

## THE REVIVAL OF SCHEDULE A, GROUP II: IS “EXCEPTIONAL” IN VOGUE?

by Rita Kushner Sostrin \*

### IS “EXCEPTIONAL” TRENDY AGAIN?

The world of high fashion has taught us that style trends are cyclical, and what seems to have gone out of fashion will eventually make its comeback. Be it platform shoes or oversized “Jackie O” sunglasses, styles disappear for a while but sooner or later return to runways and magazine covers. Has the immigrant visa classification of Schedule A, Group II followed in the footsteps of fashion, coming full circle and returning from obscurity with a newly found power to defy immigrant visa backlogs? Is it merely a fleeting trend that, after a brief reappearance, will again collect dust? Or is Schedule A, Group II a classic that is here to stay?

After the enactment of the Immigration Act of 1990 (IMMACT90),<sup>1</sup> Schedule A, Group II<sup>2</sup> quickly became a rarely utilized, nearly forgotten immigrant visa classification that was replaced by the creation of the EB-1 priority worker category.<sup>3</sup> Most aliens who could claim super powers were covered by the EB-11 for individuals of extraordi-

nary ability<sup>4</sup> and the EB-12 for outstanding professors and researchers.<sup>5</sup> Yes, Schedule A, Group II was sometimes used in those limited instances where a petitioner wished to take advantage of its two-criteria standard, but the alien was neither a professor nor a researcher. Or, perhaps, the professor or researcher alien lacked the necessary three years of experience<sup>6</sup> or a permanent job offer<sup>7</sup> and thus could not make use of the EB-12 category. Nevertheless, while EB-12 did not always accommodate all who had a sponsoring employer, the rest could usually claim extraordinary abilities under EB-11.

Immigration law publications openly acknowledged the redundancy of the Schedule A, Group II immigrant classification. In his book, *Kurzban’s Immigration Law Sourcebook*, Ira Kurzban called it “unnecessary in light of EB-1.”<sup>8</sup> A number of articles discussing employment-based preference categories, when giving Schedule A, Group II a token mention, spoke of its superfluous nature.<sup>9</sup> There was even an entire article written on the sole issue of whether or not Schedule A, Group II had “a reason to exist.”<sup>10</sup> Thus, Schedule A, Group II was tossed aside, like an old shoe, by the immigration bar. There was simply no real justification to use Schedule A, Group II with

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<sup>1</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

<sup>2</sup> INA §212(a)(5)(A)(ii)(II).

<sup>3</sup> INA §203(b)(1); 8 USC §1153(b)(1).

<sup>4</sup> INA §203(b)(1)(A); 8 USC §1153(b)(1)(A).

<sup>5</sup> INA §203(b)(1)(B); 8 USC §1153(b)(1)(B).

<sup>6</sup> 8 CFR §204.5(i)(3)(ii).

<sup>7</sup> 8 CFR §204.5(i)(3)(iii)(A)–(C).

<sup>8</sup> See *Kurzban’s Immigration Law Sourcebook* 753 (9th ed.). Visit [www.ailapubs.org](http://www.ailapubs.org) to order and to see a table of contents of the tenth edition.

<sup>9</sup> See P. Webber, “Strategies for Avoiding Labor Certification,” 93-12 *Immigration Briefings* (Dec. 1993); A. Cherazi *et al.*, “Employment-Based Petitions Exempt from Labor Certification,” *Immigration & Nationality Handbook* 291 (AILA 2005–06 Ed.).

<sup>10</sup> F. Retman, “Schedule A, Group II: A Reason to Exist,” *Immigration Options for Academics & Researchers*, 185 (AILA 2005). See [www.ailapubs.org](http://www.ailapubs.org) for more information about this book.

its confusing two sets of regulations, overlapping legal standards, and needless Department of Labor (DOL) forms. This was the case until the start of the era of immigrant visa retrogression, which brought back Schedule A, Group II.

In its November 2005 Visa Bulletin, the Visa Office of the U.S. Department of State (DOS) announced that, as of October 1, 2005, it had established cut-off dates for the first and second employment-based immigrant visa preferences for China and India.<sup>11</sup> Since that time, when priority dates retrogressed as far back as 1999, only limited forward movement on visa processing has been observed. This has subjected Chinese and Indian aliens with extraordinary and outstanding abilities and whose work is in the national interest, and who would usually use the first or second employment-based immigrant visa preferences, to long delays in obtaining visas.

As a result, today, Schedule A, Group II has, once again, gained recognition and popularity, for it has become a streamlined way to obtain immigrant visas for those individuals who would normally opt for one of the EB-1 or EB-2 categories, currently subject to visa retrogression. The Emergency Supplemental Appropriations Act provided for 50,000 additional visas for the Schedule A category, including both Groups I and II.<sup>12</sup> Qualified individuals who would otherwise have to wait several years now have a direct path to permanent residence, thanks to Schedule A.

### THE DOL LEGAL STANDARD

Through the Schedule A, Group II category, DOL allows petitioners to seek an immigrant visa on behalf of aliens of exceptional ability in the sciences or arts (including performing arts), and university teachers, by bypassing the process of labor certification.<sup>13</sup> DOL refers to this procedure as pre-certification to the effect that the alien's admission would not adversely affect the U.S. workforce and, consequently, would not require a labor certification. Since DOL's Schedule A application allows for pre-certification only and does not provide an alien with an immigrant visa, the petitioner must also qualify its beneficiary for an immigrant visa

through either the second or third employment-based immigrant visa preferences. In other words, a petitioner must meet two sets of regulations—those of DOL and those of U.S. Citizenship and Immigration Services (USCIS)—in order to gain approval of a Schedule A, Group II petition.

Schedule A, Group II is an employer-sponsored classification and is unavailable to self-petitioners. It explicitly covers only those aliens who possess exceptional abilities in the sciences and the arts, including the performing arts,<sup>14</sup> and excludes individuals who excel in other fields, such as athletics, from getting an immigrant visa through this classification. DOL defined the term “exceptional ability” as “recognized outstanding performance well above the standard for professional competence in the occupation.”<sup>15</sup> A “science” or an “art” is defined as a field in which “colleges and universities commonly offer specialized courses leading to a degree.”<sup>16</sup> It could therefore be argued that aliens working in the fields of business or education, included in the EB-1 regulations,<sup>17</sup> could be eligible for Schedule A, Group II because colleges and universities grant degrees in these fields. The regulations specify that an alien need not have received such a degree to qualify for the Schedule A, Group II occupation.<sup>18</sup> Hence, a prodigy painter who has not received a formal education in the fine arts could qualify for a Schedule A, Group II, provided that he or she meets the requisite legal standard.

### The Legal Standard for Arts and Sciences

According to DOL regulations, an alien can qualify for an immigrant visa if he or she satisfies a three-prong test by demonstrating: (1) widespread acclaim and international recognition accorded by recognized experts; (2) documentation confirming that the alien's work during the past year did, and the alien's intended work will, require exceptional

<sup>11</sup> [http://travel.state.gov/visa/frvi/bulletin\\_2712.html](http://travel.state.gov/visa/frvi/bulletin_2712.html).

<sup>12</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109–13, 119 Stat. 231.

<sup>13</sup> 20 CFR §§656.5(b); 656.15(d).

<sup>14</sup> The PERM regulation extended Schedule A, Group II eligibility to performing artists who were excluded in the original DOL regulations. 69 Fed. Reg. 77391 (Dec. 27, 2004).

<sup>15</sup> Employment and Training Admin., U.S. Dep't of Labor, Technical Assistance Guide No. 656: Schedule A (TAG); 9 FAM 40.41, Exhibit I.

<sup>16</sup> 20 CFR §656.5(b)(1).

<sup>17</sup> 8 CFR §204.5(h)(1).

<sup>18</sup> 20 CFR §656.5(b)(1).

ability; and (3) confirmation that the alien meets at least two of the seven regulatory criteria.<sup>19</sup>

***Prong One: Widespread Acclaim and International Recognition Accorded by Recognized Experts***

The first prong of the Schedule A, Group II standard is reminiscent of the EB-1. It is, in fact, similar to a combination of the EB-11’s “sustained acclaim”<sup>20</sup> and EB-12’s “international recognition.”<sup>21</sup> DOL regulations, however, specifically address the type of evidence that must be submitted in order to meet this prong. The regulations ask for testimony from “recognized experts,” which should be in the form of reference letters. While reference letters are normally submitted in support of a beneficiary’s claim of original contributions, Schedule A, Group II analysis additionally requires that reference letters address the claim of widespread acclaim and international recognition. This can be achieved either by a separate set of letters from recognized experts or by presenting letters that cover all bases.

Ideally, the petitioner will submit reference letters from a diverse group of recognized experts who know the alien through his or her widespread acclaim and international recognition. To confirm the international reputation of the beneficiary, reference letters should come from experts in different countries or should speak of the beneficiary’s accomplishments in more than one country. Practitioners should be aware that USCIS pays careful attention to the credentials of referees. In a 2001 decision, the Administrative Appeals Office (AAO) rejected the argument that an alien’s petition was supported by experts from around the world because most of the experts, although then currently living and working in different international locations, were the beneficiary’s former compatriots. The AAO ruled that “[t]he dispersal of the beneficiary’s former collaborators to several countries does not make the beneficiary’s reputation ‘international’ in any meaningful sense.”<sup>22</sup>

It is important also to ensure that the experts who write letters on an alien’s behalf understand the high benchmark of proof and utilize appropriate language

that assists the case. Some modest cultures in Europe, Africa, and Asia consider “competent” to be a high form of praise. Yet such language would be destructive to any claim of “exceptional” ability or attempt to show widespread acclaim and international recognition. USCIS could use such evidence against the alien, arguing that even the alien’s own supporters describe him or her only as competent, not exceptional. Likewise, any reference to an alien as a “promising” scientist or artist will be regarded as a statement rejecting his or her eligibility, since one who is “promising,” by definition, has not yet made it.

It is common for USCIS to question the objectivity of reference letters, particularly when they are written by individuals who personally know the beneficiary. We frequently see language such as “the reference letters are predominantly written by the beneficiary’s collaborators, mentors or supervisors and, as such, their probative value is limited by these previous relationships.” However, it is the author’s opinion that, in addition to submitting some letters from experts who do not personally know the alien, practitioners can argue that letters from some referees who know the beneficiary should also be admissible. What is really at issue here is whether they qualify as “recognized experts,” as required by the regulations.<sup>23</sup> If they do, USCIS cannot dismiss statements of top scholars, who are considered industry experts and who submitted support letters in that capacity, as biased merely because they may have worked with the alien. It is simply inaccurate to presume that all recognized experts would be willing to issue compromised reference letters just to accommodate a colleague. In fact, it can be argued that collaboration of the referees with the beneficiary only confirms the elite professional circles with which the beneficiary affiliates.

Legacy Immigration and Naturalization Service (INS) has acknowledged in a number of AAO decisions that expert testimony must be accorded evidentiary weight in petitions evaluating outstanding or extraordinary ability,<sup>24</sup> and the same reasoning

<sup>19</sup> 20 CFR §656.15(d)(1).

<sup>20</sup> 8 CFR §204.5(h)(3).

<sup>21</sup> 8 CFR §204.5(i)(3)(i).

<sup>22</sup> *Matter of [name not provided]*, EAC-99-081-50490 (AAO Apr. 13, 2001).

<sup>23</sup> 20 CFR §656.15(d)(1).

<sup>24</sup> In *Matter of [name not provided]*, LIN-02-015-53361, (AAO Jul. 15, 2002), an appeal was sustained because INS failed to consider all evidence submitted in support of a petition, specifically citing expert reference letters. In *Matter of [name not provided]*, LIN-02-243-52670, (AAO Feb. 28, 2003), the AAO likewise concluded that the beneficiary

should apply to Schedule A applications. Further, the examiner cannot substitute his or her judgment for that of experts, nor can the examiner ignore evidence that clearly satisfies a category.<sup>25</sup> Reference letters confirming widespread acclaim and international recognition issued by recognized experts should satisfy this prong, regardless of whether they personally know the alien.

***Prong Two: Confirmation that the Alien’s Work During the Past Year Did, and Intended Work Will, Require Exceptional Ability***

There are three parts to this prong, all of which must be satisfied: (1) the alien has at least one year of experience; (2) his or her work during the past year required exceptional ability; and (3) his or her future work will continue to require exceptional ability.

Demonstrating one year of experience is the easy part. A letter from an employer will meet this portion of the regulations. A more complicated scenario would arise if an alien with at least one year of experience has taken a year off and has done no work, exceptional or otherwise, during the *past* year. In that situation, it is advisable to gain the requisite experience in a nonimmigrant status before applying for Schedule A, Group II.

The second and third parts of this prong examine whether the alien’s work during the past year required, and his or her future work will continue to require, exceptional ability. This is in direct conflict with the EB-11, which asks the beneficiary only to demonstrate that he or she will work in the area of extraordinary ability,<sup>26</sup> but does not mandate that the alien’s job require extraordinary ability. Similarly, in a 2002 decision, the AAO sustained an appeal of an O-1 case that presented this issue.<sup>27</sup> The AAO cited the supplementary information from the regulations and confirmed that there is no statutory support for the requirement that the alien must be com-

ing to the United States to perform services that require extraordinary ability.

This is not so, however, for exceptional aliens seeking to qualify under Schedule A, Group II. They must show both that their past year’s work and future work can be performed only by a person with exceptional skills. Both can be demonstrated by the reference letters from recognized experts required by prong one. This is where a letter from the beneficiary’s employer should be given particular credence, since the employer is in the best position to assess whether exceptional abilities are required to perform the beneficiary’s job. Additionally, publications about an alien’s work or any other documents confirming the uniqueness of his or her work would be helpful to satisfy this regulation.

Furthermore, the regulations do not specifically state that the alien’s one year of exceptional work experience must be in the same field in which he or she seeks pre-certification. What if the alien’s work during the past year required exceptional ability in one field, but his or her future work will require exceptional ability in another field due to a career change? It appears that this could be allowed under the current version of the regulations. However, DOL’s clarification in its Technical Assistance Guide, which accompanied its pre-PERM regulations, suggested otherwise. It stated that Schedule A, Group II is intended for aliens of exceptional ability “... who have been practicing their science or art during the year prior to application and who intend to practice *the same* science or art in the United States”<sup>28</sup> (emphasis added). Practitioners should also keep in mind that most of the seven regulatory criteria of the third prong require that the alien’s accomplishments be “in the field in which certification is sought.”

***Prong Three: Confirmation that the Alien Meets at Least Two Regulatory Criteria***

Acceptable proof of “exceptional ability,” required in prong three of the DOL regulations, is defined as documentation in at least two of the following seven groups:

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satisfied a regulatory criterion by providing letters from experts about the value of his work.

<sup>25</sup> *Muni v. INS*, 891 F. Supp. 440, 444 (N.D. Ill. 1995).

<sup>26</sup> 8 CFR §204.5(h)(5); INA §101(a)(15)(O)(i).

<sup>27</sup> *Matter of [name not provided]*, LIN-02-184-53385 (AAO Sep. 17, 2002). The AAO said: “After careful consideration, the Service agrees that there is no statutory support for the requirement that an O-1 alien must be coming to the U.S. to perform services requiring an alien of O-1 caliber. 59 Fed. Reg. 41820 (August 15, 1994). In review, the director applied an incorrect legal standard.”

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<sup>28</sup> Employment and Training Admin., U.S. Dep’t of Labor, Technical Assistance Guide No. 656: Schedule A (TAG); 9 FAM 40.41, Exhibit I.

- *Receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.*<sup>29</sup>

This criterion asks exclusively for “internationally recognized” awards, thus significantly limiting the beneficiary’s options, as nationally recognized awards would be inadmissible. However, the definition of “internationally recognized” is not provided by the regulations. Would a GRAMMY Award, the most coveted national music award in the United States, be considered acceptable? GRAMMY Awards have been issued by The Recording Academy for nearly 50 years, honoring achievements in the recording arts and supporting the music community. It can be argued that the GRAMMY, while a national award, is certainly recognized internationally as one of the top U.S. music awards and, therefore, satisfies this criterion. The GRAMMY argument is an easy one to make, given this award’s prestige. However, similar logic can be applied to other, less obvious, national awards for excellence.

- *Membership in international associations, in the field for which certification is sought, which require outstanding achievements of their members, as judged by recognized international experts.*<sup>30</sup>

Here, exceptional aliens seeking to qualify under Schedule A, Group II are again restricted to holding memberships only in “international associations.” Therefore, membership in the U.S. National Academy of Sciences, for example, may not be sufficient for a Schedule A, Group II beneficiary, despite that members are elected into the academy based on their “distinguished and continuing achievements in original research.”<sup>31</sup> Once again, creative lawyering is important in order to meet this criterion where an alien is a member of prestigious professional organizations that, on first glance, appear to be national.

- *Published material in professional publications about the alien, about the alien’s work in the field.*<sup>32</sup>

This criterion calls for published material in “professional publications” only and omits any mention of major trade publications or other major media.<sup>33</sup> A front-page article on the alien in *The Los Angeles Times* or an interview as an expert on *The Today Show* is unlikely to satisfy this criterion because neither *The Los Angeles Times* nor *The Today Show* would qualify as “professional publications.” Note that published material must be “about the alien” or “about the alien’s work.” It is not specifically required that the publication be strictly about the alien himself, as materials about his or her work would suffice. It follows that even published material that does not mention the beneficiary by name but discusses his or her work would qualify. This is helpful to those exceptional aliens who avoid personal celebrity and prefer to promote their work instead.

- *Evidence of participation on a panel, or individually, as a judge of the work of others in the same or in an allied field.*<sup>34</sup>

Artists usually demonstrate this criterion by showing that they have participated in judging professional competitions or contests. For academics, service as a reviewer or editor of professional journals will be sufficient to meet this standard. Note that it is not necessary to show that the beneficiary was selected to act as a judge on account of his or her exceptional abilities. Simply showing that an alien has served as a judge of others’ work should satisfy this criterion.<sup>35</sup>

- *Evidence of original scientific or scholarly research contributions of major significance in the field.*<sup>36</sup>

There are two components to this criterion. The alien must show that his or her professional contributions are “original” and also that they are of “major significance.” For instance, although many patented inventions are considered original,<sup>37</sup> they do not necessarily lead to commer-

<sup>29</sup> 20 CFR §656.15(d)(1)(i).

<sup>30</sup> 20 CFR §656.15(d)(1)(ii).

<sup>31</sup> See the National Academy of Sciences website at [www.nas.edu/nas](http://www.nas.edu/nas) for membership criteria.

<sup>32</sup> 20 CFR §656.15(d)(1)(iii).

<sup>33</sup> 8 CFR §204.5(h)(3)(iii).

<sup>34</sup> 20 CFR §656.15(d)(1)(iv).

<sup>35</sup> *Buletini v. INS*, 860 F. Supp. 1222, 1229 (E.D. Mich. 1994), specifically addresses this regulatory criterion and confirms that the alien did not have to prove that his selection as a judge was as a result of his extraordinary abilities.

<sup>36</sup> 20 CFR §656.15(d)(1)(v).

<sup>37</sup> Over the years, legacy INS/USCIS has made conflicting statements regarding whether or not patents are considered

cially successful products or scientific methodologies that considerably influence the field. Such original contributions would not satisfy this regulatory criterion of Schedule A, Group II because they would not meet the “major significance” component.

It is also noteworthy that this Schedule A, Group II criterion only asks for “scientific or scholarly research” contributions and leaves out artistic contributions. It may be inferred from this drafting of the regulation that DOL does not expect artists to produce evidence relating to the original contributions criterion, unless they are also scholars in their respective fields. This begs a bigger question: Does DOL believe that artists do not make original contributions of major significance? Picasso certainly argued otherwise when he said “[d]rawing is no joke. There is something very serious and mysterious about the fact that one can represent a living human being with line alone and create not only his likeness but, in addition, an image of how he really is.”<sup>38</sup>

- *Evidence of authorship of published scientific or scholarly articles in the field in international professional journals or professional journals with international circulation.*<sup>39</sup>

International circulation is required for publications authored by exceptional aliens, and professional publications with only national circulations would not qualify. It is also apparent that, as in the “original contributions” criterion, there is no mention of aliens who work in the field of the arts. The regulation calls for “scientific or scholarly” articles in “professional journals” and omits any mention of articles in artistic professional journals or in the major media. An interior designer who published an article about his award-winning project in *Architectural Digest*, one of the leading international publications in the field of interior design, would not be able to satisfy this criterion.

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“original.” In one AAO decision, INS opined that “[t]he granting of a patent documents that an invention or innovation is original...” *Matter of [name not provided]*, LIN-02-298-52969 (AAO Mar. 12, 2003). A year later, however, the AAO contradicted itself by saying “the simple grant of a patent does not signify that the petitioner has made an original contribution to his field of endeavor.” *Matter of [name not provided]* (AAO Apr. 13, 2004).

<sup>38</sup> H. Clark, *Picasso: In His Words* 76 (1993).

<sup>39</sup> 20 CFR §656.15(d)(1)(vi).

Despite USCIS’s frequent attempts to place the additional condition that the articles be well regarded or that the journals that publish them be of a high rank, the law imposes no such requirements. USCIS regularly remarks that, because all researchers are expected to publish, an alien seeking to qualify as extraordinary, outstanding, or exceptional must show that his or her publications establish national or international acclaim or international recognition. This is simply incorrect. National or international acclaim and recognition are demonstrated through satisfying the required number of regulatory criteria, depending on the visa classification. The alien should not be required to demonstrate it through meeting the singular criterion of “authorship of scholarly articles.” It is important to keep in mind, however, that the journals that publish the alien’s articles be “professional.” In other words, publications in peer-reviewed journals will meet this requirement.

- *Evidence of the display of the alien’s work, in the field, at artistic exhibitions in more than one country.*<sup>40</sup>

Again, this criterion requires artistic exhibitions with an international reach. Additionally, it emphasizes that the exhibitions must be artistic and not in any other field. USCIS has been adamant about not allowing scientists and academics to use presentations at professional conferences as admissible evidence for this criterion.<sup>41</sup> Some practitioners have been getting around this requirement by arguing that “display of work at scholarly exhibitions” is sufficiently comparable to the “display of work at artistic exhibitions.” In both cases, the alien showcases his or her work to an audience, the alien can participate by invitation only, and invitations to display work are granted based on merit of achievement. USCIS, however, has been routinely rejecting this position.

### The Legal Standard for Performing Arts

PERM regulations added the performing arts to the list of eligible fields for the Schedule A, Group II category.<sup>42</sup> This standard appears to be slightly

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<sup>40</sup> 20 CFR §656.15(d)(1)(vii).

<sup>41</sup> *Matter of [name not provided]* (AAO Apr. 13, 2004), stating that “[t]he wording of this criterion strongly suggests it is for visual artists such as sculptors and painters.”

<sup>42</sup> 20 CFR §§656.5(2); 656.15(d)(2).

lower than that for the sciences and nonperforming arts, since it combines the prong of “widespread acclaim and international recognition” with the criterion of “international prizes and awards,” resulting in only two required prongs. To qualify for Schedule A, Group II in the field of performing arts, a petitioner must satisfy a two-prong test by demonstrating: (1) that the alien’s work during the past year did, and the alien’s intended work will, require exceptional ability; and (2) that the alien has exceptional ability by meeting some of the enumerated regulatory criteria.<sup>43</sup> The regulations are silent about exactly how many criteria a performing artist must meet to be considered exceptional, and it could be assumed that meeting just one would suffice. Those criteria are:

- documentation of current widespread acclaim and international recognition, and receipt of internationally recognized prizes and awards for excellence;<sup>44</sup>
- published material by or about the alien, such as critical reviews or articles in major newspapers, periodicals, or trade journals;<sup>45</sup>
- evidence of earnings commensurate with the claimed level of ability;<sup>46</sup>
- playbills and star billings;<sup>47</sup>
- confirmation of the outstanding reputation of theaters, concert halls, night clubs, and other establishments where the alien has appeared or is scheduled to appear;<sup>48</sup>
- confirmation of the outstanding reputation of theaters or repertory companies, ballet troupes, orchestras, or other organizations where the alien has performed during the past year in a leading or starring capacity.<sup>49</sup>

It is noteworthy that aliens in the performing arts were excluded by the original Schedule A regulations. This is because DOL had concluded that performing artists of exceptional ability were already available in the United States and were having diffi-

culty finding permanent employment.<sup>50</sup> Today, DOL has a different view of performing artists of exceptional ability and has added this field of endeavor to the Schedule A, Group II regulations.

## ADDITIONAL DOL REQUIREMENTS

### “International” Legal Standard

Nearly all regulatory criteria of the Schedule A, Group II classification require international recognition of the alien and stipulate that each criterion should be supported by evidence of such recognition “in the field in which certification is sought.” These requirements make the Schedule A, Group II unavailable to aliens with acclaim on a national level allowed under the EB-11 regulations,<sup>51</sup> or to those who received most of their accolades in another field.

Although it is clear that “exceptional ability” in this context requires international recognition and is “far above average in the field,”<sup>52</sup> some practitioners argue that applying the highest standard, that the individual must reach the very top of his or her field, is too restrictive. However, USCIS clarified this issue in a recent Interoffice Memorandum by confirming that “Congress intended for the ‘extraordinary ability’ classification to be comparable to DOL’s ‘exceptional ability’ standard in Schedule A, Group II.”<sup>53</sup> It then went on to state that the standard of exceptional ability of the USCIS regulations under the second preference<sup>54</sup> is “less restrictive” than the exceptional ability standard of DOL. In other words, it is clear that DOL’s “exceptional ability” should be addressed like USCIS’s “extraordi-

<sup>43</sup> 20 CFR §656.15(d)(2).

<sup>44</sup> 20 CFR §656.15(d)(2)(i).

<sup>45</sup> 20 CFR §656.15(d)(2)(ii).

<sup>46</sup> 20 CFR §656.15(d)(2)(iii).

<sup>47</sup> 20 CFR §656.15(d)(2)(iv).

<sup>48</sup> 20 CFR §656.15(d)(2)(v).

<sup>49</sup> 20 CFR §656.15(d)(2)(vi).

<sup>50</sup> Employment and Training Admin., U.S. Dep’t of Labor, Technical Assistance Guide No. 656: Schedule A (TAG); 9 FAM 40.41, Exhibit I.

<sup>51</sup> 8 CFR §204.5(h)(3).

<sup>52</sup> *Matter of Medical University of South Carolina*, 17 I&N 266 (R.C. 1978); *Matter of Tagawa*, 13 I&N Dec. 13 (DD 1967).

<sup>53</sup> USCIS Interoffice Memorandum, “Current Processing of Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with U.S. Department of Labor (DOL) Notification/Posting Requirements and Guidance Effective March 28, 2005, Pursuant to New DOL Regulations at 20 CFR Part 656 Regarding the New Process for Blanket Labor Certification for Schedule A,” Yates, Assoc. Dir. Operations, HQPRD70/8.5 (Sep. 23, 2005), published on AILA InfoNet Doc. No. 05101267 (posted Oct. 12, 2005)

<sup>54</sup> 8 CFR §204.5(k)(2).

nary ability,” while DOL’s and USCIS’s “exceptional ability” standards are, in fact, different.

Go figure.

### **Form ETA-9089**

The petitioner must file a signed, uncertified Form ETA-9089,<sup>55</sup> in duplicate, together with Form I-140 and the rest of the evidence, with USCIS. The ETA-9089 must be submitted in paper form, not electronically.

When completing the ETA-9089, it is advisable to state in item H-12, which calls for information about special skills or requirements, that the job requires exceptional ability in the alien’s field. This is to ensure that the information listed in Form ETA-9089 is aligned with the regulatory prerequisite that the alien’s intended work require exceptional ability.<sup>56</sup> Likewise, if the petitioner is seeking to qualify under the second preference immigrant visa by claiming an advanced degree,<sup>57</sup> Form ETA-9089 should list the advanced degree in item H-4 as an educational requirement for the job.

If the case is approved, a copy of the Form ETA-9089 will be forwarded to the Chief of the Division of Foreign Labor Certification.<sup>58</sup>

### **Posting Notice Requirement**

The employer is required to provide notice of filing the Application for Permanent Employment Certification.<sup>59</sup> Notice must be given to the appropriate bargaining unit representative or, if there is no such representative, it must be posted in a visible location at the place of the alien’s employment for at least 10 consecutive business days.<sup>60</sup> Additionally, if the employer normally uses other methods of in-house media to recruit for similar positions, the posting should be published in all such in-house media. Once the posting is completed, it must be filed with the rest of the petition.

The notice must be posted between 30 and 180 days prior to filing of the petition.<sup>61</sup> In other words, USCIS would have sufficient grounds to deny a

Schedule A, Group II application if the posting notice is dated more than 180 days or less than 30 days prior to filing.

### **Prevailing Wage Determination**

Under the new PERM regulations, the employer must pay a Schedule A, Group II applicant a prevailing wage, and a wage determination issued by the state workforce agency (SWA) must be submitted with the application.<sup>62</sup> The alien’s wage must be at least 100 percent of the prevailing wage.<sup>63</sup> Once again, to ensure the SWA’s proper determination of the prevailing wage for the alien’s position, it should be indicated that the job requires exceptional abilities. The same applies to the educational requirements. If the alien beneficiary seeks a second preference immigrant visa as a member of the professions holding an advanced degree,<sup>64</sup> the degree requirement should be listed in the prevailing wage request.

### **MEETING THE USCIS REQUIREMENTS**

Once the DOL requirements of the Schedule A, Group II classification are satisfied, pre-certification may be granted. However, since Schedule A, Group II is not an immigrant visa, but an alternative to a labor certification, it is not sufficient alone and should be accompanied by an immigrant visa petition. A beneficiary wishing to obtain pre-certification under these provisions must qualify either for the second or third preference employment-based category in order to receive an immigrant visa.

### **Second Preference Employment-Based Immigrant Visa**

In practice, most beneficiaries who are able to successfully claim exceptional abilities hold advanced degrees, making it easy for them to meet the requirements of the second preference. Under this category, an employer may file an immigrant visa petition if the beneficiary holds an advanced degree or has exceptional abilities.<sup>65</sup> Note that the law only requires one or the other, and those aliens who hold a master’s degree or above would make the grade.<sup>66</sup>

<sup>55</sup> 20 CFR §656.17.

<sup>56</sup> 20 CFR §656.15(d)(1).

<sup>57</sup> 8 CFR §204.5(k)(1).

<sup>58</sup> 20 CFR §656.15(f).

<sup>59</sup> 20 CFR §656.10(d).

<sup>60</sup> *Id.*

<sup>61</sup> 20 CFR §656.10(d)(3)(iv).

<sup>62</sup> 20 CFR §656.15(b)(i).

<sup>63</sup> H-1B Reform Act of 2004, Pub. L. No. 108-447.

<sup>64</sup> 8 CFR §204.5(k)(1).

<sup>65</sup> *Id.*

<sup>66</sup> INA §203(b)(2); 8 CFR §204.5(k).

Alternatively, a beneficiary may show that he or she holds a baccalaureate degree followed by at least five years of progressive experience in the field, which should also meet the requirement of an “advanced degree.”<sup>67</sup> To qualify under this provision, the employer must demonstrate that the job requires an advanced degree.<sup>68</sup> Should a doctoral degree be required by the alien’s profession, then he or she must possess a doctorate in order to satisfy this requirement.<sup>69</sup> Thus, if the alien qualifies as a member of the professions holding an advanced degree, there is no reason to meet the exceptional ability standard of the USCIS regulations. However, in those rare instances where the beneficiary does not possess, at minimum, a bachelor’s degree and five years of experience, or holds less than the Ph.D. required by the job, it will be necessary to go to the second part of the test and demonstrate exceptional abilities.

USCIS regulations define exceptional ability as “a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.”<sup>70</sup> Curiously, USCIS added the field of business, despite the fact that DOL limited its scope to the sciences or arts.<sup>71</sup> Meeting this standard of exceptional ability is accomplished by presenting evidence of at least three of the following six criteria<sup>72</sup>:

- degree, diploma, or certificate from a college, university, or other institution of learning relating to the area of exceptional ability;
- confirmation of at least 10 years of full-time experience in the occupation;
- license to practice the profession or certification for a particular profession;
- evidence of a salary or remuneration that demonstrates exceptional ability;
- membership in professional associations; or
- evidence of recognition for achievements and significant contributions to the field by peers,

governmental entities, or professional or business organizations.

Additionally, the petitioner must establish the prospective benefit requirement of the EB-2 classification.<sup>73</sup> Aliens of exceptional ability must show that they will “substantially benefit prospectively” the United States. The regulations are silent about this statutory prerequisite and provide no guidance as to documentation requirements in this regard. A district court in *Buletini v. INS* analyzed the prospective benefit requirement in the context of the EB-1 statute and concluded that legacy INS/USCIS should assume that “persons of extraordinary ability working in their field of expertise will benefit the United States.”<sup>74</sup> In other words, according to *Buletini*, if an extraordinary alien will work in his or her field of expertise, it is reasonable to assume that he or she will substantially prospectively benefit the United States. Legacy INS has also opined that “[o]rdinarily, the ‘substantial benefit’ criterion is met through satisfying the other statutory requirements” and that “there may be very rare instances where an extraordinary alien’s admission may be damaging or detrimental to the interests of the United States.”<sup>75</sup> Therefore, as long as the alien meets the other requirements for extraordinary ability, the prospective benefit of his or her work is implied, with rare exceptions.

The same reasoning could be applied to exceptional aliens. In order to be eligible for the Schedule A, Group II pre-certification, USCIS must conclude that the alien qualifies as “exceptional” by satisfying at least two of the seven regulatory criteria of prong three. Therefore, by following the *Buletini* logic that prospective benefit is satisfied by proving extraordinary abilities, proof that the alien does in fact possess exceptional abilities should be sufficient to meet the prospective benefit requirement for this visa preference category. In other words, if it is confirmed that the alien has exceptional abilities and is working in his or her field of expertise, it should follow that the alien’s work will benefit the United States.

<sup>67</sup> 8 CFR §204.5(k)(2).

<sup>68</sup> 8 CFR §204.5(k)(4)(i). *See also* INS Memorandum, “Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants” (Mar. 20, 2000), published on AILA InfoNet at Doc. No. 0032703 (posted Mar. 27, 2000).

<sup>69</sup> 8 CFR §204.5(k)(4)(i).

<sup>70</sup> 8 CFR §204.5(k)(2).

<sup>71</sup> 20 CFR §656.5(b).

<sup>72</sup> 8 CFR §204.5(k)(3)(i)(A)–(F).

<sup>73</sup> INA §203(b)(2)(A).

<sup>74</sup> *Buletini v. INS*, 860 F. Supp. 1222, 1229 (E.D. Mich. 1994).

<sup>75</sup> Letter, Skerrett, Chief, Imm. Branch, Adjudications, HQ 204.23-C (Mar. 8, 1995).

### Third Preference Employment-Based Immigrant Visa

Given that the standard of exceptional ability for the EB-2 is lower than that for the Schedule A, Group II,<sup>76</sup> an alien who has met the DOL regulations for exceptional ability should have no problem meeting the USCIS requirements. However, nothing mandates that the second preference be used, and the petitioner may choose to qualify under the third preference, if necessary. This may apply to an individual working in the arts who does not meet two of the most commonly utilized criteria, namely, a college degree and 10 years of experience. As such, a famous movie producer who meets at least two of the DOL regulations (*i.e.*, evidence of international awards and evidence of publications about the alien), may not qualify for at least three of the second preference regulations, since most of these regulations do not reflect the reality of who succeeds in Hollywood.

In that situation, the petitioner may opt to use the third preference employment-based visa designed for skilled workers, professionals, and other workers as the appropriate immigrant visa vehicle.<sup>77</sup> The regulations of the third preference specifically allow the petitioner to apply for the Schedule A designation in lieu of submitting a labor certification.<sup>78</sup>

### CONCLUSION

Schedule A, Group II is back in fashion. In the past several months, it has become the necessary and much-needed bridge to permanent residence for Indian and Chinese nationals of exceptional abilities who are now faced with lengthy delays due to immigrant visa retrogression. Our country has been suffering from a chronic shortage of scientists and must rely on foreign nationals in order to fill our hospitals, universities, and scientific laboratories.

William A. Wulf, Ph.D., president of the National Academy of Engineering of the National Academies, reported to the U.S. House of Representatives' Subcommittee on Immigration, Border Security, and Claims Committee on the Judiciary:

“One third of all U.S. Ph.D.s in science and engineering are now awarded to foreign born graduate students. We have been skimming the best and brightest minds from across the globe, and prospering because of it; we need these new Americans even more now as other countries become more technologically capable.”<sup>79</sup>

Over the years, we have been benefiting from the extraordinary, outstanding, and exceptional abilities of numerous foreign nationals who chose to work in this country on a permanent basis. Today, with visa retrogression posing a major obstacle, Schedule A, Group II has provided an important avenue by adding visa numbers and allowing those aliens who would be subjected to years of waiting to qualify for permanent residence.

So, is Schedule A, Group II in vogue again? Is it, as they say in high fashion, “the new black”? Coco Chanel once said, “I want to create classics,” and in 1926, with the little black dress, she did.<sup>80</sup> And while it may look plain and redundant, the little black dress will never go out of style. Rather than being “the new black,” Schedule A, Group II may have emerged as the “little black dress” of immigration law. It is not a trend, but rather a classic that is a solid backup when other options are not current.

<sup>76</sup> *Supra* note 53.

<sup>77</sup> 8 CFR §204.5(1)(1).

<sup>78</sup> 8 CFR §204.5(1)(3).

<sup>79</sup> “Sources and Methods of Foreign Nationals Engaged in Economic and Military Espionage: Hearings before the Subcomm. on Immigration, Border Security, and Claims Comm. on the Judiciary,” 109th Cong., 1st Sess. (2005) (testimony of William A. Wulf (the importance of foreign-born scientists and engineers to the security of the United States), also found at [www7.nationalacademies.org/ocga/testimony/Importance\\_of\\_Foreign\\_Scientists\\_and\\_Engineers\\_to\\_US.asp](http://www7.nationalacademies.org/ocga/testimony/Importance_of_Foreign_Scientists_and_Engineers_to_US.asp).

<sup>80</sup> [www.chanelamour.com](http://www.chanelamour.com).

**SCHEDULE A, GROUP II CHART**

