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Immigration Law Group

SCHEDULE A UNDER PERM: AN INTERESTING ASSORTMENT OF IMMIGRANT OPTIONS FOR NURSES, PHYSICAL THERAPISTS, ARTISTS, SCIENTISTS, AND ENTERTAINERS—AN UPDATE

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The Program Electronic Review Management system (PERM) requires an employer to test the labor market and show that there are no able, willing, and qualified U.S. workers to perform the job for which the foreign national is seeking permanent residence. An employer also must show that the employment of that foreign national will not adversely affect the wages and working conditions of U.S. workers. However, the Department of Labor (DOL) has continued to recognize that there is a shortage of available U.S. workers in certain occupations, and it would not be appropriate to spend time, effort, and expense in testing the labor market for these occupations where the unavailability of workers has already been acknowledged. These occupations are called Schedule A occupations—a special "pre-certified" category of occupations that are exempted from the labor certification process. Schedule A consists of two groups: Group I, which includes professional nurses and physical therapists; and Group II, which includes aliens of exceptional ability in the arts, sciences, and performing arts.

Application Form ETA 9089

All Schedule A filings require the submission of ETA Form 9089 Application for Permanent Employment Certification in duplicate. Form ETA 9089 must be filed with U.S. Citizenship and Immigration Services (USCIS) with jurisdiction over the place of permanent employment . Similar to the procedures before the implementation of PERM, nothing is submitted to DOL.

Prevailing Wage Determination (PWD)

PERM requires all employers, including those filing Schedule A occupations, to obtain a prevailing wage determination (PWD) through the Department of Labor's iCERT Portal.[1] If there is a bargaining representative, the PWD must list the prevailing wage from the collective bargaining agreement. The validity of the PWD is no less than 90 days and no more than one year from the date of determination. Since Schedule A cases do not involve recruitment, the applications must be filed during the actual validity period noted on the PWD, or USCIS will deny the application.

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[1] http://icert.doleta.gov/

The PWD Form ETA-9141 bearing wage determination and endorsement must be submitted to USCIS. Moreover, since PERM eliminates the 5 percent variance, employers are required to pay the foreign national 100 percent of the prevailing wage either when the foreign national is admitted to take up the certified employment or when the alien worker is granted permanent residency status.

Posting Notices

PERM continues to require employers to post notices regarding the job opportunity for at least 10 consecutive business days in two conspicuous locations at the work site.[2]

Practice Pointer: Based on a recent BALCA case, as long as an employer has employees working on the premises on a Saturday, Sunday or holiday, those days are business days for purposes of complying with the Notice of Filing posting.[3]

If the employees have a union, the petitioner must notify the bargaining representative that an immigrant visa petition is being filed and may provide a copy of Form ETA 9089, which provides all the relevant information including the proffered position title, duties, and rate of pay. If the petitioner has notified the bargaining representative, the petitioner need not also post a notice for 10 business days.

The internal posting notice must include a job description, work hours, and rate of pay. Where a salary range is used, the bottom end of the range must be at least the prevailing wage.[4] In addition to the printed posted notice, PERM further requires that an employer use any and all in-house media, whether electronic or printed, in accordance with the normal procedures used in recruiting for other similar positions in the employer's organization.

[2] If the employer currently employs workers in multiple sites and does not know where the beneficiary will be placed, the employer must post notices at the worksites of all of its locations or clients. "USCIS updates Adjudicator's Field Manual guidance on posting requirements for Schedule A visa petitions filed before and after the effective date of the PERM regulations on March 28, 2005," *published on* AILA Infonet at Doc. No. 06021661 (*posted* Feb. 16, 2006)

[3] *See* Il Cortile Restaurant, BALCA Case No.: 2010-PER-00683; ETA Case no.: A-07235-68746; 12 Oct. 2010. Prior to this BALCA decision, Monday through Friday were considered actual business days, regardless of whether a facility operated seven days a week.

[4] See Appendix A for the Service's Sample Notice of Posting.

SCHEDULE A, GROUP I

Professional Nurses

Under PERM, a professional nurse is defined as "a person who applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological and behavioral sciences. Professional nursing generally includes making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments prescribed by the physician or dentist; and participation in the activities for the promotion of health and prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry and medicine."[5] Professional nurses who qualify under the Schedule A, Group I category include: Registered Nurses, Director of School of Nursing; Nurse Anesthetist; Nurse, Office; Nurse, School; Nurse, Supervisor; Nurse, Instructor; and Nurse Practitioner. Licensed Vocational Nurses (LVNs), Licensed Practical Nurses (LPNs), Certified Nurse Assistants (CNAs), and Nurse's Aides do not qualify for Schedule A pre-certification and must file a labor certification application with DOL.

In general, to qualify as a professional nurse, the beneficiary must have completed at least two years of education in nursing. Nurses educated outside of the United States must possess a valid license in their home country.

Filing Procedures

Schedule A, Group I applications for professional nurses are filed directly with the appropriate USCIS service center having jurisdiction over the intended place of employment. Supporting documentation to be submitted with the Form I-140 Immigrant Petition for an Alien Worker includes the following:

(1) Form I-140 Immigrant Petition for Alien Worker, along with evidence that the petitioning employer has the financial ability to pay the salary offered;[6]

[5] 20 CFR §656.5(a)(3)(ii), at 69 Fed. Reg. 77325, 77389 (Dec. 27, 2004), *published on* AILA InfoNet at Doc. No. 04122312 (*posted* Dec. 27, 2004).

[6] If the employer is a hospital or clinic with more than 100 employees, the I-140 should include a statement from the financial officer establishing the prospective employer's ability to pay the proffered wage. Smaller nursing homes or registries may be asked to provide contracts between the

(2) PERM Labor Certification Application Form ETA 9089 in duplicate;

(3) Prevailing wage determination;

(4) Posting notice;

(5) Nursing degree or diploma;

(6) Nurse license from country where the nursing degree was obtained;[7]

(7) Proof that the alien who will be employed as a professional nurse:

(i) has received a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS);[8] or

(ii) holds a permanent, full, and unrestricted license to practice professional nursing in the state of intended employment; or

(iii) has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) administered by the National Council of State Boards of Nursing.

The criteria for Schedule A professional nurses have changed slightly under PERM. Previously, a professional nurse had to show that he or she has passed the CGFNS examination, or that he or she held a full and unrestricted (permanent) license to practice nursing in the state of intended employment. Under PERM, professional nurses may now demonstrate eligibility through one of three ways: (1) passage of NCLEX-RN; (2) a permanent, full, and unrestricted license to practice professional nursing in the state of intended employment; or (3) obtaining a CGFNS certificate.[9]

The NCLEX-RN alternative was added to address the problem that many professional nurses encountered based on their inability to obtain state licensure without a Social Security number (SSN). In many states, state boards of nursing refuse to issue a state nursing license without a SSN. Yet, the Social Security Administration, particularly after 9/11, will not issue a SSN without proof of employment authorization. Thus, many foreign nurses could not qualify under Schedule A under the state license option based on this double-edged dilemma.[10] PERM, therefore, added this alternative as an acceptable option for Schedule A eligibility and does not even require proof that the SSN is the only problem to obtaining the state license.

The final PERM rule also specifically addressed the issue of temporary licensing and determined that the state license must be permanent—a temporary license or a license from a state other than the state of intended employment is not acceptable.[11] Finally, PERM also modified the CGFNS eligibility provision, specifically requiring a CGFNS certificate

company and the clients for whom the beneficiary would perform services.

[7] In some cases, the foreign nurse may be a citizen of one country but obtained the nursing license in another country. Schedule A, Group I requires that the foreign license must be from the country where the nursing was obtained.

[8] The VisaScreen certificate issued by Graduates of Foreign Nursing Schools (CGFNS) is a separate requirement from the CGFNS certificate that evidences the individual has English proficiency and nursing skills.

[9] 20 CFR §656.5(a)(2) (69 Fed. Reg. at 77389).

[10] USCIS responded to this predicament by issuing a memorandum on December 20, 2002, stating that a professional nurse could qualify for Schedule A if the professional nurse had met the state requirements including passage of the National Council Licensure Examination for Registered Nurses (NCLEX) and the Social Security number (SSN) was the only obstacle to obtaining full and unrestricted state licensure. *See* legacy Immigration and Naturalization Service (INS) Memorandum, "Nurses Eligible for Schedule A Approval if Eligible for Licensing," *published on* AILA InfoNet at Doc. No. 03010840 (*posted* Jan. 8, 2003). *See* 69 Fed. Reg. at 77334. In order to file the I-140 petition, the state board of registered nursing previously provided a letter to the applicants confirming they have passed the NCLEX-RN exam and have met all the requirements, but for the social security number. In California, registered nurse applicants were given three years to present a social security number or their applications will be closed. Now applicants must present a social security number with their initial application for licensure. If the social security number is not provided, the application will not be processed and the applicant will not have an opportunity to take the NCLEX-RN. http://www.rn.ca.gov/pdfs/applicants/exam-app.pdf.

[11] In the supplementary information, DOL states that the reasoning behind this prohibition is because it broadened the rule under PERM to include passage of the NCLEX-RN as qualifying for Schedule A, Group II, and virtually all alien nurses who have temporary licensure would be covered by this rule, thereby avoiding any need to distinguish between different types of temporary licenses. *See* 69 Fed. Reg. at 77334. The supplementary information also notes that some states have already passed legislation allowing Nurse Licensure Compacts, which allow a nurse licensed in his or her state of residence to practice nursing in another state. DOL further notes that it is anticipated most states will pass legislation to authorize the Nurse Licensure Company and adopt the mutual-recognition model of nurse licensure. *Id.*

and not merely proof the alien has passed the CGFNS nursing skills examination.[12]

As a practical matter, a majority of states require the CGFNS certificate as a *prerequisite* to the NCLEX-RN exam. California is one of the few states that permits nurses to take the NCLEX-RN exam without the CGFNS certificate. The CGFNS exam is administered in over 30 countries, whereas the NCLEX-RN exam is only administered by Pearson Vue in the United States, its territories, and a few select countries,[13] which previously presented a problem for many applicants based on the logistical and economic difficulty in securing a visa and traveling to a test site.[14]

Prevailing Wage Determination Issues for Nurses

Registered nurse positions are often covered by a collective bargaining agreement (CBA) negotiated between the employer and the union. However, the PERM requirement regarding obtaining a PWD \ seems unnecessary when a CBA exists When submitting the ETA-9141 PWD request, one must also provide the relevant portion of the CBA. If the CBA has expired and is under negotiations, the DOL will issue the PWD with a 90-day validity.

Physical Therapists

The other designated Group I shortage occupation is that of physical therapists.[15] Under PERM, the foreign national must be "employed as a physical therapist," defined as, "a person who applies the art and science of physical therapy to the treatment of patients with disabilities, disorders and injuries to relieve pain, develop or restore function, and maintain performance, using physical means, such as exercise, massage, heat, water, light, and electricity, as prescribed by a physician (or surgeon)."[16] Physical therapist aides who provide physical therapy services under the supervision of a physical therapist do not qualify for Schedule A pre-certification and must file a labor certification application.

The minimum educational requirement for physical therapists is a post-baccalaureate degree in physical therapy from an accredited education program in the United States or overseas. While some programs offer a master's degree, a growing majority of programs in the United States offer the Doctor of Physical Therapy (DPT) degree. According to the 2010 American Physical Therapist Association Background Sheet, 199 colleges and universities nationwide currently offer professional physical therapist education programs; 96 percent offer the DPT; and the remaining programs are planning to convert.[17] More importantly, because of the education credentialing criteria applied by the two USCIS accredited credentialing agencies for VisaScreen Certificates (to be discussed in the next section), in most instances, the intending immigrant physical therapist must have the equivalent of a master's degree to successfully obtain the VisaScreen Certificate required for immigration. After graduation, candidates must also pass the National Physical Therapy Examination (NPTE) administered by the Federation of State Boards of Physical Therapy (FSBPT). For most states, candidates are eligible to sit for the NPTE examination if they have graduated from an accredited physical therapy program and have completed a requisite number of hours of clinical services. The NPTE examination is given on most business days year-round. For close to one year between 2010 and 2011 however, the NPTE test was suspended by the FSBPT for all graduates of physical therapy schools located in Egypt, India, Pakistan and the Philippines due to pervasive, ongoing security breaches.[18] As of May 25, 2011, the FSBPT will offer NPTE-i for candidates who received their first professional degree from such affected countries. The NPTE-i will be similar to other forms of the NPTE and will be offered at least

[12] When the previous regulation was drafted, CGFNS did not issue a certificate, but instead required applicants to pass a test that evaluated both English proficiency and nursing skills. As such, DOL understood passage of the CGFNS nursing examination to include both factors. DOL believed that proficiency in English is essential to perform the job duties of a professional nurse in the United States, due to the need to communicate with doctors and patients. DOL states that the current CGFNS certificate requirement is analogous to passage of the old CGFNS nursing exam. *Id.*

[13] These currently include Puerto Rico, Guam, the U.S. Virgin Islands and its outlying possessions of American Samoa, the Northern Mariana Islands, Australia, Canada, Germany, Hong Kong, India, Japan, Mexico, Philippines, Taiwan, and the United Kingdom.

[14] A registered nurse who is granted an immigrant visa based on a CGFNS certificate must take the NCLEX-RN exam upon arrival in the U.S. to complete the licensure process.

[15] 20 CFR §656.5(a)(1) (69 Fed. Reg. at 77389).

[16] 20 CFR §656.5(a)(3)(i) (69 Fed. Reg. at 77389).

[17] American Physical Therapy Association Background Sheet 2010.

[18] The Federation of State Boards of Physical Therapy News Announcement, July 12, 2010 and November 1, 2010.

twice in 2011 with the goal of FSBPT to offer the NPTE-i at least twice during 2012.[19] Other requirements for physical therapy practice vary from state-to-state according to physical therapy practice acts or state regulations governing physical therapy.

Under the PERM regulations, licensure is not a pre-requisite to filing of a Schedule A petition for physical therapists. Rather, the foreign national need only "possess all the qualifications necessary to take the physical therapist licensing examination" in the state of intended employment.[20] Thus, unlike Schedule A professional nurses, physical therapists need only be eligible to sit for the relevant state licensing examinations without actual proof of passage of any qualifying examinations. In practicality, proof of qualifications to sit for the licensing examination is often evidenced in the form of a letter or statement signed by an authorized state physical therapy licensing official in the state of intended employment. In continuing to allow intending immigrant physical therapists to submit proof of eligibility to sit for the licensing examination rather than proof of permanent licensure, DOL thus recognizes the common problem posed by many licensing boards where they refuse to issue permanent licensure until the applicant has a SSN or is physically in the United States.

Practice Pointer: It appears that even if the foreign physical therapist were to fail the licensing examinations, the applicant could still receive permanent residency status since there is no further requirement in the green card process for the applicant to provide proof of actual passage of the relevant licensing examinations. In practicality however, if the applicant were unable to pass the examinations, he or she would not be able to obtain the requisite state licensure to practice as a Physical Therapist.

Similar to Schedule A professional nurses, applications for labor certifications for physical therapists are filed directly with the appropriate USCIS service center having jurisdiction over the permanent place of employment. Supporting documentation to be submitted with the I-140 Immigrant Petition for Alien Worker include the following:

(1) Form I-140 Immigrant Petition for Alien Worker, along with evidence that the petitioning employer has the financial ability to pay the salary offered;

(2) PERM Labor Certification Application Form ETA 9089 in duplicate;

(3) Prevailing wage determination;[21]

(4) Posting notice;

(5) Proof that the alien applicant possesses all the qualifications necessary to take the physical therapist licensing examination or permanent physical therapist license from the state of intended employment; and

(6) Physical therapy degree diploma and transcript.

Issues Affecting Schedule A, Group I Professional Nurses and Physical Therapists

Section 343 VisaScreen Certificate for Professional Nurses and Physical Therapists

Although the Section 343 VisaScreen Certificate is not a new PERM requirement for processing of permanent residency applications for nurses and physical therapists, it is a requirement common to both Schedule A, Group I occupations and continues to be one of the most burdensome requirements. Since the passage of §343 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA),[22] foreign-born health care professionals in seven occupations—including professional nurses and physical therapists seeking nonimmigrant or immigrant visas—are required to present a VisaScreen Certificate.[23] Section 343 is now

[19] The Federation of State Boards of Physical Therapy News Announcement, September 30, 2010.

[20] 20 CFR §656.5(a)(1) (69 Fed. Reg. at 77389).

[21] Since there are currently no union organizations covering the occupation of physical therapists, the State Workforce Agency (SWA) in most instances will utilize the Bureau of Labor Statistics Occupational Employment Statistics (OES) survey for prevailing wage determination unless the employer provides acceptable alternative survey.

[22] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.

[23] Certificates for Certain Health Care Workers, 68 Fed. Reg. 43901 (July 25, 2003). By way of background, §343 of IIRAIRA created new grounds for inadmissibility for any uncertified immigrant or nonimmigrant alien who seeks to enter the United States to perform labor as a health care worker in one of the covered occupations. The affected professionals are nurses, physical therapists, occupational therapists, speech language pathologists, medical technologists, medical technicians, and physician assistants. For intending immigrants, the Section 343 VisaScreen

codified at INA §212(a)(5)(c) and 8 CFR §212.15.[24] Supervisory positions within these occupations that do not entail any patient care but do have a direct effect on patient care also are subject to the certification requirement. Intending immigrants in research-oriented positions within these occupations who are not involved in any direct patient care may be classified as "non-clinical" and are exempt from the requirement.[25] The VisaScreen Certificate verifies that the foreign health care worker's education, training, licensing, experience, and English competency are comparable to American health care workers. VisaScreen Certificates must be presented at the I-485 stage for applicants in the United States or at the consular interview for candidates who immigrant visa process at a U.S. consular post abroad.[26]

The Credentialing Agencies

Currently, the International Commission on Healthcare Professions (ICHP), a division of the Commission on Graduates of Foreign Nursing School (CGFNS), is authorized to issue certificates to both nurses and physical therapists. Physical therapists have the additional option of presenting a certificate issued by the Foreign Credentialing Commission on Physical Therapists (FCCPT). Both credentialing agencies offer online applications and the processing time is much improved.

Certificates must be presented with the adjustment of status application or at the immigrant visa interview. In the nonimmigrant context, a valid VisaScreen Certificate must be presented after July 26, 2004, either to a consular officer at the time of visa issuance or when applying for change of nonimmigrant visa status or extension of stay within the United States..

[24] Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163 (*codified as amended at* 8 USC §§1101 *et seq.*).

[25] Per 8 CFR §212.15(b)(2), the certification requirement does not apply to aliens seeking admission to perform services in a nonclinical health care occupation, defined by this section as "one in which the alien is not required to perform direct or indirect patient care," including, but not limited to, teachers, researchers, and managers of health care facilities.

[26] As a practical matter, based on some of the logistical problems in collecting the documentation required for the VisasScreen Certificate, the I-485 may be filed without the VisaScreen Certificate, which can be submitted at a later date, usually in response to a USCIS-issued Request for Evidence (RFE). USCIS has flip-flopped on this issue. On September 22, 2003, USCIS issued a memo stating that the VisaScreen had to be submitted at the time of filing the I-485, but revised this policy on October 1, 2003, at an AILA/USCIS Benefits Liaison meeting and confirmed that the VisaScreen requirement will be requested at the time an adjudicator starts reviewing the I-485. *See* USCIS Memorandum, "Final Regulation on Certification of Foreign Health Care Workers: Adjudicator's Field Manual Update AD 03-31" (Sept. 23, 2003), *published on* AILA InfoNet at Doc. No. 03092641 (*posted* Sept. 26, 2003) and "USCIS Headquarters Response to Issues Raised by AILA at the AILA/USCIS Benefits Liaison Meeting on October 1, 2003," *published on* AILA InfoNet at Doc. No. 03112547 (*posted* Nov. 25, 2003). Importantly, anecdotal reports confirm that the Nebraska Service Center has been uncharacteristically generous in granting extensions for the Visa Screen Certificate, particularly if the alien can show that he or she is very close to receiving it.

However, confusion abounds concerning the educational requirements for physical therapists for VisaScreen Certificate purposes because of the different requirements imposed by the two credentialing agencies. Is a bachelor's degree sufficient or must one have the equivalent of a master's degree? The confusion boils down to the different evaluation tools used by the two agencies. The CGFNS professional standards committee developed the educational standard based on whom the Commission on Accreditation in Physical Therapy Education (CAPTE) would accredit. The CAPTE stopped accrediting bachelor's degree programs in the United States as of January 1, 2003. Therefore, most accredited U.S. degrees in physical therapy are now only offered at the masters level. Accordingly, when CGFNS evaluates the education of a physical therapist, it will first look at what year the education was completed. If the education was completed prior to January 1, 2003, the applicant must have the equivalent of a bachelor's degree in physical therapy. Post 2003 graduates will have to show that they have the equivalent of a master's degree in order to successfully obtain a VisaScreen Certificate from CGFNS. FCCPT on the other hand uses a Coursework Evaluation Tool (CET) established by the FSBPT that has been validated against the CAPTE criteria. The CET consists of a course-by-course evaluation to ensure the minimum credits in particular subjects are earned. It is therefore possible that physical therapists with bachelor's degrees may be found to have a substantially equivalent education based on their extensive course work. Not all physical therapists with bachelor's degrees will meet the CET requirements. The CET draws no distinction as to when the degree was earned. In reality, if a physical therapist applicant received a bachelor's degree prior to 2003, but does not have the requisite courses on the CET, no certification will be issued.

Practice Pointer*:* Recent and upcoming physical therapist graduates should visit the FCCPT website to review the coursework checklist. This is a powerful resource that can help current physical therapist students in bachelor's programs to wisely select courses and electives. For many others, there will be no other alternatives other than to return to school and complete the missing classes. Intending immigrant physical therapists should carefully review their education against the different standards. In some states, only a FCCPT credential evaluation will be accepted for licensure.

Further, pursuant to the VisaScreen program, foreign-born nurses and physical therapists are required to establish competency in oral and written English by meeting specified scores on one or more nationally recognized standardized testing services. For nurses, the English language requirements can be met by taking : (a) the three tests offered by the Educational Testing Service (ETS); namely, Test of English as a Foreign Language (TOEFL), Test of Written English (TWE) and Test of Spoken English (TSE); or (b) the Test of English in International Communication (TOEIC) in addition to the TWE and the TSE; or (c) taking the International English Language Testing System (IELTS) examination; or (d) taking the TOEFL iBT administered by the ETS, which measures reading, writing, listening, and speaking skills.

	Nurses	Physical Therapists
TOEFL	540/207	560/220
TWE	4.0	4.5
TSE	50	50
TOEIC	725	N/A
TWE	4.0	
TSE	50	
IELTS	6.5	N/A
Band	7.0	
TOEFL iBT	83	89
Speaking	26	26

For physical therapists, this requirement can only be met by sitting for the TOEFL in addition to the TWE and TSE, or TOEFL iBT. Graduates of health care programs in Australia, Canada (except Quebec), Ireland, New Zealand, the United Kingdom, and the United States are exempt from the English language proficiency requirement. English scores are valid only for two years from the date of testing and all scores must be valid at the time that the VisaScreen Certificate is issued.

VisaScreen Certification

VisaScreen certification verifies that the foreign health care worker's education, training, licensing, experience, and English competency are comparable to that of an American health care worker. Each certification document must contain the following items:

- name and address of the certifying organization with a point of contact;
- date of issue;
- title of occupation for which the certification was issued;
- applicant's name, date, and place of birth;
- verification that the education, training, license and experience are comparable to American health care workers;
- verification that the education, training, license and experience are authentic;
- verification that the education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States as an immigrant (this determination is not binding on USCIS);
- verification that the applicant has passed the licensing or certification exam, or has passed a test predicting success on a licensing or certification exam; and
- results of standardized testing for English competency requirement.

The requirement is met when the foreign health care workers present a VisaScreen Certificate at the time of immigrant visa issuance or when applying for adjustment of status within the United States.[27]

Validity of the VisaScreen Certificates

Once issued, VisaScreen certificates are valid for five years. Therefore, if the Schedule A-based application takes longer than five years to process (for instance, as a result of bureaucratic delay, security checks delay, or visa retrogression), the applicant is required to renew the certificate. This is a cumbersome process that is not only costly, but also burdensome where the applicant may be required to provide proof of continued oral and written English competency by retaking one of the nationally recognized, standardized testing services. Note that VisaScreen certificates issued in conjunction with the three interim rules and prior to the final codification of Section 343 have no expiration dates and remain valid.[28]

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[27] INA §212(r).

[28] Section 343 of the IIRAIRA was implemented via three interim rules published in the federal register as follows:

(1) Interim Procedures for Certain Health Care Workers, 63 FR 55007 (October 14, 1998) (codified at 8 CFR 212.15 and 245.14) (the first Interim Rule);

(2) Additional Authorization to Issue Certificates for Foreign Health Care Workers, 64 FR 23174) (April 30, 1999) (amending 8 CFR 212.15) (the second Interim Rule);

(3) Additional Authorization to Issue Certificates for Foreign Health Care Workers; Speech Language Pathologists and Audiologists, Medical Technologists and Technicians, and Physician Assistants, 66 FR 3440 (January 16, 2001) (amending 8 CFR 212.15) (the third Interim Rule).

In the first Interim Rule, the CGFNS and the National Board for Certification in Occupational Therapy, Inc. (NBCOT) were authorized to issue certificates to immigrant nurses and occupational therapists respectively, and established the appropriate English language competency levels for these occupations, and specified exemptions from English language proficiency testing. In the second Interim Rule, CGFNS was temporarily authorized to issue certificates to immigrant occupational therapists and physical therapists. It also authorized the Foreign Credentialing Commission on

Streamlined Certification Process for Aliens Trained in the United States

Foreign-born nurses and physical therapists who received their entry-level professional education in the United States from an accredited institution are eligible to utilize a "streamlined certification process" to meet the certification requirements. This is meant to shorten the certification process required for health care workers educated in the United States. Under this approach, the educational comparability and English proficiency components of the certification requirement can be waived if foreign-born nurses and physical therapists present evidence of graduation from certain accredited programs in their respective occupations.[29]

Practice Pointer. CGFNS will not waive the English proficiency component for nurse applicants who have completed a Master's degree in the U.S. but obtained their qualifying nursing diploma or bachelor's degree abroad.

Alternative Certification Process for Nurses

INA §212(r) allows for an alternative certification process for certain foreign nurses.[30] In lieu of a Section 343 VisaScreen Certificate, a foreign nurse may present a certified statement from CGFNS stating that he or she has a valid and unrestricted license as a nurse in the state of intended employment and that his or her foreign license is authentic and unencumbered. Currently, foreign nurses with unrestricted licenses from Florida, Georgia, Illinois, Michigan, and New York are eligible for this alternative certification process. In addition, the foreign nurses must have graduated from a nursing program where instruction was in English and located in Australia, Barbados, Canada (the Quebec approved schools include: McGill University and Dawson College in Montreal, Vanier College in St. Laurent, John Abbot College in Sainte Anne de Bellevue, and Heritage College in Gatineau), Ireland, Jamaica, New Zealand, South Africa, Trinidad, Tobago, United States, and the United Kingdom.

Common Problems in Obtaining the VisaScreen Certificates

One of the most common problems associated with obtaining the VisaScreen Certificate is the lengthy process involved in securing the original academic, experience, and licensure validation documents required for credentialing. The certification requirements entail multiple time-consuming steps, including the submission of documentation from the VisaScreen applicant's secondary school and onwards; although in the case of secondary education, legible photocopies will be accepted in lieu of originals. However, all validation of registration/licenses and the applicant's professional school's transcripts must come directly from the issuing authority to the credentialing agency. If the school or licensing agency has closed, the applicant is required to contact the ministry of health or the national, provincial, or state licensing authority in his or her country of education where the defunct institution's documentation is held.

In addition, the VisaScreen applicant is required to provide validations of all licenses he or she has held, past and present. Hence, another common problem is where the applicant's initial licensure from his or her home country has lapsed. CGFNS insists on validation of the initial license from the country of education even though the applicant no longer practices in that country. The rationale behind this requirement is to verify that the applicant has indeed complied with all the requirements for licensure. Without that initial validation, the nurse would not be eligible to sit for the qualifying examination as part of the VisaScreen program. Moreover, all subsequent licenses must also be

Physical Therapy (FCCPT) to immigrant physical therapists and established the appropriate English language competency levels for physical therapists. In the third Interim Rule, CGFNS was temporarily authorized to issue certificates to all seven affected health care professionals and established the passing scores for the English tests for each health care occupation. The final rule implementing IIRAIRA's changes with an effective date September 23, 2003, further established that VisaScreens are valid for five years from date of issuance. However, VisaScreens issued prior to September 23, 2003, are valid indefinitely.

[29] For nurses, this would include graduation from an entry-level program accredited by the National League for Nursing Accreditation Commission (NLNAC) or the Commission on Collegiate Nursing Education (CCNE). For physical therapists, this would include graduation from a program accredited by the Commission on Accreditation in Physical Therapy Education (CAPTE) of the American Physical Therapy Association (APTA).

[30] The final Certificates for Certain Health Care Workers Rule essentially adopted the alternative certification process for foreign nurses promulgated by the interim rule implementing the passage of the Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA), Petitioning Requirements of the H-1C Nonimmigrant Classification under Pub. L. No. 106-95, 66 Fed. Reg. 31107 (June 11, 2001), and created an alternative certification process for nurses.

validated for the VisaScreen certification process to ensure that they have not been suspended or revoked in one jurisdiction without notice being given to the others. This can be an extremely complicated, drawn-out, and costly process. In order to reactivate the applicant's initial licensure, some countries, such as the Philippines, require that all past renewal fees be paid even if the applicant has not been in the country for years. Another frequently encountered problem is where the applicant graduated with the professional-level degree but never held registration or obtained licensure in the country of education. In this case, the applicant is rendered ineligible to sit for the CGFNS qualifying examination. The only time this requirement is waived is where the applicant can demonstrate that he or she was not permitted to sit for the licensing examination in the country of education (*e.g.*, Chinese citizens are not eligible to sit for the Philippines licensure examination).

The VisaScreen Certificate is only valid for five years. Applicants who have not received permanent resident status within the validity period, must apply to renew their certificate. Given the lengthy waiting period for an EB-3 visa number, most applicants will have to renew their certificates. As part of the renewal process, applicants must re-validate their licenses and retake the English language proficiency exam. Beginning March 2010, applicants are exempt from the English exam if they worked as a registered nurse in the United States for at least 27 to 36 months, of which 9 months must be in the year preceding the filing of the renewal application.[31]

Visa Retrogression and Concurrent Filing

Professional nurses and physical therapists who are in the United States and eligible to file for adjustment of status are able to file their I-485 and ancillary applications concurrently with the I-140 immigrant visa petition as long as their priority date is current. The priority date for a professional nurse or a physical therapist is established when a complete I-140 immigrant visa petition is received by the USCIS service center.

Unfortunately, professional nurses in jobs that require only two years of nursing training fall under the third preference category for Skilled Workers. This three– to seven-year visa retrogression has exacerbated the immediate need for qualified registered nurses nationwide. Most foreign nurses do not qualify for an H-1B visa unless they are certified advanced practice registered nurses (APRN) or upper-level nurse managers.[32] The Treaty NAFTA (TN) visa remains an option for Canadian and Mexican citizens. The H-1C visa for registered nurses at a select few hospitals located in "Health Professional Shortage Areas (HPSAs) sunset in December 2009 and is no longer an option.

Visa retrogression may be less of a problem for physical therapists. According to the American Physical Therapy Association, close to 79 percent of the accredited physical therapist programs in 2005 offer doctorate degrees. Moreover, in accordance with the Commission on Accreditation in Physical Therapy Education, all physical therapist programs seeking accreditation are required to offer degrees at the master's degree level and above.[33] In addition, the list of professional occupations in Appendix A of the final PERM rule, which designates the usual educational requirement for each professional occupation, lists physical therapists as a Level 3 coding—thus recognizing that the usual minimum entry-level requirement for the position is a master's degree. Thus, even an entry-level physical therapist position will almost automatically fall within the EB-2 category, and employers who usually hire candidates with at least a master's degree in physical therapy will not have to justify the higher degree requirement with a business necessity argument.

SCHEDULE A, GROUP II

The Schedule A, Group II category includes aliens of exceptional ability in the sciences or arts, and now includes the performing arts. It also includes college and university teachers of exceptional ability who have been practicing their

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[31] http://www.cgfns.org/sections/programs/vs/.

[32] INS Memorandum "Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses" *published on* AILA InfoNet at Doc. No. 02121746 (*posted* Dec. 17, 2002). Advanced practice registered nurses (APRN) include clinical nurse specialists (CNS), certified registered nurse anesthetist (CRNA), certified nurse-mid-wives (CNM) or certified nurse practitioners (APRN-certified). Advanced practice occupations generally include Clinical Nurse Specialists (CNS): Acute Care, Adult, Critical Care, Gerontological, Family, Hospice and Palliative Care, Neonatal, Pediatric, Psychiatric and Mental Health-Adult, Psychiatric and Mental Health-Child, and Women's Health; Nurse Practitioner (NP): Acute Care, Adult, Family, Gerontological, Pediatric, Psychiatric and Mental Health, Neonatal and Women's Health; Certified Registered Nurse Anesthetist (CRNA) and Certified Nurse-Midwife (CNM).

[33] U.S. Department of Labor, *Occupational Outlook Handbook* (2004–05 Ed.).

science or art during the year prior to application and who intend to practice the same art or science in the United States. The "sciences" or "arts" are defined as "any field of knowledge, and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien, however, need not have studied at a college or university to qualify for the Group II occupation."[34]

Historically, the Schedule A, Group II category has been often overlooked since the EB-1-1 (alien with extraordinary ability) and EB-1-2 (outstanding professors and researchers) categories were available to individuals in the arts and sciences. However, for aliens who may not qualify under the higher regulatory criteria under the EB-1-1 or EB-1-2 categories, Schedule A Group II is a viable alternative because of the lower "exceptional ability" standard.[35] It is also a viable alternative strategy to a regular PERM Labor Certification application given the challenges presented by layoffs and double-digit unemployment rates, particularly for foreign nationals in the arts and sciences. Moreover, in light of the perpetual problems that practitioners face with recent adjudications of EB-1-1 and EB-1-2 cases where USCIS continues to "raise the bar," the lower standard of "exceptional ability" under Schedule A, Group II is especially appealing.[36] However, unlike the EB-1-1 category, an alien cannot self-petition in a Schedule A, Group II occupation.

To qualify under the Schedule A, Group II category, an individual must meet both the USCIS and DOL criteria. Under the DOL regulations, an individual must show:

(1) Documentation evidencing widespread acclaim and international recognition accorded the foreign national by recognized experts in the alien's field; and

(2) Documentation showing the alien's work during the past year required, and his or her intended work in the United States will require, exceptional ability. In addition, the employer also must file documentation about the foreign national from at least two of the following seven groups:

(i) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought;

Practice Pointer: Generally, student awards, student fellowships, and travel awards carry little weight in this standard. The awards also should be truly international and should not be local or regional awards. Include documentation to show the importance of the award in the field.

(ii) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields;

Practice Pointer: Scientists, scholars, professionals, and entertainers often belong to professional organizations or associations upon payment of membership dues—*e.g.*, the American Bar Association, American Chemical Society, Screen Actors Guild, etc. These types of membership are not appropriate to meet this criterion. To qualify under this criterion, an individual's membership must be based on some form of selective standard that requires proven achievements for admission to the organization.

(iii) Published material in professional publications about the foreign national, about the his or her work in the field for which certification is sought, which shall include the

[34] 20 CFR §656.5(b)(1).

[35] In some instances, even though colleges and universities are able to use the Optional Special Recruitment and Documentation Procedures for Colleges and Universities (formerly known as "Special Handling"), there are occasions when Schedule A, Group II is a more viable strategy. For example, a university may be outside the 18-month requirement period under Special Handling and may feel it cannot, in good faith, undergo formal recruitment efforts again. The alien may not qualify under the higher EB-1-1 criteria, but may have enough to qualify under the "exceptional ability" standard.

[36] At the time of writing, immigration practitioners have been "dealing" with the "fallout" from USCIS guidance implementing *Kazarian vs. USCIS,*596 F. 3d 1115 (9th Cir. 2010). *See* "USCIS Interim Guidance for Comment" *posted on* AILA InfoNet at Doc. No. 100820064 (Aug. 20, 2010); "AILA Interim Memo for Comment" *posted on* AILA InfoNet at Doc. No. 10090733 (Sept. 7, 2010; "Request for Evidence Template: I-140 E11 Alien of Extraordinary Ability," *posted on* AILA InfoNet at Doc. No. 11012168 (Jan. 21, 2011). It remains to be seen whether the Kazarian RFE/NOID template will be applied to Schedule A, Group II filings.

title, date, and author of such published material;

Practice Pointer: In order to satisfy this criterion, the foreign national or his or her work should be mentioned in international, national, or regional newspapers, magazines, trade journals or peer-reviewed journals. Articles in local or community newspapers, university or organizational newsletters, or internal company reports cannot be counted as "published" material about the alien.

One must also be careful about the use of citations. Often, standard academic citations are viewed as part of the publication process—they demonstrate "academic honesty" but are not considered as legitimate "published materials" about the alien. Similarly, self-citations or citations by collaborators do not meet the criterion. However, if an article discusses or critiques the alien's actual research, such citations are valuable.

Articles in the mainstream media or news outlets such as Reuters, the Associated Press, BBC, webzines or international newspapers also can be used to meet this criterion.

(iv) Evidence of the alien's participation on a panel, or individually, a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought;

Practice Pointer: Participation as a conference program committee member or as a speaker on a panel at an international conference can be used in this criterion. Review of grants and articles for international peer-reviewed journals also can be used, but not if the request has been passed down from a supervising professor or principal investigator. Also, sitting on a thesis committee or acting as a mentor or speaking or giving a workshop at a local meeting is not granted any weight under this criterion.

(v) Evidence of the alien's original scientific or scholarly contributions of major significance in the field for which certification is sought;

Practice Pointer: This category is often used to show the alien's widespread acclaim and international recognition by experts in the field. Reference letters should specifically detail how the alien's research is original or of major significance. Mere publication is not enough as many Administrative Appeals Office (AAO) decisions have concluded that publication or presentation of one's work or receipt of grant funding is common in academic life. Was the foreign national one of the first to discover something? Is his or her work in the cutting-edge of the field? Has his or her work sparked research efforts or renewed interest in the field or been the topic of debate at international conferences? Has a particular article been published in a prestigious journal or impacted the field of expertise?

Reference letters should be from credible sources and confirm some of the above-mentioned points. Letters from mentors, collaborators, and colleagues from the same institution are often viewed suspiciously by USCIS. A combination of letters from colleagues, independent experts, and collaborators at universities or government agencies or distinguished organizations is preferred.

If submitting evidence of an approved patent or patent application, these carry little weight unless you can show the widespread use or application of the patent.

(vi) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals, or professional journals with an international circulation;

Practice Pointer: Publications should be in peer-reviewed academic journals with an international circulation. If the alien's publications are all in one country with only domestic circulation (which is often the case with many Chinese journals), this does not satisfy the criterion. It is often helpful to include rankings and impact factors available at either journal websites or scientific websites such as ISI Journal Citations (Institute for Scientific Information), which ranks journals in broad multidisciplinary sciences as well as specific fields of expertise.

It is permissible for a foreign national to co-author articles, and there is no requirement that he or she must be first-author. However,

published abstracts are not given as much weight as full-length journal articles. Also, manuscripts submitted for publication that have not been accepted cannot be used to meet this criterion.

(vii) Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

Practice Pointer: Display of the alien's work must be at international, national, or regional exhibitions and not at local galleries, museums, or town fairs.

This category also can be used where a alien's films may have been showcased at international or national film festivals or where a musician has performed at international or national festivals or concerts.

Although it appears that the DOL standard of "exceptional ability" is somewhat more difficult to meet than the USCIS criteria for EB-2 classification (Members of Professions Holding Advanced Degrees or Individuals of Exceptional Ability in the Sciences, Arts or Business), the EB-2 category nevertheless provides some guidance with regard to how "exceptional ability" is defined. Under EB-2 classification, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business."[37] Moreover, recent experience has shown that USCIS applies this lower standard of "exceptional ability" to petitions filed under the Schedule A, Group II category.[38]

Case law confirming the lower standards includes *Matter of Medical University of South Carolina*, which cited DOL's comments in the final rulemaking concerning the labor certification process and defined "exceptional ability" as "so far above the average members of their field that they will clearly be an asset to the United States."[39] Similarly, in *Matter of Frank*, the court found that exceptional ability "contemplates something more than what is usual, ordinary or common, and requires some rare or unusual talent, or unique or extraordinary ability in a calling which, of itself, requires talent or skill."[40]

Schedule A, Group II Expanded to Include Performing Arts

Under PERM, the Schedule A, Group II category has been expanded to include persons of exceptional ability in the performing arts. This includes, but is not limited to, occupations in theater, motion pictures, drama, comedy, music, dance, opera, magic, martial arts, visual arts, and the marching arts. Previously, performing arts petitions were filed under the Special Handling provisions.[41] The inclusion of performing artists under Schedule A, Group II is a logical step since the criteria is fairly similar to Group II arts and science requirements.[42] Under PERM, there is no longer an advertising requirement or the need to use the union as a recruitment source. The new changes allow aliens of exceptional ability in the performing arts whose work during the past 12 months did require, and whose intended work in the United States will require, exceptional ability.

To qualify under the Schedule A, Group II performing arts category, an employer must show:[43]

(A) Documentation that the alien's work experience during the past 12 months did require,

[37] 8 CFR §204.5(k)(2).This standard is much easier to satisfy than the EB-1 "alien of extraordinary ability," which is defined as a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 CFR §204.5(h)(2).

[38] When DOL published regulations implementing the Immigration Act of 1990 (Pub. L. No. 101-649, 104 Stat. 4978) (IMMACT 90), DOL recognized some aliens may be able to qualify under Schedule A, Group II, as aliens of exceptional ability but may not be able to qualify as an alien of extraordinary ability. *See* 56 Fed. Reg. at 54923 (Oct. 23, 1991). Despite this, USCIS has, in the past, applied DOL's pre-IMMACT 90 definition of exceptional ability and denied eligibility for Schedule A, Group II unless the higher post-IMMACT 90 standard of extraordinary ability can be satisfied. *See* 67 Fed. Reg. at 77335.

[39] *Matter of Medical University of South Carolina,* 17 I&N Dec. 266 (July 27, 1978).

[40] *Matter of Frank,* 11 I&N Dec. 657 (Apr. 13, 1966).

[41] Previously, under 20 CFR §656.21a(a)(iv), to meet the special handling criteria for performing artists, a petitioner had to: (i) show international recognition; (ii) place one ad in recruitment; and (iii) document that unions, if customarily used as a recruitment source, were unable to refer equally qualified standards. Here, too, the audition process had to result in a showing that the alien applicant was better qualified than any U.S. workers who responded to the recruitment.

[42] In the supplementary information, DOL confirms that it did not receive any comments objecting to its initial proposal to add performing artists to the Schedule A, Group II category, but in fact received several comments supporting this change.

[43] 20 CFR §656.15(d)(2).

and the alien's intended work in the United States will require, exceptional ability and must show this exceptional ability through:

(i) Documentation attesting to the current widespread acclaim and international recognition accorded to the alien and receipt of internationally recognized prizes or awards for excellence;

(ii) Published material by or about the alien, such as critical reviews or articles in major newspapers, periodicals, and/or trade journals (the title, date, and author of such material shall be indicated);

(iii) Documentary evidence of earnings commensurate with the claimed level of ability;

(iv) Playbills and star billings;

(v) Documents attesting to the outstanding reputation of theaters, concert halls, night clubs, and other establishments in which the alien has appeared or is scheduled to appear; and/or

(vi) Documentation attesting to the outstanding reputation of theaters, or repertory companies, or other organizations in which or with which the alien has performed during the past year in a leading or starring capacity.[44]

Unlike petitions under the Schedule A, Group II, Alien of Exceptional Ability in Arts and Sciences category, performing arts petitions do not have to meet a minimum number of the above-mentioned criteria.

Prevailing Wage Determination Requests for Occupations in the Arts and Performing Arts

In addition to the posting requirement, Schedule A, Group II occupations also must obtain a prevailing wage determination. Prevailing wage data for occupations in the arts (*e.g.*, digital artists, graphic designers, interior designers, architects, etc.) and sciences, including academic positions, is generally available. However, the requirement to obtain a prevailing wage for performing arts occupations appears unnecessary. Many of these occupations are usually covered by a collective bargaining agreement, and one would attach a copy of the wage information with the PWD request.[45] However, if there is no union agreement, prevailing wage data may not necessarily exist. As a practical matter, if no union exists for a performing arts occupation,[46] one submits a PWD request to the appropriate SWA, which will provide a response that there is no prevailing wage data available.

Filing Procedures for Schedule A, Group II

Similar to Schedule A, Group I occupations, applications for Group II occupations are filed directly with the appropriate USCIS service center having jurisdiction over the intended place of employment or where the employer's office is located. Supporting documentation to be submitted with the I-140 Immigrant Petition for Alien Worker includes the following:

(1) Form I-140 Immigrant Petition for Alien Worker, along with evidence that the petitioning employer has the financial ability to pay the salary offered;

(2) PERM Labor Certification Application Form ETA 9089 in duplicate;

[44] *Id.*

[45] Generally, the Actors Equity Association covers performers (other than musicians) in the "live," dramatic, and musical theater, including revues and theater at theme parks; the American Federation of Musicians covers all musicians, vocalists, and conductors; the American Federation of Television and Radio Artists covers performers (other than musicians) in the broadcasting, cable, and/or recorded media; the American Guild of Musical Artists covers performers (except musicians), including concert artists and choreographers in opera, ballet, and dance; the American Guild of Variety Artists covers performers (except musicians) in ice shows and circuses and performers in hotels, nightclubs, burlesque, and cabarets as part of a variety show; the Directors Guild of America covers directors, assistant directors in theatrical or feature motion pictures, commercials, documentaries, live and prerecorded television programs on film and tape, music and other videos, industrial film and videos, documentary films and videos, and all film and tape material produced for video cassette or DVD; Hebrew Actors Union covers performers (except musicians) in the Hebrew or Yiddish language theater; the Screen Actors Guild covers performers (other than musicians, stunt performers, and puppeteers) involved in the production of motion pictures, television programs, television commercials, video tapes, video discs, or DVD; and the Society of Stage Directors and Choreographers covers directors and choreographers in the professional theater.

[46] Examples of performing arts occupations where there is no union or prevailing wage data include, but is not limited to, puppeteers, magicians, illusionists, martial artists, cowboy or rodeo riders, fire-eaters, jugglers, vaudevillian, ventriloquists, snake charmers, and comedians.

(3) Prevailing wage determination;

(4) Posting notice; and

(5) Documentation evidencing exceptional ability in the arts, sciences, or performing arts.

It is important to note that qualifying under the Schedule A, Group II criteria simply satisfies the labor certification requirement. The beneficiary must still meet the USCIS requirements of the underlying immigrant visa category as an EB-2 (advanced degree holder or alien of exceptional ability under the USCIS regulations) or EB-3 (skilled workers, professionals, or other workers).

Under USCIS regulations, a petition filed under the EB-2 Alien of Exceptional Ability classification must include documentation to show a minimum of three of the following types of documentation:

(i) An official academic record demonstrating that the alien has a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning relating to the area of exceptional ability;

(ii) Evidence in the form of letter(s) from current or former employer(s) demonstrating that the aliens has at least 10 years of full-time experience in the occupation for which he or she is being sought;

(iii) A license to practice the profession or certification for a particular profession or occupation;

(iv) Evidence that the alien has commanded a salary or other remuneration for services, which demonstrates exceptional ability;

(v) Evidence of membership in professional association(s);

(vi) Evidence of recognition for achievements and significant contributions to the industry or field by peers or government entities or professional or business organizations.

Similar to the EB-1 or O-1 regulations, the use of comparable or alternative criteria is also acceptable if the above standards do not readily apply. Some of these alternatives might include evidence of the following:

- Employment in a critical role for organizations or productions that have a distinguished reputation;
- Being the subject of widespread, mainstream media attention;
- Commercial or critically acclaimed success
- Peer review activity for journals or conference committees or scientific boards;
- Acting as a judge or voting member for professional academies or boards (e.g. Academy Awards, Visual Effects Society);
- Presentation of work at industry events or international or national conferences;
- Display of work at artistic exhibitions or film festivals.

In some situations, a person may qualify under the DOL regulations as an alien of exceptional ability, but may not meet three of the above-mentioned required criteria under the USCIS regulations to qualify under EB-2. In these rare situations, one may file under the EB-3 preference category as an alternative.

Priority Dates for Schedule A Petitions

The priority date for Schedule A occupations is the date of receipt of application at the USCIS service center. Upon approval of the petition, USCIS is required to indicate the occupation in which the alien qualifies and the date of determination and must forward one of the ETA 9089 forms (hence, the requirement to file in duplicate) to DOL. If the Schedule A petition is denied, USCIS's decision is conclusive and final, and the employer cannot appeal the determination under the PERM appeal process through BALCA. However, if an application for a Schedule A, Group II occupation in the arts and sciences is denied, the employer may, at any time, file for a labor certification on the alien's behalf under the regular PERM process or file an appeal to the AAO. In contrast, applications for professional nurses and physical therapists under Schedule A, Group I are not eligible to file under the regular PERM process.

DOL Fraud Rule and Schedule A Petitions

On March 31, 2008, the Office of Foreign Labor Certification issued a second round of FAQs, which clarified that prohibitions relating to the May 17, 2007, Final Rule on Labor Certifications (commonly referred to as the "PERM Fraud Rule") on substitution[47] and improper payment and transactions[48] also apply to Schedule A petitions.[49]

[47] Per 20 CFR §656.11(a), substitution of an alien beneficiary on any permanent labor certification application "is prohibited for any request to substitute submitted after July 16, 2007."

[48] Per 20 CFR §656.12(b), an employer may not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, except from a party

In addition, while there is no exception to 20 CFR §656.30(b)[50] that created a validity period of 180 days for approved permanent labor certifications for Schedule A petitions, since all Forms I-140s for Schedule A petitions are filed with Form 9089 with USCIS, it will always be filed within 180 days of its approval. And as such, it is impossible that such an application will expire.

CONCLUSION

As with all PERM applications, Schedule A, Group I and II must comply with the PERM procedures, including the form, posting requirements, and the obligation to request a PWD from the local SWA. While the requirement to obtain a prevailing wage request for some occupations seems unnecessary, the basic underlying principles and issues remain fairly similar. Schedule A, Group I nurses and physical therapists continue to face VisaScreen certification complications, as well as potentially serious visa retrogression issues. The addition of performing artists in Schedule A, Group II classification has simplified the process for many performing artists. This all-inclusive Group II category for aliens of "exceptional ability" in the arts, sciences, and performing arts provides a viable alternative based not only on the challenges regular PERM Labor Certification cases face with widespread layoffs and high unemployment rates, but also based on USCIS's increasing scrutiny and restrictive adjudication standards affecting cases filed under the EB-1-1 and EB-1-2 classification.

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with legitimate, pre-existing business relationship with the employer, if the work to be performed by the alien beneficiary will benefit that party. This prohibition applies to applications filed under current regulations or under regulations in effect prior to March 28, 2005.

[49] "DOL Round 2 FAQs on the 'Substitution Plus' Final Rule," *published on* AILA InfoNet at Doc. No. 08040234 (*posted* Apr. 2, 2008).

[50] Per 20 CFR §656.30(b), an approved labor certification approved on or after July 16, 2007, expires if not filed in support of a Form I-140 petition submitted to the Department of Homeland Security (DHS) within 180 days of its approval. An approved labor certification granted before July 16, 2007, expires if not filed in support of a Form I-140 petition submitted to DHS within 180 days of July 16, 2007.

APPENDIX A: SAMPLE NOTICE OF POSTING[51]

An application concerning the employment of one or more alien workers for the following permanent position will be filed with the Department of Homeland Security. 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 *http://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 normal procedures used for the recruitment of similar positions in the employer's organization.

[51] "USCIS updates Adjudicator's Field Manual guidance on posting requirements for Schedule A visa petitions filed before and after the effective date of the PERM regulations on March 28, 2005," *published on* AILA InfoNet at Doc. No. 06021661 (*posted* Feb. 16, 2006).

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: ______________________

APPENDIX B: U.S. STATE BOARDS OF NURSING AND THEIR CGFNS REQUIREMENTS FOR FOREIGN-EDUCATED NURSES PRIOR TO LICENSURE*

Board of Nursing	Type	Temp Permit	Initial RN	Initial LPN	Secondary School (refers to whether an evaluation of high school diploma is required for a CES Report)
Alabama	RN & LPN	Yes	CP and CES Full		Yes
Alaska	RN & LPN	Yes	CP		
American Samoa	RN & LPN	No			
Arizona	RN & LPN	Yes	CES or VS or CP	CES or VS	No
Arkansas	RN & LPN	Yes	CES Full	CES Full	Yes
California	RN	Yes			
California	LPN/LVN	Yes			
Colorado	RN & LPN	Yes	CES HP/S	CES HP/S	No
Connecticut	RN & LPN	Yes	CP		
Delaware	RN & LPN	Yes	CP		
District of Columbia	RN & LPN	No	CP		LPN only
Florida	RN & LPN	Yes	CES HP/S	CES HP/S	No
Georgia	RN	Yes	CP or CES HP/S		Yes

* Reprinted with permission from *HealthScope International* pp. 4–5 (Winter 2005 issue), published by the Commission on Graduates of Foreign Nursing Schools (CGFNS).

<table>
<tr><td>Georgia</td><td>LPN/LVN</td><td>No</td><td>CES Full</td><td></td><td>Yes</td></tr>
<tr><td>Guam</td><td>RN & LPN</td><td>No</td><td></td><td></td><td></td></tr>
<tr><td>Hawaii</td><td>RN & LPN</td><td>No</td><td>CP or CES HP/S</td><td></td><td></td></tr>
<tr><td>Idaho</td><td>RN & LPN</td><td>Yes</td><td>CP or CES HP/S</td><td></td><td></td></tr>
<tr><td>Illinois</td><td>RN & LPN</td><td>No</td><td>CP</td><td></td><td>No</td></tr>
<tr><td>Indiana</td><td>RN & LPN</td><td>Yes</td><td>CP</td><td></td><td>Yes</td></tr>
<tr><td>Iowa</td><td>RN & LPN</td><td>No</td><td>CP</td><td>CES HP/S</td><td>Yes</td></tr>
<tr><td>Kansas</td><td>RN & LPN</td><td>Yes</td><td>CES Full</td><td>CES Full</td><td>Yes</td></tr>
<tr><td>Kentucky</td><td>RN & LPN</td><td>Yes</td><td>VS or CES HP/S</td><td></td><td>Yes</td></tr>
<tr><th>Board of Nursing</th><th>Type</th><th>Temp Permit</th><th>Initial RN</th><th>Initial LPN</th><th>Secondary School (refers to whether an evaluation of high school diploma is required for a CES Report)</th></tr>
<tr><td>Louisiana (RN)</td><td>RN</td><td>No</td><td>CP</td><td></td><td></td></tr>
<tr><td>Louisiana (LPN)</td><td>LPN/LVN</td><td>No</td><td></td><td></td><td></td></tr>
<tr><td>Maine</td><td>RN & LPN</td><td>No</td><td>CP or CES HP/S</td><td></td><td>Yes</td></tr>
<tr><td>Maryland</td><td>RN & LPN</td><td>No</td><td>CES Full</td><td>CES Full</td><td>Yes</td></tr>
<tr><td>Massachusetts</td><td>RN & LPN</td><td>No</td><td>CP or CES HP/S or VS</td><td>CES HP/S or VS</td><td>No</td></tr>
<tr><td>Michigan</td><td>RN & LPN</td><td>Yes</td><td>CP</td><td></td><td>No</td></tr>
<tr><td>Minnesota</td><td>RN & LPN</td><td>No</td><td>CES HP/S</td><td>CES Full</td><td>No</td></tr>
</table>

Mississippi	RN & LPN	No	CP or CES HP/S		No
Missouri	RN & LPN	No	CP	CES Full	LPN only
Montana	RN & LPN	No	CP		
Nebraska	RN & LPN	No	CP		Yes
Nevada	RN & LPN	Yes	CES HP/S		No
New Hampshire	RN & LPN	Yes	CP or CES Full		
New Jersey	RN & LPN	No	CP	CES HP/S	LPN only
New Mexico	RN & LPN	Yes	CP or CES HP/S	CES HP/S	No
New York	RN & LPN	Yes	CVS	CVS	
North Carolina	RN & LPN	No	CES HP/S	CES HP/S	
North Dakota	RN & LPN	No	CP		
Northern Marianas	RN & LPN	No			
Ohio	RN & LPN	No	CES Full		No
Oklahoma	RN & LPN	No	CP	CES HP/S	Yes
Oregon	RN & LPN	No	CES HP/S	CES HP/S	No
Pennsylvania	RN & LPN	No	CP	CES HP/S	LPN only
Puerto Rico	RN & LPN	No			
Rhode Island	RN & LPN	No	CP	CES HP/S	No
South Carolina	RN & LPN	Yes	CES HP/S	CES HP/S	Yes
South Dakota	RN & LPN	No	CP	CES HP/S	Yes
Tennessee	RN & LPN	Yes	CP		Yes

Board of Nursing	Type	Temp Permit	Initial RN	Initial LPN	Secondary School (refers to whether an evaluation of high school diploma is required for a CES Report)
Texas (RN)	RN	Yes	CP or CES Full		
Texas (LVN)	LPN/LVN	Yes			
Utah	RN & LPN	Yes	CP	CES HP/S	No
Vermont	RN & LPN	No	CP		
Virgin Islands	RN & LPN	No	CP		Yes
Virginia	RN & LPN	No	CP		
Washington	RN & LPN	No	CP		
West Virginia (RN)	RN	Yes	CP		Yes
West Virginia (LPN)	LPN/LVN	Yes			
Wisconsin	RN & LPN	Yes	CP		Yes
Wyoming	RN & LPN	Yes	CP		No

NOTES:

1. Nurses educated in Canada may have different requirements than those listed above.
2. All applicants should contact the State Boards of Nursing directly to verify current requirements for both initial and endorsement licensure.

KEY:

- CES = Credential Evaluation Service
- VS = *VisaScreen*™
- CP = Certification Program
- CVS = Credentials Verification Service for New York State
- HP/S = Health Care Profession and Science Course-by-Course Report