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

*by Rita Sostrin and Alexander Dgebuadze*[*]

To gauge exactly where the Schedule A, Group II classification stands among employment-based immigrant visa categories is never an easy task. Even the United States Court of Appeals for the Ninth Circuit could be muddled about the differences between "extraordinary ability" and "exceptional ability" immigrant visa classifications and misstate the applicable standards.[1] Enter *Kazarian v. USCIS*.[2] According to this decision, "To qualify for the 'exceptional ability' visa, a petitioner must make a *lesser showing of ability*. . ."[3] Judge Pregerson, whose original dissent highlighted the flaws of the Court's September 2009 ruling, concurred in the March 4, 2010 opinion, stating that, while the petitioning alien could not meet the requirements of the extraordinary ability visa, he "… would have been an excellent candidate for an 'exceptional ability' visa,"[4] suggesting that it is a lower standard. The authors could not disagree more.

While the *Kazarian* decision remains controversial for reasons outside the scope of this article, this federal appeals court certainly appears misinformed as to the legal standards governing "exceptional ability" visas. Schedule A, Group II is not an "easy" or "low" legal standard as suggested by *Kazarian* and presents practitioners with a challenge of having to meet two sets of regulations. However, 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 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 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.

Exceptional ability aliens, 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.[5] However, none of the workers satisfying the DOL exceptional ability standards is subject to the



**Rita Sostrin** (rsostrin@sostrinimmigration.com) is a partner at Sostrin Immigration Lawyers, LLP in Los Angeles, CA. Ms. Sostrin focuses her practice on immigration of individuals of extraordinary abilities as well as international academics. Throughout her professional career, Ms. Sostrin has represented a diverse array of clients across the United States and abroad, handling all aspects of employment-based immigration for leading academic institutions, hospitals, and scientific laboratories. She frequently receives invitations to speak at national and regional conferences and to write for legal publications. Ms. Sostrin is included in *The International Who's Who of Corporate Immigration Lawyers* and *Chambers USA*. She was honored by the American Immigration Lawyers Association's *Presidential Award* in 2008. She currently serves as Senior Editor of the *Immigration & Nationality Law Handbook* and Chair of AILA's Liaison Committee with the California Service Center of USCIS.

**Alexander Dgebuadze** (adgebuadze@sostrinimmigration.com) is a founding partner of Sostrin Immigration Lawyers, LLP in Los Angeles, CA. He focuses on business immigration law matters and represents healthcare, academic, automotive, banking, legal services, bioscience and high technology clients. He has served in several liaison capacities for the Southern California Chapter of AILA, and is currently serving on AILA's national Business Immigration and Healthcare Professionals/Physicians Committees. Mr. Dgebuadze has written on various immigration law topics, including extraordinary ability visas, labor certifications, and H-1B cap exemptions. He is a Contributing Editor for the upcoming edition of *AILA's Guide to PERM Labor Certification: Strategies, Samples, and Guidance for Achieving Success*.

[1] *Kazarian v. USCIS*, posted at *www.ca9.uscourts.gov/ datastore/opinions/2010/03/04/07-56774.pdf*, 3429-44.

[2] *Id*.

[3] *Id*., at 3439.

[4] *Id*., at 3444.

[5] 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).

labor certification process, because, by definition, Schedule A occupations are exempt from it.[6] Indeed, DOL pre-certifies that employment of aliens in Schedule A occupations does not adversely affect the U.S. workforce because these occupations are determined to be in short supply.[7] But since DOL's Schedule A application allows for "pre-certification" only, the alien 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.

Schedule A, Group II is an employer-sponsored classification and is unavailable to self-petitioners. Additionally, it only covers aliens who possess exceptional abilities in the sciences and the arts, including the performing arts,[8] but excludes individuals who excel in other fields. The term "exceptional ability" is defined as "recognized outstanding performance well above the standard for professional competence in the occupation."[9] A "science" or an "art" is defined as a field in which "colleges and universities commonly offer specialized courses leading to a degree."[10] Thus, aliens working in the fields of business or education, included in the EB-1 regulations,[11] appear to be eligible under Schedule A, Group II because colleges and universities grant degrees in these fields. The regulations specify, however, that an alien need not have actually received such a degree to qualify.[12] 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, an alien can qualify for an immigrant visa if he or she satisfies a three-prong test by demonstrating: (1) widespread acclaim and international recognition accorded by recognized experts; (2) documentation confirming that the alien's work during the past year did, and the alien's intended work will, require exceptional ability; and (3) confirmation that the alien meets at least two of the seven regulatory criteria.[13]

***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"[14] and EB-12's "international recognition"[15] requirements. This combination undermines the position expressed in the *Kazarian* case that exceptional visa standards are less restrictive than (EB-11) extraordinary visa standards. Further, 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 alien will submit reference letters from a diverse group of recognized experts who know the alien through his or her widespread acclaim and international recognition. To confirm the international reputation of the beneficiary, reference letters should come from experts in different countries or should speak of the beneficiary's accomplishments in more than one country. Practitioners should be aware that USCIS pays careful attention to the credentials of referees.

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.[16] However, it is the authors' opin-

[6] 20 CFR §656.5.

[7] *Id*.

[8] 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).

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

[10] 20 CFR §656.5(b)(1).

[11] 8 CFR §204.5(h)(1).

[12] 20 CFR §656.5(b)(1).

[13] 20 CFR §656.15(d)(1).

[14] 8 CFR §204.5(h)(3).

[15] 8 CFR §204.5(i)(3)(i).

[16] *Matter of [name not provided]*, LIN 09 005 51257 (NSC Jul. 13, 2010), *Matter of [name not provided]*, LIN 11 175 50019 (NSC Aug. 2, 2011), *Matter of [name not provided]*, SRC 11 800 00769 (TSC Aug. 25, 2011), *Matter of [name not provided]*, SRC 11 191 51302 (TSC Sep. 26, 2011) and many others dismissing the significance of reference letters based on the fact that their authors knew the beneficiary or

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ion that, in addition to submitting some letters from experts who do not personally know the alien, practitioners can argue that letters from some referees who know the beneficiary should also be admissible. What is really at issue here is whether they qualify as "recognized experts," as required by the regulations.[17] If they do, USCIS should not dismiss statements of top scholars, who are considered industry experts and who submitted support letters in that capacity, as biased merely because they may have worked with the alien.

The examiner cannot substitute his or her judgment for that of experts, nor can the examiner ignore evidence that clearly satisfies a category.[18] Reference letters confirming widespread acclaim and international recognition issued by recognized experts should satisfy this prong, regardless of whether they personally know the alien.

### *PRONG 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 alien with at least one year of experience has taken a year off and has done no work, exceptional or otherwise, during the *past* year. In that situation, it is advisable to gain the requisite experience in a nonimmigrant status before applying for Schedule A, Group II.

The second and third parts of this prong examine whether the alien's work during the past year required, and his or her future work will continue to require, exceptional ability. This is a step above EB-11 standards, which require that the alien work in the area of extraordinary ability,[19] but do not mandate that the alien's 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 an alien's work or any other documents confirming the exceptional nature of his or her work would be helpful to satisfy this regulation.

The regulations do not specify that the alien's one year of exceptional work experience must be in the same field in which he or she seeks 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 aliens of exceptional ability "… who have been practicing their science or art during the year prior to application and who intend to practice *the same* science or art in the United States"[20] (emphasis added). Practitioners should also keep in mind that most of the seven regulatory criteria of the third prong require that the alien's accomplishments be "in the field in which certification is sought."

### *PRONG 3: Confirmation that the Alien 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.*[21]

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

provided the letters specifically in connection with the petition. Although these examples are drawn from EB-1 petition denials, they are also applicable to Schedule A, Group II petitions.

[17] 20 CFR §656.15(d)(1).

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

[19] 8 CFR §204.5(h)(5); INA §101(a)(15)(O)(i).

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

[21] 20 CFR §656.15(d)(1)(i).

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.[22] 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.

*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.*[23]

Here, exceptional aliens seeking to qualify under Schedule A, Group II are again restricted to holding memberships only in "international associations." Therefore, membership in the U.S. National Academy of Sciences, technically a national organization, may not be sufficient for a Schedule A, Group II beneficiary, even though its members are elected based on their "distinguished and continuing achievements in original research."[24] Once again, creative lawyering is important in order to meet this criterion where an alien is a member of prestigious professional organizations that, on first glance, appear to be national.

*Published material in professional publications about the alien, about the alien's work in the field.* [25]

This criterion calls for published material in "professional publications" only and omits any mention of major trade publications or other major media.[26] A front-page article about the alien in *The Los Angeles Times* or an interview as an expert on *The Today Show* is unlikely to satisfy this criterion because *The Los Angeles Times* and *The Today Show* 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 alien him- or herself, as materials about his or her work would suffice. It follows that even published material that does not mention the beneficiary by name but discusses his or her work should qualify. This is helpful to those exceptional aliens who avoid personal celebrity and prefer to promote their work instead.

*Evidence of participation on a panel, or individually, as a judge of the work of others in the same or in an allied field.*[27]

Artists usually demonstrate this criterion by showing that they have participated in judging professional competitions or contests. For academics, service as a reviewer or editor of professional journals will be sufficient to meet this standard. Note that it 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 an alien has served as a judge of others' work should satisfy this criterion.[28] A recent federal appeals court holding in this respect confirms this position.[29]

*Evidence of original scientific or scholarly research contributions of major significance in the field.*[30]

There are two components to this criterion. The alien must show that his or her contributions are "original" and also that they are of "major significance." For instance, although many patented inventions are considered original,[31] they do not necessarily lead to commercially successful products or scientific methodologies that considerably influence the field. Such original contributions would not satisfy this regulatory criterion of Schedule A, Group II because they would not meet the "major significance" component.

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[22] *www.grammy.com*/.

[23] 20 CFR §656.15(d)(1)(ii).

[24] See the National Academy of Sciences website at *www.nas.edu/nas* for membership criteria.

[25] 20 CFR §656.15(d)(1)(iii).

[26] 8 CFR §204.5(h)(3)(iii).

[27] 20 CFR §656.15(d)(1)(iv).

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

[29] See *supra* note 1, at ____.

[30] 20 CFR §656.15(d)(1)(v).

[31] Over the years, legacy INS/USCIS has made conflicting statements regarding whether or not patents are considered "original." In one AAO decision, INS opined that "[t]he granting of a patent documents that an invention or innovation is original…" *Matter of [name not provided]*, LIN-02-298-52969 (AAO Mar. 12, 2003). A year later, however, the AAO contradicted itself by saying "the simple grant of a patent does not signify that the petitioner has made an original contribution to his field of endeavor." *Matter of [name not provided]* (AAO Apr. 13, 2004).

It is also noteworthy that this Schedule A, Group II criterion only asks for "scientific or scholarly research" contributions and leaves out artistic contributions. It may be inferred from this drafting of the regulation that DOL does not expect artists to produce evidence relating to the original contributions criterion, unless they are also scholars in their respective fields.

*Evidence of authorship of published scientific or scholarly articles in the field in international professional journals or professional journals with international circulation.*[32]

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

USCIS often attempts to place the additional condition that the articles be well regarded, frequently cited, or that the journals that publish them be of a high rank. But the law imposes no such requirements. The 9th Circuit Court's recent ruling has ended years of USCIS' 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.[33] So, in addition to international circulation, it is important to note that the journals that publish the alien'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.*[34]

Again, this criterion requires artistic exhibitions with an international reach. Additionally, it emphasizes that the exhibitions must be artistic and not in any other field. USCIS has been adamant about not allowing scientists and academics to use presentations at professional conferences as admissible evidence for this criterion.[35] Some practitioners have been getting around this requirement by arguing that "display of work at scholarly exhibitions" is sufficiently comparable to the "display of work at artistic exhibitions." In both cases, the alien showcases his or her work to an audience, the alien can participate by invitation only, and invitations to display work are granted based on merit of achievement. USCIS, however, has been routinely rejecting this position.[36]

**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.[37] This standard appears to be slightly lower than that for the sciences and nonperforming arts, since it combines the prong of "widespread acclaim and international recognition" with the criterion of "international prizes and awards," resulting in only two required prongs. To qualify for Schedule A, Group II in the field of performing arts, a petitioner must satisfy a two-prong test by demonstrating: (1) that the alien's work during the past year did, and the alien's intended work will, require exceptional ability; and (2) that the alien has exceptional ability by meeting *one or more* of the enumerated regulatory criteria.[38] 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;[39]

[32] 20 CFR §656.15(d)(1)(vi).

[33] See *supra* note 1, at ___.

[34] 20 CFR §656.15(d)(1)(vii).

[35] *Matter of [name not provided]* (AAO May 29, 2009), stating that "[t]he plain language of this criterion reveals that it relates to the visual artists."

[36] *Id*: "[W]e find the regulation at 8 CFR §204.5(h)(4) allows the submission of "comparable" evidence where a criteria is not "readily applicable," we find that conference presentation are far more comparable to published articles and, thus, we have considered the petitioner's conference presentations under the criterion set forth at 8 CFR §204.5(h)(3)(vi)…

[37] 20 CFR §§656.5(2); 656.15(d)(2).

[38] 20 CFR §656.15(d)(2).

[39] 20 CFR §656.15(d)(2)(i).

- published material by or about the alien, such as critical reviews or articles in major newspapers, periodicals, or trade journals;[40]
- evidence of earnings commensurate with the claimed level of ability;[41]
- playbills and star billings;[42]
- confirmation of the outstanding reputation of theaters, concert halls, night clubs, and other establishments where the alien has appeared or is scheduled to appear;[43]
- 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.[44]

It is noteworthy that aliens in the performing arts were excluded by the original Schedule A regulations. This is because DOL had concluded that performing artists of exceptional ability were already available in the United States and were having difficulty finding permanent employment.[45] Today, DOL has a different view of performing artists of exceptional ability and has added this field of endeavor to the Schedule A, Group II regulations.

## ADDITIONAL DOL REQUIREMENTS

### "International" Legal Standard

Nearly all regulatory criteria of the Schedule A, Group II classification require international recognition of the alien and stipulate that each criterion should be supported by evidence of such recognition "in the field in which certification is sought." These requirements make the Schedule A, Group II unavailable to aliens with acclaim on a national level allowed under the EB-11 regulations,[46] or to those who received most of their accolades in another field.

### Form ETA-9089

The petitioner must file a signed, uncertified Form ETA-9089,[47] in duplicate, together with Form I-140 and the rest of the evidence, with USCIS. The ETA-9089 must be submitted in paper form, not electronically.

When completing the ETA-9089, it is advisable to state in item H-12, which calls for information about special skills or requirements, that the job requires exceptional ability in the alien's field. This is to ensure that the information listed in Form ETA-9089 is aligned with the regulatory prerequisite that the alien's intended work require exceptional ability.[48] Likewise, if the petitioner is seeking to qualify under the second preference immigrant visa by claiming an advanced degree,[49] Form 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 Form ETA-9089 will be forwarded to the Chief of the Division of Foreign Labor Certification.[50]

### Posting Notice Requirement

The employer is required to provide notice of filing the Application for Permanent Employment Certification.[51] Notice must be given to the appropriate bargaining unit representative or, if there is no such representative, it must be posted in a visible location at the place of the alien's employment for at least 10 consecutive business days.[52] Additionally, if the employer normally uses other methods of in-house media to recruit for similar positions, the posting should be published in all such in-house media. Once the posting is completed, it must be filed with the rest of the petition.

The notice must be posted between 30 and 180 days prior to filing of the petition.[53] 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.

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[40] 20 CFR §656.15(d)(2)(ii).

[41] 20 CFR §656.15(d)(2)(iii).

[42] 20 CFR §656.15(d)(2)(iv).

[43] 20 CFR §656.15(d)(2)(v).

[44] 20 CFR §656.15(d)(2)(vi).

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

[46] 8 CFR §204.5(h)(3).

[47] 20 CFR §656.17.

[48] 20 CFR §656.15(d)(1).

[49] 8 CFR §204.5(k)(1).

[50] 20 CFR §656.15(f).

[51] 20 CFR §656.10(d).

[52] *Id*.

[53] 20 CFR §656.10(d)(3)(iv).

**Prevailing Wage Determination**

Under the new 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.[54] The alien's wage must be at least 100 percent of the prevailing wage.[55] Further, as of January 1, 2010, all prevailing wage requests are submitted on Form 9141 to the National Prevailing Wage and Helpdesk Center.[56] Each wage request should indicate that the job requires exceptional abilities, and, if the alien beneficiary seeks a second preference immigrant visa,[57] 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**

In practice, most beneficiaries who are able to successfully claim exceptional abilities hold advanced degrees, making it easy for them to meet the requirements of the second preference. Under this category, an employer may file an immigrant visa petition if the beneficiary holds an advanced degree or has exceptional abilities.[58] Note that the law only requires one or the other, and those aliens who hold a master's degree or above would make the grade.[59] 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."[60] To qualify under this provision, the employer must demonstrate that the job requires an advanced degree.[61] Should a doctoral degree be required by the alien's profession, than he or she must possess a doctorate in order to satisfy this requirement.[62] Thus, if the alien qualifies as a member of the professions holding an advanced degree, there is no reason to meet the exceptional ability standard of the USCIS regulations. However, in those 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."[63] Curiously, USCIS added the field of business, despite the fact that DOL limited its scope to the sciences or arts.[64] Meeting this standard of exceptional ability is accomplished by presenting evidence of at least three of the following six criteria[65]:

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

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."[66]

Additionally, the petitioner must establish the prospective benefit requirement of the EB-2 classification.[67] Aliens of exceptional ability must show

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[54] 20 CFR §656.15(b)(i).

[55] H-1B Reform Act of 2004, Pub. L. No. 108-447.

[56] 69 Fed. Reg. 63796 (Dec. 4, 2009).

[57] 8 CFR §204.5(k)(1).

[58] *Id*.

[59] INA §203(b)(2); 8 CFR §204.5(k).

[60] 8 CFR §204.5(k)(2).

[61] 8 CFR §204.5(k)(4)(i). *See also* INS Memorandum, "Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants" (Mar. 20, 2000), *published on* AILA InfoNet at Doc. No. 0032703 (*posted* Mar. 27, 2000).

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[62] 8 CFR §204.5(k)(4)(i).

[63] 8 CFR §204.5(k)(2).

[64] 20 CFR §656.5(b).

[65] 8 CFR §§204.5(k)(3)(i)(A)–(F).

[66] 8 CFR §204.5(k)(3)(iii).

[67] INA §203(b)(2)(A).

that they will "substantially benefit prospectively" the United States. The regulations are silent about this statutory prerequisite and provide no guidance as to documentation requirements in this regard. A district court in *Buletini v. INS* analyzed the prospective benefit requirement in the context of the EB-1 statute and concluded that legacy INS/USCIS should assume that "persons of extraordinary ability working in their field of expertise will benefit the United States."[68] In other words, according to *Buletini*, if an extraordinary alien will work in his or her field of expertise, it is reasonable to assume that he or she will substantially prospectively benefit the United States. Legacy INS has also opined that "[o]rdinarily, the 'substantial benefit' criterion is met through satisfying the other statutory requirements" and that "there may be very rare instances where an extraordinary alien's admission may be damaging or detrimental to the interests of the United States."[69] Therefore, as long as the alien meets the other requirements for extraordinary ability, the prospective benefit of his or her work is implied, with rare exceptions.

The same principle clearly applies to exceptional aliens. In order to be eligible for the Schedule A, Group II pre-certification, USCIS must conclude that the alien qualifies as "exceptional" by satisfying at least two of the seven regulatory criteria of prong three. Under the *Buletini* logic (that prospective benefit is satisfied by proving extraordinary abilities), proof that the alien possesses exceptional abilities should be sufficient to meet the prospective benefit requirement for this visa preference category. In other words, if the alien is shown to have exceptional abilities and is working in his or her field of expertise, the alien'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,[70] an alien who has met the DOL regulations for exceptional ability should have no problem meeting the USCIS requirements. However, nothing mandates that the second preference be used, and the petitioner may choose to qualify under the third preference, if necessary. This may apply to an individual working in the arts who does not meet two of the most commonly utilized criteria, namely, a college degree and 10 years of experience. As such, a successful movie producer who meets at least two of the DOL regulations (*i.e.*, evidence of international awards and evidence of publications about the alien), may not qualify for at least three of the second preference regulations, since most of these regulations do not reflect the reality of who succeeds in Hollywood.

In that situation, the petitioner may opt to use the third preference employment-based visa designed for skilled workers, professionals, and other workers as the appropriate immigrant visa vehicle.[71] The regulations of the third preference specifically allow the petitioner to apply for the Schedule A designation in lieu of submitting a labor certification.[72]

### Recent Developments

The law concerning exceptional ability petitions is confusing and, as such, rarely used by practitioners. Because Schedule A, Group II DOL regulations place such a restrictive burden on beneficiaries (with the exception of performing artists), this classification offers little benefit, when compared to the EB-11 petitions of extraordinary ability. Although it could be a helpful strategy in certain circumstances (*e.g.*, performing artists who do not rise to the level of extraordinary, aliens who can meet two but not three regulatory criteria, etc.), Schedule A, Group II remains underutilized. Two recent developments further added to the confusion surrounding this immigrant classification.

First, the USCIS Policy Memorandum[73] issued in response to the *Kazarian* case outlining the two-step adjudication approach has included a section that

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

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

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

[71] 8 CFR §204.5(l)(1).

[72] 8 CFR §204.5(l)(3).

[73] Policy Memorandum, "Evaluation of Evidentiary Criteria in Certain I-140 Petitions" (Dec. 22, 2010), *published on* AILA InfoNet at Doc. No. 11020231 (*posted* Feb. 2, 2011).

*continued*

revised the portion of the Adjudicator's Field Manual (AFM) dealing with petitions for aliens of exceptional ability. According to the Policy Memorandum, USCIS officers must use a two-part analysis to evaluate the evidence submitted in support of exceptional ability petitions filed under 8 CFR §204.5(k)(3)(ii). Thus, according to the Memorandum, the officers must first review whether the petitioner meets the requisite number of regulatory criteria, and then conduct a final merits determination of whether the alien has a degree of expertise significantly above that ordinarily encountered in the field.[74] While this appears to be a high standard, USCIS gives minimal guidance to adjudicators on how to conduct the final merits analysis and leaves it up to individual offers to decode this guidance. The good news is that the Memorandum applies only to USCIS regulations and is inapplicable to the higher DOL standard. Thus, if the alien meets the DOL standard and meets the advanced degree requirement, the final merits analysis coined by the *Kazarian* case should not apply.

Additionally, USCIS and Department of Homeland Security Janet Napolitano recently added to this confusion by introducing new initiatives to expand the EB-2 category to entrepreneurs.[75] In an accompanying Questions and Answers posting on its website, USCIS noted that an entrepreneur may qualify as an individual of exceptional ability in the sciences, arts, or business.[76] However, the posting assumes that all exceptional ability petitions will require labor certifications.[77] As shown in this article, Schedule A, Group II petitions in the area of sciences, arts, and performing arts do not require labor certifications. Thus, en entrepreneur who has an advanced degree or equivalent, and who meets DOL's Schedule A Group II regulations at 20 C.F.R. 655.15(d), will not be subject to definitions and criteria of exceptional ability at 8 C.F.R. 204.5(k)(2) and (3), and will not require a labor certification application. Those without an advanced degree or equivalent will also not require a labor certification, but they must meet the exceptional ability criteria set out in both the USCIS and DOL regulations. Where an entrepreneur fails to satisfy DOL's Schedule A, Group II standards, he or she may only qualify as an advanced degree professional under INA 203(b) - provided he has an advanced degree or equivalent - but *not* as an exceptional ability individual. In this scenario, EB-2 status may be obtained either through an individual labor certification pursuant to INA 203(b)(A) or a national interest waiver pursuant to INA 203(b)(B). In short, the August 2, 2011 announcement and accompanying USCIS posting amount to very little by way of new "exceptional ability" procedures which could specifically benefit entrepreneurs.[78]

## CONCLUSION

Because today's adjudication climate for immigrant visa petitions based on aliens' abilities, be it exceptional, extraordinary, or outstanding, remains restrictive, practitioners are well advised to weigh all aspects of all immigrant visa classifications to arrive at the best possible scenario for the client. Specific 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.

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[74] *Id.*

[75] See DHS Press Release, "Secretary Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation," posted at *www.dhs.gov/ynews/releases/2011 0802-napolitano-startup-job-creation-initiatives.shtm* (Aug. 2, 2011) (last accessed Nov. 9, 2011).

[76] See *www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=93da6b814ba81310VgnVCM100000082ca60aRCRD&vgnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD* (last accessed Nov. 9, 2011).

[77] Id., see Answers 5 and 6.

[78] For an article on PERM-based exceptional ability procedures, *see* Mirabal, Jeanette, "Understanding the Other Category in the Employment Based Second Preference: Exceptional Ability," published in this handbook.

# APPENDIX A

## SCHEDULE A, GROUP II CHART