may be removed.

(B) Investing the Required Amount of Capital. You should always be aware that the statutory requirements of investing the prescribed amount of capital and the creation of new jobs apply no matter how the alien seeks to demonstrate investment in a new commercial enterprise. These requirements apply even if the alien is investing in a new commercial enterprise that purchases an existing

business. The alien is still obligated to show that he or she has invested the prescribed amount of capital (some of which would probably be the purchase price of the old company) and that 10 new jobs would be created in addition to the employees of the purchased company. A mere intent to invest does not suffice for EB-5 purposes. The petitioner must actually have committed the capital to the new commercial enterprise.

Note: "Capital" is defined to include cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the alien provided that he or she is personally and primarily liable and the assets of the new commercial enterprise are not used to secure any of the indebtedness. If the alien uses a secured note, the alien must be able to show that this note has a real cash value, and that the total value of all capital invested, including the note, has a cash value equal to or greater than the statutory minimum.

Note also: As discussed below, all of the requisite capital must go directly into the new commercial enterprise; amounts paid for "administrative fees, attorneys' fees," "finders' fees" and other types of expenses not directly paid into the new commercial enterprise will not count towards the minimum investment amount.

Note further: The term "invest" is defined as a contribution of capital. In determining whether the full amount of capital has been invested, adjudicators should be aware that proceeds that are left (i.e., "reinvested") in the business do not count toward meeting the minimum investment requirement. Further, adjudicators should be aware that an EB-5 petitioner must make an equity investment in the commercial enterprise; a mere loan from the alien shareholder or partner to the business does not qualify as an investment of capital for purposes of the EB-5 statute. Thus, contributions of funds to the commercial enterprise, in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement, cannot be counted toward meeting the minimum capital requirement. Balance sheets, including those incorporated into tax returns, generally, but not necessarily, should reflect the amount of equity versus debt contributed to the commercial enterprise. The determination as to what constitutes debt or equity is, in the final analysis, a question of fact, and not simply a matter of what is reflected on a balance sheet.

(C) Investment of Capital Obtained Through Lawful Means. The regulation at 8 CFR 204.6(j)(3) indicates that the petitioner is to submit documentation "as applicable" that investment capital has been obtained through lawful means. Since it is often difficult to determine the source of the capital used for the investment, there is no clear-cut answer as to how far back the petitioner should

go to establish that he or she has met this requirement. In making your determination, you should exercise sound judgment. Obviously, if you have reason to believe that more documentation is necessary, it should be requested.

An individual who is operating as a sole proprietor cannot count his or her personal bank account as committed funds. The regulation refers specifically to funds in business bank accounts, not personal bank accounts. This applies to all cases, including sole proprietorships. Funds in a personal bank account are not necessarily committed to the new commercial enterprise.

(D) Job Creation. The petition must be supported with evidence the new commercial enterprise will create no fewer than 10 full-time positions (or the equivalent).

If the petitioner has invested in an existing enterprise, he or she must demonstrate how the investment will cause the creation of at least 10 additional full-time positions. Merely purchasing a share of a business from an existing shareholder, without more, will not qualify, since the payment goes to the former shareholder rather than towards the development of the enterprise.

If the employees have already been hired, the petitioner must submit copies of tax records, Forms I-9, or similar documents relating to the ten qualifying employees. If the employees have not been hired, the petitioner must submit a comprehensive business plan demonstrating the need for ten new employees. If the petitioner purchases a troubled business, it must be demonstrated that the number of jobs at the pre-investment level will be maintained for at least two years. To qualify as a troubled business, it must have been in existence for at least two years and have incurred a net loss for accounting purposes of at least twenty percent of the troubled business's net worth prior to such loss. The loss must have been incurred during the twelve or twenty-four month period prior to the priority date on the I-526.

If the investment is in a regional center under the Pilot Program, the petition must show, through the use of reasonable methodologies, the likelihood that the business will create ten jobs indirectly. See 8 CFR 204.6(m)(7)(ii). Such methodologies may include multiplier tables, feasibility studies, and other economically or statistically valid forecasting devices indicating the likelihood that the business will result in increased employment.

Note: You must also keep in mind that full-time employment as defined in 8 CFR 204.6(e) means year-round employment and not seasonal full-time employment. Full-time employment consists of 35 hours a week. Regulations permit the combining of certain part-time positions to equal one full-time equivalent position for purposes of meeting the job creation requirement. Seasonal positions do not

qualify for purposes of the full-time employment requirement.

(E) Alien Petitioner Engaged in the Management of the New Enterprise. The alien petitioner must be involved in the new enterprise by either exercising managerial control of the day-to-day operations or through policy formulation. The alien petitioner cannot just invest in the new enterprise; he or she must be involved in the new enterprise. An alien must be "actively involved in the business;" a purely passive investor may not qualify for the EB-5 classification. See 8 CFR 204.6(j)(5). While an alien may seek EB-5 qualification on the basis of an investment in a limited partnership, under current regulations, even he or she, as a limited partner, must have a certain level of involvement in the running of the business. Under 8 CFR 204.6(j)(5)(iii), if the alien is a limited partner, he or she must have been granted *all* (i.e., not simply some) of the rights, powers, and duties granted to the other limited partners in the partnership in order to be considered sufficiently engaged in the business.

(F) New Commercial Enterprise in a Targeted Employment Area. As noted, a targeted area is either a rural area or an area experiencing a high unemployment rate at the time the qualifying EB-5 investment is made. If the petitioner shows that the area where he or she is investing is a rural area, the petitioner need not also establish that the area has high employment. Conversely, if the area is a high unemployment area, the petitioner need not also show that it is a rural area.

- A rural area means any area outside of a metropolitan statistical area (MSA) or an area outside of a city or town having a population of 20,000 or more. See section 203(b)(5)(B)(iii) of the Act. MSAs are designated by the Office of Management and Budget and can be found on the Internet at www.census.gov.

- A high unemployment area may include an MSA, a county, city, or town, or, other political or geographical subdivision designated by a State authority (appointed by the State's governor) as having an unemployment rate of at least 150% of the national unemployment rate. For a political or geographical area other than an MSA, county, city, or town, the State authority must also certify, in writing, that such area is in fact a "high unemployment area" meeting the requisite 150% unemployment rate standard. If the State governor has not designated an official for this purpose, an alien petitioner must demonstrate that, at the time when the petition is filed, there has been an unemployment rate of at least 150% of the national unemployment rate within the MSA or other non-rural area in which the ten newly created positions is located (or in the case of a troubled business, the location of the ten saved positions). This should be based on the most recent information available from Federal or State governmental

sources as of the time the petition is submitted. An adjudicator, of course, must be satisfied of the veracity of any documentation as well as the substance of the information submitted by the petitioner. If the adjudicator has reason to believe that the information submitted by the petitioner fails to meet either of these criteria, he or she of course is not obligated to approve the petition.

(d) Approval of the Petition.

(1) Affix the approval stamp on the Form I-526 and sign.

(2) An approved visa petition should be sent to the specified embassy or consul or if petitioner is requesting adjustment, then the petition should be routed (with file) to the main file shelf waiting request by field office.

(3) Keep a record of statistics (approvals, denials, returned, etc.)

(4) Update CLAIMS with appropriate information. Do not place on clerical hold unless there is documentation to be sent back to the petitioner.

(e) Action to be Taken if the Petition is Denied.

Denial decisions will be prepared on Form I-292, usually with the reference "SEE ATTACHMENTS." The attached pages will cover the specific grounds for denial as determined from the evidence. Form M-188 (on appeals and motions) and Form I-290B will be attached to all visa petition denials. It is essential that any denial you prepare be premised solely on the evidence submitted. Refer in your denial to controlling statutes and regulations. Where the decision is motivated by or governed by any published decisions, reference to those decisions must be made in the approved format. Your decision should be written in direct and comprehensible language. All reasons for denial should be included. In all denial cases, an "A" file must be used to house the petition and supporting documents. Copies of the decision must be sent to the petitioner and any attorney of record. Once your supervisor has signed off your denial, CLAIMS should be updated to reflect that the case has been denied.

(f) Revocation of Petitions. Visa petitions approved under section 204 of the Act may be revoked under the provisions of section 203(e) or section 205 of the Act.

(g) Precedent Decisions. The following precedent decisions relate to employment creation petitions:

- *In re Soffici*, ID #3359 (Commr, 1998). (1) A petitioner under section 203(b)(5) of the Act cannot establish the requisite investment of capital if he lends the money to his

new commercial enterprise. (2) Loans obtained by a corporation, secured by assets of the corporation, do not constitute capital invested by a petitioner. Not only is such a loan prohibited by 8 CFR 204.6(e), but the petitioner and the corporation are not the same legal entity. (3) A petitioner's personal guarantee on a business's debt does not transform the business's debt into the petitioner's personal debt. (4) A petitioner must present clear documentary evidence of the source of the funds that he invests. He must show that the funds are his own and that they were obtained through lawful means. (5) A petitioner who acquires a pre-existing business must show that the investment has created, or at least has a reasonable prospect of creating, 10 full-time positions, in addition to those existing before acquisition. The petitioner must, therefore, present evidence concerning the pre-acquisition level of employment. Simply maintaining the pre-acquisition level of employment is not sufficient, unless the petitioner shows that the pre-existing business qualifies as a "troubled business."

- *In re Izumii*, ID #3360 (Assoc. Commr, 1998). (1) Regardless of its location, a new commercial enterprise that is engaged directly or indirectly in lending money to job creating businesses may only lend money to businesses located within targeted areas in order for a petitioner to be eligible for the reduced minimum capital requirement. (2) Under the Immigrant Investor Pilot Program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must all be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling. (3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to USCIS requirements. (4) If the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based. (5) An alien may not receive guaranteed payments from a new commercial enterprise while he owes money to the new commercial enterprise. (6) An alien may not enter into a redemption agreement with the new commercial enterprise at any time prior to completing all of his cash payments under a promissory note. In no event may the alien enter into a redemption agreement prior to the end of the two-year period of conditional residence. (7) A redemption agreement between an alien investor and the new commercial enterprise constitutes a debt arrangement and is prohibited under 8 CFR 204.6(e). (8) Reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk. (9) USCIS does not pre-adjudicate immigrant investor petitions; each petition must be adjudicated on its own merits. (10) Under 8 CFR 204.6(e), all capital must be valued at fair market value in United States dollars, including promissory notes used as capital. In determining the fair market value of a promissory note, it is necessary to consider, among other things, present value. (11) Under certain circumstances, a promissory note that does not itself constitute capital may constitute evidence that the alien is "in the process of investing" other capital, such as cash. In such a case, the petitioner must substantially complete

payments on the promissory note prior to the end of the two-year conditional period. (12) Whether the promissory note constitutes capital or is simply evidence that the alien is in the process of investing other capital, nearly all of the money due under the promissory note must be payable within two years, without provisions for extensions.

Note: In 2002, Congress eliminated the requirement set forth in *Izumii* that, in order for a petitioner to be considered to have "created" an original business, he or she must have had a hand in its actual creation. Under the new law, an alien may invest in an existing business at any time following its creation, provided he or she meets all other requirements of the regulations.

- *In re Hsiung*, ID #3361 (Assoc. Commr, 1998). (1) A promissory note secured by assets owned by a petitioner can constitute capital under 8 CFR 204.6(e) if: the assets are specifically identified as securing the note; the security interests in the note are perfected in the jurisdiction in which the assets are located; and the assets are fully amenable to seizure by a U.S. note holder. (2) When determining the fair market value of a promissory note being used as capital under 8 CFR 204.6(e), factors such as the fair market value of the assets securing the note, the extent to which the assets are amenable to seizure, and the present value of the note should be considered. (3) Whether a petitioner uses a promissory note as capital under 8 CFR 204.6(e) or as evidence of a commitment to invest cash, he must show that he has placed his assets at risk. In establishing that a sufficient amount of his assets are at risk, a petitioner must demonstrate, among other things, that the assets securing the note are his, that the security interests are perfected, that the assets are amenable to seizure, and that the assets have an adequate fair market value. (4) A petitioner engaging in the reorganization or restructuring of a preexisting business may not cause a net loss of employment.

- *In re Ho*, ID #3362 (Assoc. Commr, 1998). (1) Merely creating and capitalizing a new commercial enterprise and signing a commercial lease are not sufficient to show that an immigrant investor petitioner has placed his capital at risk. The petitioner must present, instead, evidence that he has actually undertaken meaningful concrete business activity. (2) The petitioner must establish that he has placed his own capital at risk; that is to say, he must show that he was the legal owner of the invested capital. Bank statements and other financial documents do not meet this requirement if the documents show someone else as the legal owner of the capital. (3) The petitioner must also establish that he acquired the legal ownership of the invested capital through lawful means. Mere assertions about the petitioner's financial situation or work history, without supporting documentary evidence, are not sufficient to meet this requirement. (4) To establish that qualifying employment positions have been created, Forms I-9 presented by a petitioner must be accompanied by other evidence to show that these employees have commenced work activities and have been hired in permanent, full-time positions. (5) In order to demonstrate that the new commercial

enterprise will create not fewer than 10 full-time positions, the petitioner must either provide evidence that the new commercial enterprise has created such positions or furnish a comprehensive, detailed, and credible business plan demonstrating the need for the positions and the schedule for hiring the employees.

Note: There are also a number of precedent decisions that pertain to old (pre-1978) immigrant investor provisions under the former non-preference immigrant visa category. While some of these decisions may be interesting from a historical perspective, they have little or no relevance to the "employment creation" investor category created by IMMACT 90 and should not be relied upon when adjudicating post IMMACT 90 cases.

(h) November 2, 2002 Amendments to EB-5.

On November 2, 2002, the President signed into law certain amendments to the EB-5 program. Title I, subtitle B of Division C of the Twenty-First Century Department of Justice Appropriations Authorization Act (the "2002 DOJ Appropriations Act)," sections 11031-37 of Public Law 107-273.

On June 10, 2003, USCIS issued interim policy guidance regarding changes effected by the new law. Memorandum from William R. Yates, HQ40/6.1.3, entitled "Amendments Affecting Adjudication for Alien Entrepreneur (EB-5)" (the "Yates Memorandum"). The Yates Memorandum provides that:

- As before, the commercial enterprise must be "new," that is, have been created after November 29, 1990. See 8 CFR 204.6(e). Section 11036 of the law does, however, eliminate the previous requirement that an alien personally have "established," that is, have had a personal hand in, the creation of the new commercial enterprise. Under the 2002 DOJ Appropriations Act, the alien need only "sustain" his or her investment in a pre-existing commercial enterprise. This effectively allows multiple investments in the same commercial enterprise at any time, *provided* that the alien still creates ten new positions for qualifying U.S. workers jobs and meets all other EB-5 requirements are complied with. The law applies to both pending I-526 and I-829 petitions filed on that date or thereafter. This provision modifies 8 CFR 204.6(h)(1), regarding the creation of an original business.

  Note: The 2002 DOJ Appropriations Act does not change the requirement that the commercial enterprise create 10 new jobs. In order to determine whether the commercial enterprise actually has created ten new positions, adjudicators must first determine whether the petitioner personally created the commercial enterprise and, if the petitioner did not create the business, the number of jobs there were in the existing business at the time the petitioner acquired the business.

  Note Also: The 2002 DOJ Appropriations Act supercedes, in part, 8 CFR 204.6(h)(3),

which describes "the establishment of a new commercial enterprise," due to the removal of the requirement that the alien entrepreneur establish the new commercial enterprise. Section 204.6(h)(3) of the Act continues, however, to be relevant in that it describes the circumstances under which a commercial enterprise in existence prior to November 29, 1990 will be considered "new" for purposes of the law. Enterprises that have been expanded or substantially reorganized, as described above, will continue to meet the definition of "new" regardless of when the commercial enterprise was actually created.

- As was the case by regulation before November 2, 2002, a new commercial enterprise may include a limited partnership.

- Full-time employment is defined as employment that requires at least 35 hours of service per week "at any time," regardless of who fills the position. This provision does not change the requirement that, in order to be "full-time," the job created may not be seasonal. If the enterprise employs individual workers on a temporary basis, it can meet the "full-time" requirement only if the job itself is permanent in nature and will be staffed year-round by qualified U.S. workers for the requisite 35 hours per week. For example, an enterprise which is staffed by qualifying workers on one-year contracts would qualify only if, upon expiration of a particular contract, the enterprise, without break, continues to employ the same or another U.S. worker in that same position.

- With the limited exception of certain persons eligible for a "second opportunity" to make a qualifying investment (discussed below) under the 2002 DOJ Appropriations Act, as before, a petitioner may invest capital, for purposes of EB-5, in only one commercial enterprise. A petitioner who filed a Form I-526 petition after August 31, 1998 therefore may not qualify for removal of conditions if he or she has invested in multiple commercial enterprises.

- The 2002 DOJ Appropriations Act does not change the definition of "qualifying employee."

The 2002 DOJ Appropriations Act also provides a second opportunity for certain aliens whom USCIS believes failed to make a qualifying investment, now to satisfy USCIS that they have done so, provided certain conditions are met. Persons specifically covered by this provision of the 2002 law may invest in the same or a new commercial enterprise, or even a combination of the two. This second opportunity is limited, however, to cases where the alien's EB-5 petition does not contain any material misrepresentation. Persons eligible for this "second chance" to comply with the statute and regulations are those whose Form I-526 petitions were approved between January 1, 1995 and August 31, 1998. The 2002 DOJ Appropriations Act also contains provisions with respect to certain aliens who applied for immigrant visas or adjustment of status prior to November 2, 2002,

but did not obtain or were not granted conditional resident status.

Note: The 2002 Appropriations Act is NOT an amnesty program; the statute merely provides certain aliens with a second chance to establish that they have made a qualifying investment. Conditions may not be removed with respect to any of these persons unless they can establish, at the end of their two-year period of conditional residence, that they meet all applicable requirements for removal of conditions.

Regulatory guidance will be forthcoming as to how cases covered by the 2002 Appropriations Act are to be handled.

☞ 3. The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

AD 03-01 [INSERT SIGNATURE DATE]	Chapter 22	Adds guidance on the adjudication of petitions for classification under the employment-based immigrant visa categories.

cc: USCIS Headquarters Directors
Bureau of Immigration and Customs Enforcement
Bureau of Customs and Border Protection