

SCHEDULE A, GROUP II: IMMIGRANT VISA STANDARDS AND PRACTICE TIPS

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INTRODUCTION

Schedule A, Group II is a confusing immigrant visa classification. Thus it tends to be ignored or underutilized by practitioners as a potential viable option for qualified beneficiaries. Even the United States Court of Appeals for the Ninth Circuit became muddled about the differences between “extraordinary ability” and “exceptional ability” immigrant visa classifications and misstated the applicable standards in *Kazarian v. USCIS*.¹ According to this decision, “To qualify for the ‘exceptional ability’ visa, a petitioner must make a lesser showing of ability. . . .”² Judge Pregerson, whose original dissent highlighted the flaws of the court’s September 2009 ruling, concurred in the March 4, 2010, opinion, stating

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¹ *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).

² *Id.* at 1120.

that, while the petitioning foreign national could not meet the requirements of the extraordinary ability visa, he “would have been an excellent candidate for an ‘exceptional ability’ visa,”³ suggesting that it is a lower standard. The authors do not agree that it is so clear.

Schedule A, Group II is not an “easy” or “low” legal standard as suggested by *Kazarian*. Rather, this immigrant classification is a helpful tool that offers yet another option to avoid the labor certification process and should be considered when evaluating immigrant visa strategies. The purpose of this article is to take a nuanced look and delineate the Schedule A, Group II qualification standards and practical considerations in choosing the best immigrant visa strategy for individuals with exceptional abilities.

DOL REGULATIONS

The Schedule A, Group II category is a peculiar hybrid creature of U.S. immigration laws subject to a confusing and overlapping web of U.S. Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS) regulations.

Foreign nationals with exceptional abilities, including certain college and university teachers, may qualify for immigrant visas in the sciences or arts (including performing arts), under Schedule A of DOL regulations.⁴ However, workers who can satisfy the DOL exceptional ability standards are not subject to the labor certification process, because, by definition, Schedule A occupations are exempt from it.⁵ Indeed, DOL precertifies that employment of foreign nationals in Schedule A occupations does not adversely affect the U.S. workforce because these occupations are determined to be in short supply.⁶ But since DOL’s Schedule A application allows for “pre-certification” only, the foreign national must still apply for an immigrant visa in either the second or third employment-based immigrant visa category. In short, all candidates must meet two sets of regulations—those of DOL and USCIS—in order to gain approval of a Schedule A, Group II petition.

³ *Id.* at 1123.

⁴ 20 CFR §§656.5(b), 656.15(d). *See also* F. Retman, *Schedule A, Group II: A Reason to Exist*, Immigration Options for Academics & Researchers 185 (AILA 2005).

⁵ 20 CFR §656.5.

⁶ *Id.*

Schedule A, Group II is an employer-sponsored classification and is unavailable to self-petitioners. It states that it covers individuals who possess exceptional abilities in the sciences and the arts, including the performing arts.⁷ The term “exceptional ability” is defined as “recognized outstanding performance well above the standard for professional competence in the occupation.”⁸ A “science” or an “art” is defined as a field in which “colleges and universities commonly offer specialized courses leading to a degree.”⁹ Thus, individuals working in the fields of business or education, expressly included in the EB-1 regulations,¹⁰ may argue eligibility under Schedule A, Group II because colleges and universities grant degrees in these fields. This very issue became contentious in 2018 when USCIS Service Centers started issuing denials of Schedule A, Group II petitions for beneficiaries who worked in business occupations, concluding that they lacked eligibility based on their field of endeavor. Specifically, in one such decision, the USCIS Nebraska Service Center stated about a beneficiary who served as a CEO of a manufacturing company: “Since the beneficiary is neither a scientist nor an artist, we have denied your I-140 petition.”¹¹ However, this was a departure from the regulations, which broadly define the field, as well as prior USCIS Administrative Appeals Office (AAO) decisions that accepted business as a permissible field for Schedule A, Group II petitions.¹² The AAO ultimately righted at least one of these erroneous denials based on the fact that the beneficiary worked in the field of business, stating the following:

... In his decision, the Director found that the duties included in the position of regional division manager did not involve working in the sciences or arts.... However, we note that the above regulation indicates that the term “science

or art” is construed broadly, and that the duties of the offered position can be classified under the fields of marketing, management and/or business, fields of knowledge which are commonly offered for study in college and university courses leading to a degree. In addition, ... we note that the regulation at 8 C.F.R. §204.5(k)(1) specifies that exceptional ability may be shown in the sciences, arts, or business. Therefore, for the purposes of both sets of regulations, the proposed position falls under a qualifying field.¹³

Thus, the issue of eligible fields appears to have been settled, and any legitimate field of endeavor in which educational institutions offer courses leading to a degree should meet the standard. The regulations specify, however, that a foreign national need not have actually received such a degree to qualify.¹⁴ Hence, a prodigy painter with no formal education would qualify under Schedule A, Group II, provided he or she meets the requisite legal standard.

The Legal Standard for Arts and Sciences

According to DOL regulations, a foreign national 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 ability; and (3) confirmation that the alien meets at least two of the seven regulatory criteria.¹⁵

PRONG 1: Widespread Acclaim and International Recognition Accorded by Recognized Experts

The first prong of the Schedule A, Group II standard is a blend of the EB-11’s “sustained acclaim”¹⁶ and EB-12’s “international recognition”¹⁷ requirements. It is also reminiscent of the regulatory criterion of “significant recognition for achievements from organizations, critics, government agencies, or other recognized experts” of the O-1B nonimmigrant

⁷ 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).

⁸ Employment and Training Admin., U.S. Dep’t of Labor, Technical Assistance Guide No. 656: Schedule A (TAG); 9 FAM 40.41, Exhibit I.

⁹ 20 CFR §656.5(b)(1).

¹⁰ 8 CFR §204.5(h)(1).

¹¹ *Matter of [name redacted]*, LIN 1903050682 (NSC Nov. 15, 2018).

¹² *Matter of H–L–F–PC*, ID# 551411 (AAO Nov. 9, 2017).

¹³ *Matter of K–R–*, ID# 4340279 (AAO Oct. 2, 2019).

¹⁴ 20 CFR §656.5(b)(1).

¹⁵ 20 CFR §656.15(d)(1).

¹⁶ 8 CFR §204.5(h)(3).

¹⁷ 8 CFR §204.5(i)(3)(i).

visa for individuals of extraordinary abilities in arts or motion picture and television productions.¹⁸ 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 beneficiary will submit reference letters from a diverse group of recognized experts who know the beneficiary through their 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.

It is common for USCIS to question the objectivity of reference letters, particularly when they are written by individuals who personally know the beneficiary or procured specifically in connection with the petition. However, it is the authors’ opinion that what is really at issue here is whether they qualify as “recognized experts,” as required by the regulations.¹⁹ If they do, USCIS should not dismiss statements of industry experts who submitted support letters in that capacity as biased. Petitioners should be afforded an opportunity to use *any* relevant and credible evidence to make their case, and do not have to be limited to “unsolicited” or “preexisting” evidence, as sometimes erroneously required by USCIS.²⁰

The examiner cannot substitute his or her judgment for that of experts, nor can the examiner ignore evidence that clearly satisfies a category.²¹ The Service is not allowed to disregard expert testimony that is “reliable, relevant and probative as to the specific facts in issue.”²² Thus, reference letters

confirming widespread acclaim and international recognition issued by recognized experts should satisfy this prong.

PRONG 2: 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. Specifically, the petition must demonstrate that: (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 can be done by submitting a letter from an employer. A more complicated scenario would arise if an individual 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 beneficiary’s work during the past year required, and his or her future work will continue to require, exceptional ability. This is a notch above EB-11 standards, which require that the beneficiary work in the area of extraordinary ability,²³ but do not mandate that the job require extraordinary ability.

Both parts of this requirement can be demonstrated by the reference letters from recognized experts required by Prong 1. 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 a foreign national’s work or any other documents confirming the exceptional nature of their work would be helpful to satisfy this regulation.

The regulations do not specify that the beneficiary’s one year of exceptional work experience must be in the same field in which they seek precertification. But DOL’s clarification in its Technical Assistance Guide, which accompanied its pre-PERM regulations, suggested otherwise. According to the Guide, Schedule A, Group II is intended for individuals of

¹⁸ 8 CFR §214.2(o)(3)(iv)(B)(5), (v)(B)(5).

¹⁹ *Id.*

²⁰ *Chursov v. Miller*, 18-cv-2886 PKC (S.D.N.Y. May 13, 2019).

²¹ *Muni v. INS*, 891 F. Supp. 440, 444 (N.D. Ill. 1995).

²² *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012).

²³ 8 CFR §204.5(h)(5); INA §101(a)(15)(O)(i).

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.” (Emphasis added.)²⁴ Practitioners should also keep in mind that most of the seven regulatory criteria of the third prong require that the beneficiary’s accomplishments be “in the field in which certification is sought.”

PRONG 3: Confirmation that the Foreign National Meets at Least Two Regulatory Criteria

Acceptable proof of “exceptional ability,” required in Prong 3 of the DOL regulations, is defined as documentation in at least two of the following seven groups:

*Receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.*²⁵

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 more than 50 years, honoring achievements in the recording arts and supporting the music community.²⁶ 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, awards for excellence.

On a related note, USCIS has confirmed that it does not consider funding from the National Institutes of Health as an “award” within the meaning of this regulation. In an AAO decision dismissing an appeal from a denied a Schedule A, Group II petition, USCIS concluded that “a research grant designed to

fund future research is not designed to recognize past excellence.”²⁷ The authors find this logic to be flawed and would argue that recognizing “future research” and “past excellence” should not be mutually exclusive concepts.

*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.*²⁸

Here, exceptional individuals seeking to qualify under Schedule A, Group II are again restricted to holding memberships only in “international associations.” Therefore, membership in the National Academy of Sciences (NAS), technically a national, U.S.-based organization, could be questioned, even though its members are elected in “recognition of their distinguished and continuing achievements in original research.”²⁹ Once again, creative lawyering is important in order to meet this criterion where a foreign national 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.*³⁰

This criterion calls for published material in “professional publications” only and omits any mention of major trade publications or other major media.³¹ A front-page article about the beneficiary in *The New York Times* or an interview as an expert on CNN technically would not satisfy this criterion because *The New York Times* and CNN may not 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 beneficiary themselves, as materials about their work should suffice. It follows that even published material that does not mention the beneficiary by name but discusses their work should qualify. This is helpful to those exceptional foreign nationals who

²⁴ Employment and Training Admin., U.S. Dep’t of Labor, Technical Assistance Guide No. 656: Schedule A (TAG); 9 FAM 40.41, Exhibit I.

²⁵ 20 CFR §656.15(d)(1)(i).

²⁶ www.grammy.com.

²⁷ *Matter of [name redacted]*, SRC 06 224 52837 (Aug. 29, 2007).

²⁸ 20 CFR §656.15(d)(1)(ii).

²⁹ See the NAS website at www.nasonline.org/about-nas/membership/ for membership criteria.

³⁰ 20 CFR §656.15(d)(1)(iii).

³¹ 8 CFR §204.5(h)(3)(iii).

avoid personal celebrity or those who are employed in behind-the-scenes, lower-profile occupations.

*Evidence of participation on a panel, or individually, as a judge of the work of others in the same or in an allied field.*³²

Individuals working in the arts 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 should not be necessary to show that the beneficiary was selected to act as a judge on account of his or her exceptional abilities. Simply showing that a beneficiary has served as a judge of others' work should satisfy this criterion.³³

*Evidence of original scientific or scholarly research contributions of major significance in the field.*³⁴

There are two components to this criterion. The beneficiary must show that their contributions are "original" and also that they are of "major significance." This is generally demonstrated through expert reference letters, and the same letters that are used for the "widespread acclaim and international recognition" prong can be utilized here. It is noteworthy that this Schedule A, Group II criterion only asks for "scientific or scholarly research" contributions and leaves out contributions in other areas of endeavor. It may be inferred from this drafting of the regulation that DOL does not expect individuals who are not scientists or scholars to produce evidence relating to the original-contributions criterion. Some practitioners still submit evidence of original contributions that are not scientific or scholarly in support of this criterion, provided that it is of major significance and would otherwise satisfy the regulation.

*Evidence of authorship of published scientific or scholarly articles in the field in international professional journals or professional journals with international circulation.*³⁵

International circulation is required for publications authored by exceptional individuals, 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 individuals who work outside of scientific or scholarly fields. The regulation calls for "scientific or scholarly" articles in "professional journals" and omits any mention of articles in professional journals in other fields or in the major media. In their own practice, the authors still advocate on behalf of their clients in nonscientific or nonscholarly fields and submit relevant evidence on their behalf for this criterion, as well as for the "original contributions of major significance" criterion. An exceptional 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, should be able to satisfy this criterion.

USCIS often attempts to place the additional condition that the articles be well regarded or frequently cited, or that the journals that publish them be of a high rank. But the law imposes no such requirements. The Ninth Circuit's ruling has ended years of USCIS's abuse and speculation in this arena by clarifying that USCIS may not "impose novel substantive or evidentiary requirements beyond those set forth" in the regulations.³⁶ So, in addition to international circulation, it is important to note that the journals that publish the beneficiary's articles be "professional." In other words, publications in peer-reviewed international 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.*³⁷

This criterion requires artistic exhibitions with an international reach. Additionally, this is, again, a field-specific criterion, as it emphasizes that the exhibitions must be artistic and not in any other

³² 20 CFR §656.15(d)(1)(iv).

³³ *Buletini v. INS*, 860 F. Supp. 1222, 1229 (E.D. Mich. 1994), specifically addresses this regulatory criterion and confirms that the foreign national did not have to prove that his selection as a judge was as a result of his extraordinary abilities. See also *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010).

³⁴ 20 CFR §656.15(d)(1)(v).

³⁵ 20 CFR §656.15(d)(1)(vi).

³⁶ *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010).

³⁷ 20 CFR §656.15(d)(1)(vii).

field. USCIS has been adamant about not allowing scientists and academics to use presentations at professional conferences as admissible evidence for this criterion. USCIS's 2010 policy memorandum on how to adjudicate EB-1 petitions provides a valuable insight on how officers view this criterion.³⁸

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.³⁹ This standard appears to be significantly 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 beneficiary's work during the past year did, and the beneficiary's intended work will, require exceptional ability; and (2) that the beneficiary has exceptional ability by meeting *one or more* of the enumerated regulatory criteria.⁴⁰ 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;⁴¹
- published material by or about the alien, such as critical reviews or articles in major newspapers, periodicals, or trade journals;⁴²
- evidence of earnings commensurate with the claimed level of ability;⁴³
- playbills and star billings;⁴⁴
- confirmation of the outstanding reputation

of theaters, concert halls, night clubs, and other establishments where the alien has appeared or is scheduled to appear;⁴⁵

- 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.⁴⁶

It is noteworthy that foreign nationals 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 difficulty finding permanent employment.⁴⁷ 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 foreign national and require support by evidence of such recognition "in the field in which certification is sought." These requirements make the Schedule A, Group II unavailable to individuals with acclaim on a national level allowed under the EB-11 regulations,⁴⁸ or to those who received most of their accolades in another field.

ETA Form 9089

The petitioner must file a signed, uncertified ETA Form 9089,⁴⁹ 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

³⁸ USCIS Policy Memorandum, *Evaluation of Evidentiary Criteria in Certain I-140 Petitions* (Dec. 22, 2010), AILA Doc. No. 11020231.

³⁹ 20 CFR §§656.5(2), 656.15(d)(2).

⁴⁰ 20 CFR §656.15(d)(2).

⁴¹ 20 CFR §656.15(d)(2)(i).

⁴² 20 CFR §656.15(d)(2)(ii).

⁴³ 20 CFR §656.15(d)(2)(iii).

⁴⁴ 20 CFR §656.15(d)(2)(iv).

⁴⁵ 20 CFR §656.15(d)(2)(v).

⁴⁶ 20 CFR §656.15(d)(2)(vi).

⁴⁷ Employment and Training Admin., U.S. Dep't of Labor, Technical Assistance Guide No. 656: Schedule A (TAG); 9 FAM 40.41, Exhibit I.

⁴⁸ 8 CFR §204.5(h)(3).

⁴⁹ 20 CFR §656.17.

special skills or requirements, that the job requires exceptional ability in the beneficiary's field. This is to ensure that the information listed in ETA 9089 is aligned with the regulatory prerequisite that the beneficiary's intended work require exceptional ability.⁵⁰ Likewise, if the petitioner is seeking to qualify under the second-preference immigrant visa by claiming an advanced degree,⁵¹ ETA 9089 should list the requirement of an advanced degree in item H-4 as an educational requirement for the job.

If the case is approved, a copy of the ETA 9089 will be forwarded to the chief of the Division of Foreign Labor Certification.⁵²

Posting Notice Requirement

The employer is required to provide notice of filing the Application for Permanent Employment Certification.⁵³ 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 beneficiary's employment for at least 10 consecutive business days.⁵⁴ 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.

A USCIS Policy Alert, which updated the *Adjudicator's Field Manual* (AFM), addressed the specific contents of a posting notice:

The notice must state that it is being provided as a result of the filing of a petition for the relevant position. (The DOL regulations refer to an application for labor certification, which technically is also filed, and notices referring to a labor certification application to DOL rather than a petition to USCIS are equally acceptable). It must also state that any person may provide documentary evidence bearing on the Schedule A labor certification application to the DOL Certifying Officer holding jurisdiction

over the location of the proposed employment. (At one point, USCIS guidance reflected that the notice should drive complaints to USCIS; thus, such notices should be accepted as sufficient).⁵⁵

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.⁵⁶ 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 PERM regulations, the employer must pay a Schedule A, Group II applicant a prevailing wage, and the application must be accompanied by a government-issued wage determination.⁵⁷ The beneficiary's wage must be at least 100 percent of the prevailing wage.⁵⁸ Each wage request should indicate that the job requires exceptional abilities, and, if the beneficiary seeks a second-preference immigrant visa,⁵⁹ should additionally list an advanced-degree requirement.

MEETING THE USCIS REQUIREMENTS

In addition to satisfying the DOL requirements of the Schedule A, Group II classification, a beneficiary 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

Many beneficiaries who are able to successfully claim exceptional abilities hold advanced degrees (or equivalents), making it easy for them to meet the requirements of the second preference. Under this

⁵⁰ 20 CFR §656.15(d)(1).

⁵¹ 8 CFR §204.5(k)(1).

⁵² 20 CFR §656.15(f).

⁵³ 20 CFR §656.10(d).

⁵⁴ *Id.*

⁵⁵ USCIS Policy Alert, *Sample Notice of Filing for Permanent Employment Certification* (Oct. 24, 2019), AILA Doc. No. 19102431.

⁵⁶ 20 CFR §656.10(d)(3)(iv).

⁵⁷ 20 CFR §656.15(b)(i).

⁵⁸ H-1B Reform Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809.

⁵⁹ 8 CFR §204.5(k)(1).

category, an employer may file an immigrant visa petition if the beneficiary holds an advanced degree or has exceptional abilities.⁶⁰ Note that the law only requires one or the other, and those foreign nationals who hold a master's degree or above would make the grade.⁶¹ 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."⁶² To qualify under this provision, the employer must demonstrate that the job requires an advanced degree.⁶³ Should a doctoral degree be required by the beneficiary's profession, then he or she must possess a doctorate in order to satisfy this requirement.⁶⁴ Thus, if the foreign national 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 instances where the beneficiary does not possess an advanced degree or its equivalent, 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."⁶⁵ This closely tracks the definitions of extraordinary ability (defined as "distinction") in the arts and extraordinary achievement in motion picture and television productions of the O-1B visa.⁶⁶ Interestingly, USCIS specifically includes the field of business, despite the fact that DOL lists the fields as only sciences or arts.⁶⁷ Meeting this standard of exceptional ability is accomplished by presenting evidence of at least three of the following six criteria:⁶⁸

- 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 by peers, governmental entities, or professional or business organizations for achievements and significant contributions to the field.

Similar to the EB-11 classification of extraordinary ability, the exceptional ability regulations allow the submission of comparable evidence to establish eligibility, if the other regulations "do not readily apply to the beneficiary's occupation."⁶⁹ Comparable evidence criteria have been well defined in a USCIS memorandum for O-1 visas, which should be applicable to any petition types where comparable evidence is allowed. USCIS has tentatively confirmed that it will "consider evidence of equal significance pertaining to the beneficiary's claim of extraordinary ability when one or more than one criterion does not readily apply to the beneficiary's occupation. USCIS will not disregard such evidence simply because some, but not all, of the criteria apply."⁷⁰

Additionally, the petitioner must establish the prospective benefit requirement of the EB-2 classification.⁷¹ Individuals 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 INS [now USCIS] should assume that "persons of extraordinary ability working in their field of expertise will benefit the United States."⁷² In other words, according to *Buletini*, if an extraordinary individual will work in his or her field of expertise, it is reasonable to assume that he

⁶⁰ *Id.*

⁶¹ INA §203(b)(2); 8 CFR §204.5(k).

⁶² 8 CFR §204.5(k)(2).

⁶³ 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), AILA Doc. No. 0032703.

⁶⁴ 8 CFR §204.5(k)(4)(i).

⁶⁵ 8 CFR §204.5(k)(2).

⁶⁶ 8 CFR §214.2(o)(3)(ii).

⁶⁷ 20 CFR §656.5(b).

⁶⁸ 8 CFR §204.5(k)(3)(i)(A)–(F).

⁶⁹ 8 CFR §204.5(k)(3)(iii).

⁷⁰ USCIS Draft Policy Memorandum, *Comparable Evidence Provision for O Nonimmigrant Visa Classifications* (Jan. 21, 2016), AILA Doc. No. 16012132.

⁷¹ INA §203(b)(2)(A).

⁷² *Buletini v. INS*, 860 F. Supp. 1222, 1229 (E.D. Mich. 1994).

or she will substantially prospectively benefit the United States. INS 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.”⁷³ Therefore, as long as the beneficiary meets the other requirements for extraordinary ability, the prospective benefit of his or her work is implied, with rare exceptions.

The same principle clearly applies to exceptional foreign nationals. In order to be eligible for the Schedule A, Group II precertification, USCIS must conclude that the beneficiary qualifies as “exceptional” by satisfying at least two of the seven regulatory criteria of prong 3. Under the *Buletini* logic (that prospective benefit is satisfied by proving extraordinary abilities), proof that the foreign national possesses exceptional abilities should be sufficient to meet the prospective-benefit requirement for this visa preference category. In other words, if the beneficiary is shown to have exceptional abilities and is working in his or her field of expertise, the beneficiary’s work should be construed to benefit the United States.

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,⁷⁴ an individual 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 a beneficiary who does not have the requisite education and does not meet two of the most commonly utilized EB-2 criteria, namely, a college degree and 10 years of experience. This is also a useful strategy where the EB-3 backlog is shorter than the EB-2 backlog, making it a more favorable path.

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.⁷⁵ The regulations of the third preference specifically allow the petitioner to apply for the Schedule A designation in lieu of submitting a labor certification.⁷⁶

CONCLUSION

Because today’s adjudication climate for immigrant visa petitions based on foreign nationals’ abilities—be they exceptional, extraordinary, or outstanding—remains unpredictable, practitioners are well advised to weigh all aspects of all immigrant visa classifications to arrive at the best possible scenario for the client. Immigrant visa retrogression, service center adjudication trends, recent case law, and USCIS announcements are all part of the calculus, as are some of the Schedule A, Group II practice pointers discussed in this article. The authors hope that the legal standards, procedural issues, and strategy analyses summarized in this article will make this rarely used category a less confusing vehicle for gaining U.S. permanent residence.

⁷³ Letter, Skerrett, Chief, Imm. Branch, Adjudications, HQ 204.23-C (Mar. 8, 1995).

⁷⁴ 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* (Sept. 23, 2005), AILA Doc. No. 05092390.

⁷⁵ 8 CFR §204.5(l)(1).

⁷⁶ 8 CFR §204.5(l)(3).

APPENDIX A

SCHEDULE A, GROUP II CHART

