

## Employment-Based Immigration: The First Three Preferences

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**This article is dedicated to the memory of Ingrid K. Brey who was our valued co-author and friend for many years.** Ingrid passed away this year and will be greatly missed by the immigration bar and all who knew her. She was an AV-rated attorney listed in *Best Lawyers in America* for more than 10 years (named Best Lawyers Detroit Area Immigration Lawyer of the Year for 2011 and 2016), *Who’s Who in Corporate Immigration Law*, and *Super Lawyers*. Ingrid practiced immigration law in Grosse Pointe Park. She served as chair of AILA’s Michigan Chapter from 1999 to 2001. She also served on AILA’s DOL and DOS liaison committees, physicians’ committee, RAIO, distance learning, and Nebraska Service Center committees.

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This article addresses the first three categories of employment-based immigration and details the statutory and regulatory requirements for each classification. The employment-based immigration categories are commonly referred to as EB-1, EB-2, and EB-3 as follows:

- First Preference EB-1 (priority workers);<sup>1</sup>
- Second Preference EB-2 (members of the professions holding advanced degrees or individuals of exceptional ability);<sup>2</sup> and
- Third Preference EB-3 (professionals, skilled workers, and other workers).<sup>3</sup>

The Immigration and Nationality Act of 1952 (INA)<sup>4</sup> provides for several employment-based immigrant visa classifications, most of which have built-in protections for the U.S. labor market.<sup>5</sup> Indeed, employment-based immigration generally requires either a strong showing that the foreign-national worker is one of the best in the field or that there are no U.S. citizen or permanent resident workers who are able, willing, available, and qualified to fill the position.

The law allocates approximately 140,000<sup>6</sup> visas per year to these categories. Within each category, a certain percentage (7 percent) of the authorized total is designated as a *ceiling* beyond which individuals born in

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<sup>1</sup> INA §203(b)(1).

<sup>2</sup> INA §203(b)(2).

<sup>3</sup> INA §203(b)(3).

<sup>4</sup> Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).

<sup>5</sup> The built-in protection takes the form of a test of the U.S. labor market via the labor certification process. Labor certification is discussed briefly in this article, and in greater detail elsewhere in this volume.

<sup>6</sup> See INA §§201(d) and 203(b)(1)–(3).

a particular country may not receive visas in a given fiscal year.<sup>7</sup> It is important to note that this 7 percent is *not* a per-country allocation, as this would quickly exceed the total number authorized by Congress. For purposes of numerical control, visas are charged against one's place of birth abroad, not place of citizenship (there are four exceptions, known as "cross-chargeability").<sup>8</sup> Until January 2005, visas for the first three employment-based preferences remained available—in other words, the supply was deemed to be "current" with the known demand. For most of the period since October 1, 1991, when the current law (and numerical system) went into effect, the EB-1 and EB-2 categories rarely reached the per-country ceiling. Notable exceptions occurred during the summer of 2001, when the EB-3 and EB-2 categories were oversubscribed for natives of India and the People's Republic of China.

To partially ameliorate the selective negative impact caused by the occasional occurrence of this supply-demand disparity, Congress passed, among other benefits, Section 104 of the American Competitiveness in the 21st Century Act (AC21),<sup>9</sup> which provided for recapture of unused immigrant visas from fiscal years 1999 and 2000, and removed the per-country limit in any calendar quarter in which overall applicant demand for employment-based visa numbers is less than the total of such numbers available.<sup>10</sup> This created a "pool" of 130,107 visas for these preferences. Approximately 101,000 of these "pool" visas remained available for use during FY2005.

Additionally, changes in U.S. Citizenship and Immigration Services (USCIS) processing created a significant backlog of cases and a consequent reduction in demand for numbers. This was one of the primary reasons the employment-based categories remained current while tens of thousands of applicants became eligible to file for adjustment of status. In the summer of 2004, USCIS notified Congress of its intent to eliminate its backlogs by the end of FY2006. This backlog-reduction effort resulted in heavy visa demand in the employment-based categories,<sup>11</sup> and as a result, we once again faced backlogs.

Then things took an "interesting" twist when the July *Visa Bulletin*, released in June 2007, announced that all employment-based preference categories with the exception of unskilled workers would be current for July 2007. This incident, now often referred to as the "July 2007 *Visa Bulletin* Debacle," made it possible for thousands of foreign nationals in the United States who had long been awaiting availability of a visa number, to file I-485 applications all at once.

However, they all needed to be filed within the month of July while the cutoff date was set to "current," as there would surely be retrogression the following month. This was a nightmare situation for business immigration attorneys practicing at the time. They were required to file an extremely large volume of applications in a very short time period. It was also very trying for USCIS, who had to receipt in and process ancillary benefits such as work and travel authorization associated with these applications.

Further, while it did provide a benefit to the foreign nationals who were permitted to file I-485 applications during that one-month window, inasmuch as they and their family members were permitted to apply for employment authorization documents (EADs) and advance parole, there were not actually visa numbers available to grant to these individuals.

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<sup>7</sup> INA §202(a)(2).

<sup>8</sup> 22 CFR §42.12(b)–(e).

<sup>9</sup> Pub. L. No. 106-313, §§101–16, 114 Stat. 1251, 1251–62.

<sup>10</sup> *Id.* Section 106(d) of AC21 was amended by the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, H.R. 1268 on May 11, 2005, by placing the unused employment-based visa numbers from fiscal years 2001–04 in the "bank" for use in future fiscal years when the demand for employment-based immigrant visas in EB-1, EB-2, and EB-3 exceeds the annual quota. The use of the "bank" visa numbers are reserved for immigrant worker petitions based on Schedule A immigrants (nurses, physical therapists, and performing artists of exceptional ability) and their family members. The total number of visas used from the "bank" may not exceed 50,000. See "President Signs Emergency Supplemental into Law," AILA Doc. No. 05051261.

<sup>11</sup> U.S. Department of State (DOS) *Visa Bulletin* No. 76, Vol. VIII, Dec. 2004.

After publishing the July 2007 *Visa Bulletin*, the U.S. Department of State (DOS) received widespread public criticism and attempted to retract the *Visa Bulletin*. In mid-July they issued a revised July *Visa Bulletin* announcing that all employment-based preference categories were now “unavailable” for that month.<sup>12</sup> This would have meant that no more employment-based I-485s could be filed for the remainder of the month. As it was not clear that DOS had the legal authority to issue a revised *Visa Bulletin* mid-month, the American Immigration Lawyers Association (AILA) threatened DOS with a lawsuit. Shortly thereafter, DOS reversed course and announced that the initial July 2007 *Visa Bulletin* remained in effect.<sup>13</sup>

In the February 2008 *Visa Bulletin*, DOS announced that despite two retrogressions of the India EB-2 category, demand for numbers by USCIS offices for adjustment of status had remained extremely high and as a result, the annual limit for this category had been reached.<sup>14</sup> In March 2008, DOS advanced some of the employment-based immigrant categories, indicating that this was done to avoid a situation later in the fiscal year where large amounts of visa numbers remain available but there would not be enough time to use them.<sup>15</sup>

USCIS announced in September 2015 revised procedures for determining visa availability for applicants waiting to file for adjustment of status. This revised process, beginning with the October 2015 *Visa Bulletin*, implemented the In November 2014, President Obama announced new executive actions on immigration and in September 2015, Secretary of Homeland Security Jeh Johnson announced revised procedures for determining visa availability for applicants for immigrants and for those waiting to file for adjustment of status, as detailed in the White House report, *Modernizing and Streamlining Our Legal Immigration System for the 21st Century*, issued in July 2015.<sup>16</sup>

In summary, there are now two important dates listed in the monthly *Visa Bulletin*: (1) the “filing date,” which determines when individuals can submit their permanent residence applications; and (2) the “final action” date, which determines when DOS or USCIS can make a decision on the application. If the immigrant has a “priority date” earlier than the listed “filing date” for his or her particular visa category and country, he or she will be able to file his or her application for permanent residence through consular processing earlier than he or she would have been allowed under the old process.

However, the immigrant must still wait for the “final action” date to become current before permanent residence can be approved. For individuals in the United States and applying for adjustment of status through USCIS, and stuck in the long visa backlogs, this means they may be able to receive employment authorization and travel documents sooner while they await their final action on their cases.

To determine whether USCIS will allow applicants to use the “filing date” or the “final action” date in filing for adjustment of status within the United States in a given month, individuals need to check the USCIS website, <https://www.uscis.gov/visabulletininfo>, on adjustment of status filing charts from the *Visa Bulletin*.

This page is updated within a few days after DOS issues the *Visa Bulletin* each month. For example, in the page that was last updated on February 20, 2018, USCIS announced that for the March 2018 Employment-Based preference Filings, individuals must use the Final Action Dates chart in the Department of State *Visa Bulletin* for March 2018.

In the March 1, 2018, *Visa Bulletin*, EB-1 final action date numbers remain current, while EB-2 numbers are severely backlogged related to the “final action” date for China and even more so for India. EB-3 numbers likewise are severely backlogged for China and the Philippines, and much more so for India.<sup>17</sup> Moreover, “filing date” numbers are also greatly backlogged in the EB-2 category for China, and much more so for India.

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<sup>12</sup> DOS *Visa Bulletin* No. 109, Vol. VIII, Aug. 2007.

<sup>13</sup> See AILA Press Release, “AILA on the Visa Bulletin Announcement: A Reversal for the Rule of Law,” AILA Doc. No. 07071868.

<sup>14</sup> DOS *Visa Bulletin* No. 115, Vol. VIII, Feb. 2008.

<sup>15</sup> DOS *Visa Bulletin* No. 116, Vol. VIII, Mar. 2008.

<sup>16</sup> See “AILA Talking Points on October 2015 Visa Bulletin Changes,” AILA Doc. No. 15090904.

<sup>17</sup> DOS *Visa Bulletin* No. 15, Vol. X, March 2018.

EB-3 “filing date” numbers are backlogged for the Philippines and China and to a much greater extent for India.

## **FIRST PREFERENCE: Priority Workers**

### **Statutory Categories**

INA §203(b)(1) allocates 28.6 percent<sup>18</sup> of the total number of employment-based immigrant visas per year to priority workers in three subcategories, which together comprise the EB-1 classification:

- Persons of extraordinary ability;
- Outstanding professors and researchers; and
- Multinational executives and managers.

There is no allocation of the available visas among these three subcategories of priority workers; they are made available on a first-come, first-served basis. When evaluating whether a worker qualifies for any of the EB-1 subcategories, the practitioner should consider:

- The EB-2 category for individuals of exceptional ability in the sciences, arts, or business under INA §203(b)(2);<sup>19</sup> and
- Workers of exceptional ability in the sciences or arts or performing arts under Schedule A, Group II, codified at INA §212(a)(5)(A)(ii)(II).<sup>20</sup>

### **Regulations**

The regulations for priority workers enumerate the criteria for each of the three subcategories.<sup>21</sup> The first subcategory, workers of extraordinary ability;<sup>22</sup> the second subcategory, outstanding professors and researchers;<sup>23</sup> and the third subcategory, multinational managers and executives,<sup>24</sup> are each discussed in more detail below.

### **Persons of Extraordinary Ability**

The regulations follow legislative history by defining extraordinary ability as a level of expertise indicating that the individual is one of a small percentage who has risen to the very top of the field of endeavor.<sup>25</sup> Workers of extraordinary ability are defined by statute as those who have extraordinary ability in the sciences, arts, education, business, or athletics, which has been demonstrated by sustained national or international acclaim, and whose achievements have been recognized in the field through extensive documentation.<sup>26</sup>

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<sup>18</sup> Under the Immigration Act of 1990 (IMMACT90), Pub. L. No. 101–649, 104 Stat. 4978, 40,000 visas per year were allocated to each of the first three employment-based immigration categories. However, sec. 302(b)(2) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102–232, 105 Stat. 1733, changed the allocation from figures to percentages. The reason for this change is that MTINA provides that unused visas in the family-based categories will be made available for employment-based immigration beginning fiscal year 1994 and vice versa.

<sup>19</sup> 8 CFR §204.5(k).

<sup>20</sup> 20 CFR §§656.5 and 656.15.

<sup>21</sup> 8 CFR §204.5.

<sup>22</sup> 8 CFR §204.5(h).

<sup>23</sup> 8 CFR §204.5(i).

<sup>24</sup> 8 CFR §204.5(j).

<sup>25</sup> 8 CFR §204.5(h)(2).

<sup>26</sup> INA §203(b)(1)(A)(i).

## ***Basic Requirements***

### ***No Job Offer or Labor Certification Required***

One of the main advantages of classifying an individual as an EB-1 worker of extraordinary ability is that neither a job offer nor a labor certification<sup>27</sup> is required.<sup>28</sup> Although an employer may petition for an EB-1 worker of extraordinary ability, the foreign national can also self-petition without a job offer or a petitioning employer.

Whether the petitioner is an employer or the foreign national, it must include evidence that the individual will continue to work in the United States in the area of his or her expertise. Such evidence includes:

- Letters from prospective employers;
- Evidence of prearranged commitments for employment; or
- A description of how he or she will continue to work in the field in the United States.<sup>29</sup>

### ***Criteria to Qualify for Extraordinary Ability Status***

To qualify as an individual of extraordinary ability, the foreign national must show that his or her accomplishments have been recognized in the field of endeavor, and that the individual has received acclaim for those accomplishments. The regulations permit a showing made through a single achievement, such as receipt of a major, internationally recognized award like a Nobel or Pulitzer Prize.<sup>30</sup> Other awards, not as notable, might also qualify, but the foreign national will have to document how the international award in the particular field compares to a Nobel or Pulitzer Prize.

As a practical matter, very few foreign nationals will qualify for extraordinary ability status through a one-time achievement, and the regulations provide for alternative requirements. To qualify through the alternative requirements, the foreign national still must make a showing of sustained recognition on either a national or international level and the petition must include persuasive documentation of at least three of the following:<sup>31</sup>

- Receipt of lesser nationally or internationally recognized prizes or awards for excellence;
- Membership in associations in the field that demand outstanding achievement of their members, as judged by recognized national or international experts;
- Published material about the foreign national in professional or major trade publications or other media;
- Evidence that the foreign national is a judge of the work of others in the field;
- Evidence of the foreign national's original contributions of major significance to the field;
- Authorship of scholarly articles;
- Display of the foreign national's work at artistic exhibitions or showcases;
- Evidence the foreign national has performed in a leading or critical role for organizations that have a distinguished reputation;
- Evidence that the foreign national commands high remuneration in relation to others in the field; or

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<sup>27</sup> Labor certification is the process whereby an employer who wishes to hire a noncitizen on a permanent basis must prove to the U.S. Department of Labor (DOL) that there are no qualified U.S. workers available. *See* 20 CFR §656.2.

<sup>28</sup> 8 CFR §204.5(h)(5).

<sup>29</sup> *Id.*

<sup>30</sup> 8 CFR §204.5(h)(3).

<sup>31</sup> USCIS intends the EB-1 extraordinary ability category to be “comparable to”—not more difficult than—the standards for DOL’s Schedule A, Group II workers, who are also exempt from the labor certification requirement. *See* Supplementary Information to the Immigration and Naturalization Service (INS) final rule on employment-based immigrants, 56 Fed. Reg. 60898 (Nov. 29, 1991), *reprinted in* 68 *Interpreter Releases* 1762 (Dec. 9, 1991).

- Evidence of commercial success in the performing arts.<sup>32</sup>

If the above criteria do not apply, the regulations also allow for “other comparable evidence.”<sup>33</sup>

In practice, the EB-1 extraordinary-ability category seems easier to satisfy than Schedule A, Group II, discussed in further detail in the Section on Second Preference classifications below.<sup>34</sup> First, the EB-1 category completely sidesteps the job offer and the need for an employer petitioner. Schedule A, Group II, however, requires an employer and a firm job offer.<sup>35</sup> Second, EB-1 extraordinary ability may be established by satisfying three of 10 criteria. The extraordinary-ability criteria also allow a showing of either national or international acclaim or achievement. Schedule A, Group II, on the other hand, emphasizes only international acclaim and requires that the petitioner satisfy two of only seven criteria for exceptional ability in the sciences or arts (excluding performing arts, which has a separate list of six representative types of evidence but does not specify the number that must be satisfied). Additionally, under Schedule A, Group II, the foreign national’s work during the past year and the intended work in the United States both require exceptional ability. However, just as in the EB-1 category, Schedule A, Group II classification requires separate and independent evidence of exceptional ability through documentation of current widespread acclaim and international recognition by other experts.<sup>36</sup>

The practitioner should consider issues of visa backlog, as well as the foreign national’s background and work in the United States to determine whether to file under the EB-1 extraordinary-ability category or Schedule A, Group II, and (in addition) should consider the outstanding-researcher category discussed below. There are overlaps in the types of documentation required for each category, although strategic considerations should include an evaluation of whether the foreign national’s work requires exceptional ability (for Schedule A, Group II petitions), or is research-oriented (for an outstanding researcher petition). The petitioner may want to consider filing petitions for the same person in all three categories. In its final permanent labor certification rule, the U.S. Department of Labor (DOL) retained and expanded Schedule A, Group II because it was persuaded that some foreign nationals who qualify in this group might not qualify for priority-worker status as individuals of extraordinary ability.<sup>37</sup>

USCIS examiners adjudicating EB-1 extraordinary ability petitions look for a showing that the extraordinary ability worker will “substantially benefit prospectively the United States.”<sup>38</sup> Additionally, an opinion issued by legacy INS general counsel imposes limitations on the scope of the extraordinary-ability category. According to the opinion, professionals do not qualify for EB-1 extraordinary-ability status unless the profes-

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<sup>32</sup> 8 CFR §204.5(h)(3)(i)–(x).

<sup>33</sup> 8 CFR §204.5(h)(4).

<sup>34</sup> Schedule A refers to the blanket determination made by the DOL Employment and Training Administration (ETA) that foreign nationals in certain occupations will not adversely affect the U.S. labor force. Schedule A (found at 20 CFR §656.5) consists of Group I occupations, currently physical therapists and professional nurses, and Group II occupations, foreign nationals of exceptional ability in the arts and sciences including college and university teachers of exceptional ability. The PERM (Program Electronic Review Management system) regulations at 20 CFR §656.5(b)(2) [69 Fed. Reg. 77389 (Dec. 27, 2004)] have expanded Group II to include persons of exceptional ability in the performing arts, including, but not limited to, occupations in theater, motion pictures, drama, comedy, music, dance, opera, magic, martial arts, visual arts, and the marching arts.

<sup>35</sup> 20 CFR §656.15(d).

<sup>36</sup> Charts comparing EB-1, extraordinary ability and outstanding researchers and professors, and EB-2, exceptional ability with Schedule A, Group II are appended as an exhibit to this article.

<sup>37</sup> See DOL interim final rule on Labor Certification Process for Permanent Employment of Aliens, 56 Fed. Reg. 54920, 54922 (Oct. 23, 1991). Schedule A, Group II has been retained in the new PERM regulations (with the notable addition of the performing arts) at 69 Fed. Reg. 77325, AILA Doc. No. 04122312.

<sup>38</sup> INA §203(b)(1)(A)(iii). See letter from E. Skerrett, Chief, Immigrant Branch, Adjudications, INS (Mar. 8, 1995), *reprinted in 72 Interpreter Releases* 445–47 (Mar. 27, 1995) (“prospective advantage” may generally be assumed except in rare instances where an extraordinary foreign national’s field of work might somehow be detrimental to U.S. interests).

sion in which they are engaged can be categorized as being in the arts, sciences, business, education, or athletics.<sup>39</sup>

Importantly, with the *Kazarian*<sup>40</sup> decision and the publication of a USCIS Policy Memorandum,<sup>41</sup> EB-1 extraordinary ability and EB-1 outstanding professor or researcher petitions are proceeding under a two-part approach where USCIS first evaluates to see if the individual has made a single achievement, such as receipt of a major, internationally recognized award like a Nobel or Pulitzer Prize, and if not has submitted evidence for at least three of the required criteria; and then the evidence is considered in the context of a final merits determination.

### **Procedures**

USCIS Form I-140, immigrant petition for alien worker, may be filed by the foreign national as a self-petitioner or by an employer. In either case, the Form I-140 petition in this category may be e-filed or filed at the USCIS Dallas Lockbox. Premium processing is available and the petition must be filed with the appropriate Service Center, depending on where the beneficiary will work. The petition packet must include Form I-140 and the required documentary evidence.

### **Outstanding Professors and Researchers**

The second subcategory of priority workers is for outstanding professors and researchers. These workers are professors and researchers who are internationally recognized for their outstanding achievements.

#### **Basic Requirements**

To qualify as an outstanding professor or researcher, the foreign national must:

- Be internationally recognized as outstanding in a specific academic field;
- Have a minimum of three years of experience in teaching and/or research in that field; and
- Enter the United States in a tenure or tenure-track teaching or comparable research position at a university or other institution of higher education, or in a comparable research position with a private employer under certain circumstances.<sup>42</sup>

Research positions must be permanent. A permanent position is defined at 8 CFR §204.5(i)(2) as tenured, tenure-track, or for a term of indefinite or unlimited duration with the expectation of continued employment, unless there is good cause for termination. A June 6, 2006, USCIS memorandum provided much needed guidance on what satisfies the requirement of a permanent offer of employment for outstanding professors and researchers and a corresponding revision to the *Adjudicator's Field Manual* (AFM).<sup>43</sup>

The employer need not be a university or educational institution. The employer can be a private company, but it must employ at least three full-time researchers. The private employer also must have documented accomplishments in an academic field.

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<sup>39</sup> See legal opinion rendered by the Office of INS General Counsel, *reprinted in 72 Interpreter Releases* 184–91 (Jan. 30, 1995).

<sup>40</sup> *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).

<sup>41</sup> USCIS Policy Memorandum, “USCIS Memo on Evaluation of Evidence Submitted with Certain I-140 Petitions,” AILA Doc. No. 11020231.

<sup>42</sup> INA §203(b)(1)(B).

<sup>43</sup> USCIS Memorandum, M. Aytes, “USCIS Memo on ‘Permanent Offer’ for Outstanding Professors and Researchers,” AILA Doc. No. 06060860.

Although one would normally expect outstanding researchers and professors to have Ph.D. degrees, neither the statute nor regulations require possession of a doctorate. Furthermore, a noncitizen who qualifies as an outstanding professor can be offered a position as a researcher and vice versa.<sup>44</sup>

### *Three Years of Experience*

The outstanding professor or researcher must have at least three years of experience. However, the requisite three years can include pre-degree research experience gained while working on the advanced degree, so long as the noncitizen completed the degree and the pre-degree research is recognized as outstanding. In addition, pre-degree teaching experience is acceptable if the individual has acquired the degree, and had full responsibility for the course. Nothing in the statute or regulations precludes reliance on experience gained with the petitioning employer.<sup>45</sup> Additionally, any combination of teaching or research totaling three years will serve to meet the experience requirement.<sup>46</sup>

### *Criteria to Show International Recognition for Outstanding Achievements*

The outstanding professor or researcher must satisfy at least two of the following criteria:

- Receipt of major prizes or awards in the field;
- Membership in associations that require outstanding achievements;
- Published material in professional journals written by others about the foreign national's work;
- Participation as a judge of the work of others in the same or an allied field;
- Original scientific or scholarly research contributions to the field; or
- Authorship of scholarly books or articles in scholarly journals with international circulation in the field.<sup>47</sup>

In a letter dated June 15, 1995, legacy INS stated that the regulations require a petition in this subcategory to be accompanied by evidence that the beneficiary is internationally recognized as outstanding in a particular academic field.<sup>48</sup> In discussing the requirements of 8 CFR §204.5(i)(3)(i), the letter explained:

The listed types of evidence serve as guidelines for the adjudicator and the petitioner. The ultimate determination, however, is whether, through the evidence submitted, the petitioner establishes that the beneficiary is a researcher or professor who is recognized internationally as outstanding. The beneficiary may well be stronger in one evidentiary area than in another. Nevertheless, the overall impression should be that the alien fits the classification. Mere presentation of evidence which relates to two of the listed criteria does not guarantee an approval. The evidence must be weighed and evaluated. If the director determines that the evidence submitted does not fully establish eligibility for this classification or raises underlying questions regarding eligibility, the director may request additional evidence.<sup>49</sup>

As noted in the discussion in the preceding section, with the *Kazarian* decision and publication of the USCIS Policy Memorandum, "Evaluation of Evidence Submitted with Certain Form I-140 Petitions," EB-1 extraordinary ability and EB-1 outstanding professor or researcher petitions are proceeding under a two-part

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<sup>44</sup> Letter from E. Skerrett, Chief, Immigrant Branch, INS Office of Adjudications (Mar. 2, 1994), *reprinted in* 71 *Interpreter Releases* 417, 437 (Mar. 28, 1994).

<sup>45</sup> 8 CFR §204.5(i)(3)(ii).

<sup>46</sup> *Id.*

<sup>47</sup> 8 CFR §204.5(i)(3)(i).

<sup>48</sup> Letter from E. Skerrett, Chief, Immigrant Branch, INS Office of Adjudications (June 15, 1995), *reprinted in* 72 *Interpreter Releases* 967–68 (July 17, 1995). *See also* Letter, Weinig, Acting Asst. Comm., Examinations, CO 204.23-C (July 30, 1992), *reprinted in* 69 *Interpreter Releases* 1052 (Aug. 24, 1992).

<sup>49</sup> *Id.*



approach where USCIS first counts to see if evidence is submitted in at least two of the required criteria, and then the evidence is considered and evaluated in the context of a final merits determination.

### ***Procedures***

Unlike the EB-1 worker of extraordinary ability, the outstanding professor or researcher cannot self-petition; the employer must file the petition. The Form I-140 petition in this category may be e-filed or filed at the USCIS Dallas Lockbox. Premium processing is available and the petition must be filed with the appropriate Service Center, depending on where the beneficiary will work.

### **Certain Multinational Executives and Managers**

The third subcategory of the EB-1 classification is reserved for executives and managers of foreign companies who are transferred to the same or a related company in the United States.

### ***Basic Requirements***

The requirements for this classification closely track those for nonimmigrant (L-1A) intracompany transferees. A multinational manager or executive may qualify for priority-worker status if he or she has been employed outside the United States in a managerial or executive capacity for at least one of the three years immediately preceding the filing of the petition, or, in the case of a foreign worker presently in the United States, one of the three years preceding entry to the United States as a nonimmigrant.<sup>50</sup> The regulations (but not the statute) require the qualifying employment to have been outside the United States and in a managerial or executive capacity.<sup>51</sup> The past employment must have been with the same employer, an affiliate, or a subsidiary of the employer.<sup>52</sup> The foreign worker must be coming to work in an executive or managerial capacity.<sup>53</sup> Finally, the U.S. employer must have been doing business in the United States for at least one year.<sup>54</sup>

### ***The Qualifying Multinational Relationship***

The petitioner must be a U.S. employer that is an affiliate, a subsidiary, or the same employer as the firm, corporation, or other legal entity that employed the foreign national abroad.<sup>55</sup> The definitions of affiliate and subsidiary in the regulations are comparable to those found in the L-1 intracompany transferee regulations.<sup>56</sup> An “affiliate” is defined as one of two subsidiaries that is owned or controlled by the same parent or individual, or by a group of individuals, so long as each individual owns and controls approximately the same share or percentage of each entity.<sup>57</sup> The term “affiliate” also includes certain international accounting firms that market accounting services under an internationally recognized name.<sup>58</sup> Subsidiaries include direct or indirect ownership of at least half of another entity, ownership of 50 percent of a 50/50 joint venture with equal control veto power, or ownership of less than 50 percent of an entity with de facto control.<sup>59</sup>

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<sup>50</sup> INA §203(b)(1)(C).

<sup>51</sup> 8 CFR §§204.5(j)(3)(i)(A), (B).

<sup>52</sup> 8 CFR §204.5(j)(3)(i)(C).

<sup>53</sup> 8 CFR §204.5(j)(5).

<sup>54</sup> 8 CFR §204.5(j)(3)(i)(D). The regulations define “doing business” as the “regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.” 8 CFR §204.5(j)(2).

<sup>55</sup> 8 CFR §204.5(j)(3)(i)(C).

<sup>56</sup> See 8 CFR §§214.2(l)(1)(ii)(K), (L).

<sup>57</sup> 8 CFR §204.5(j)(2).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* See also *Matter of Arctic Storm, Inc.*, A73-426-962 (AAO Nov. 29, 1999), (addressing the definition of “joint venture” as a type of subsidiary and noting that where a joint venture is owned by two companies through an equal 50/50 ownership interest, petitioner’s “negative control” of the subsidiary corporation through exercise of its veto power helped establish that it was a joint venture, thereby meeting the regulatory definition of “subsidiary”).

*Managerial or Executive Capacity*

The beneficiary's qualifying experience and the position offered in the United States must be in a managerial or executive capacity. The definitions of manager and executive<sup>60</sup> are critical in formulating a case.

*Managerial capacity* is an assignment in which the employee primarily:

- Manages the organization or a department, subdivision, function, or component of the organization;
- Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.<sup>61</sup>

Note that a managerial position does not necessarily require management of staff; management of a *function* is sufficient. However, there must be subordinate personnel who actually carry out that function. The regulations do specify that first-line supervisors, even if directly managing the work of subordinate employees, are not deemed to meet the definition of managerial capacity unless those supervised are professionals.<sup>62</sup>

*Executive capacity* means an assignment within an organization in which the employee primarily:

- Directs the management of the organization, or a major component or function of the organization;
- Establishes the goals and policies of the organization, component, or function;
- Exercises wide latitude in discretionary decision making; and
- Receives only general supervision or direction from high-level executives, the board of directors, or stockholders of the organization.<sup>63</sup>

***Procedures***

The Form I-140 in this category is filed at the USCIS Dallas lockbox. Premium processing is not available for these petitions. Please note that it is always a best practice to double-check the filing locations on the USCIS website at [www.uscis.gov/i-140-addresses](http://www.uscis.gov/i-140-addresses), as filing locations are subject to change by USCIS with little advance notice.

## **SECOND PREFERENCE: Members of Professions Holding Advanced Degrees or Individuals of Exceptional Ability in the Sciences, Arts, or Business**

***Statutory Categories***

By statute, 28.6 percent of the total number of employment-based immigrant visas available each year is allocated to second-preference workers.<sup>64</sup> There are two subcategories of the second preference, which together comprise the EB-2 classification:

- Workers who are members of the professions holding advanced degrees or their equivalent, and

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<sup>60</sup> 8 CFR §204.5(j)(2).

<sup>61</sup> *Id.*

<sup>62</sup> 8 CFR §204.5(j)(4)(i).

<sup>63</sup> 8 CFR §204.5(j)(2).

<sup>64</sup> INA §203(b)(2)(A).

- Workers, who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.<sup>65</sup>

The legacy INS general counsel issued an opinion in January 1995, stating that the EB-2 classification includes athletics.<sup>66</sup> There is no allocation of the available visas according to subcategory.

## Regulations

The regulations for second-preference workers are found at 8 CFR §204.5(k).

## Basic Requirements

### *Members of the Professions Holding Advanced Degrees*

Any U.S. employer can file a petition in this category when the job requires an advanced degree and the noncitizen possesses such a degree.<sup>67</sup> An advanced degree is defined as an academic or professional degree beyond the baccalaureate.<sup>68</sup> Professions include, but are not limited to, the occupations listed in INA §101(a)(32), as well as any occupation for which a U.S. baccalaureate degree or foreign-degree equivalent is the minimum requirement for entry into the occupation.<sup>69</sup>

As an alternative means of qualifying as an advanced-degree professional, a baccalaureate degree plus five years of progressive experience in the field can serve as the equivalent of a master's degree.<sup>70</sup> A foreign national must have earned a baccalaureate degree, and may not qualify as an advanced-degree professional utilizing work experience in lieu of both the baccalaureate and master's level education; nor may experience substitute for a doctoral degree.<sup>71</sup>

“Progressive experience” is defined neither by statute nor by regulation. In response to litigation, in which legacy INS was sued for denying I-140 petitions involving labor certification requirements of a master's degree or equivalent,<sup>72</sup> legacy INS provided some guidance on the issue. The March 20, 2000, EB-2 memo offered the following:

A petitioner seeking classification for an EB-2 advanced degree professional must clearly demonstrate that the position requires ... an employee with either a master's degree or a U.S. baccalaureate or foreign equivalent degree followed by at least five years of progressive experience in the specialty.... Progressive experience is demonstrated by advancing levels of responsibility and knowledge in the specialty.<sup>73</sup>

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

<sup>66</sup> See legal opinion rendered by the Office of [Legacy] INS General Counsel, reprinted in 72 *Interpreter Releases* 184–91 (Jan. 30, 1995).

<sup>67</sup> 8 CFR §204.5(k)(4)(i). See also INS Memorandum, “Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants” (Mar. 20, 2000).

<sup>68</sup> 8 CFR §204.5(k)(2).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See 8 CFR §§204.5(k)(2), (3)(i)(B).

<sup>72</sup> *Chintakuntla v. INS*, No. C99-5211MMC (N.D. Cal. May 4, 2000).

<sup>73</sup> INS Memorandum, “Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants” (Mar. 20, 2000).

### ***Workers of Exceptional Ability***

The use of the word “exceptional” in various contexts in immigration law has caused confusion.<sup>74</sup> For the purpose of showing eligibility for EB-2 classification as a worker of exceptional ability in the sciences, arts (including athletics), or business, the individual must have a degree of expertise significantly above the ordinary. This is established by satisfying at least three of the following six criteria which, under the USCIS Policy Memorandum, “Evaluation of Evidence Submitted with Certain Form I-140 Petitions” as discussed in footnote 41, *infra*, is ascertained by using the two-prong test discussed therein:

- An official academic record showing a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
- At least 10 years of full-time experience in the occupation documented by letters from current or past employers
- A license to practice the profession or certification for the particular profession or occupation
- Evidence that the noncitizen has commanded a salary or other remuneration for services demonstrating exceptional ability
- Membership in professional associations (there is no requirement that the professional associations require outstanding achievement for admission)
- Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.<sup>75</sup>

Other comparable evidence is also acceptable.<sup>76</sup>

### **Procedures**

The petitioner must file Form I-140, petition for alien worker, for an EB-2 worker at the USCIS Dallas Lockbox. As a general rule, the petition must include a certified individual labor certification from DOL, with evidence that the individual meets the requirements for the job set forth in the labor certification.

There are two exceptions to the labor-certification requirement:

First, if the foreign national will serve the national interest, labor certification may be waived.<sup>77</sup> If the foreign national is claiming exceptional ability and is seeking a waiver of the labor certification requirement, the foreign national or anyone on his or her behalf may be the petitioner.<sup>78</sup> To apply for a national interest waiver, the regulations state that the petitioner must submit Form I-140, together with Form ETA-750B, Statement of Qualifications of Alien, in duplicate, available at <https://www.foreignlaborcert.doleta.gov/form.cfm>, and evidence to support the claim that exemption would be in the national interest.<sup>79</sup> In practice, USCIS will also accept the newer Form ETA-9089, Application for Permanent Employment Certification, available at [www.plc.doleta.gov](http://www.plc.doleta.gov) in lieu of the Form ETA-750B. The national interest waiver is discussed in greater detail below.

The second exception to the labor certification requirement is for workers under DOL’s Schedule A, found at 20 CFR §§656.5 and 656.15. Petitions under Schedule A, Group II for individuals of exceptional ability are not limited to the second-preference category, and there is no specific box to check on the I-140 petition. The petitioner should check the preference category box on Form I-140 that corresponds to the minimum educa-

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<sup>74</sup> It also appears in DOL regulations in Schedule A, Group II, covering workers of exceptional ability in the arts and sciences. See 20 CFR §§656.5(b) and 656.15(d).

<sup>75</sup> 8 CFR §204.5(k)(3)(ii).

<sup>76</sup> 8 CFR §204.5(k)(3)(iii).

<sup>77</sup> INA §203(b)(2)(B)(i).

<sup>78</sup> 8 CFR §204.5(k)(1).

<sup>79</sup> 8 CFR §204.5(k)(4)(ii).

tion, training, and experience required for the position, and should clarify in parentheses that the case is being filed under Schedule A, Group II.

### **Labor Certification or Schedule “A” Application**

As a general rule, EB-2 petitions must be accompanied by an approved individual labor certification.<sup>80</sup> Exceptions to the labor certification requirement (referred to as precertification) are available for positions under Schedule A, Group I and Group II occupations.<sup>81</sup>

To qualify for Schedule A, Group II, in the sciences or arts (excluding the performing arts) an individual must submit: (1) evidence of current widespread acclaim and international recognition; (2) documentation showing that his or her work during the past year required—and his or her intended work will require—exceptional ability; and (3) evidence from at least two of the following seven categories:

- Receipt of international prizes or awards for excellence in the field;
- Membership in international organizations that require outstanding achievement of their members;
- Published material about the noncitizen relating to his or her work in professional publications;
- Evidence of the noncitizen’s participation as a judge of the work of others in the same or an allied field;
- Original scientific or scholarly research contributions of major significance in the field;
- Authorship of scientific or scholarly articles in the field in professional journals with international circulation; or
- Display of the noncitizen’s work at artistic exhibitions in more than one country.<sup>82</sup>

To qualify for Schedule A, Group II, in the performing arts, an individual must submit: (1) evidence that the noncitizen’s work experience during the past 12 months did require—and the intended employment will require—exceptional ability, and (2) documentation to show exceptional ability, such as:

- Documentation attesting to current widespread acclaim and international recognition and receipt of international prizes or awards for excellence;
- Published material by or about the noncitizen, such as critical reviews or articles in major newspapers, periodicals, and/or trade journals (with title, date, and author);
- Evidence of earnings commensurate with the claimed level of ability;
- Playbills and star billings;
- Documents attesting to the outstanding reputation of theaters, concert halls, nightclubs, and other venues in which the noncitizen has appeared or is scheduled to appear; and/or
- Documents attesting to the outstanding reputation of theaters or repertory companies, ballet troupes, orchestras, or other organizations in which—or with which—the noncitizen has performed during the past year in a leading or starring capacity.<sup>83</sup>

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<sup>80</sup> 8 CFR §204.5(k)(4)(i).

<sup>81</sup> 8 CFR §204.5(k)(4)(i). A close look at the standards for Schedule A, Group II, however, shows it is a more difficult standard to satisfy than USCIS’s definition of exceptional ability. *See* 20 CFR §656.15(d); 8 CFR §204.5(k)(3)(ii). DOL’s position is that Group II exceptional ability is analogous to extraordinary ability for EB-1, not exceptional ability for EB-2. In other words, one may be sufficiently “exceptional” to qualify for second preference, but not “exceptional” enough to qualify for Schedule A, Group II pre-certification.

<sup>82</sup> 20 CFR §656.15(d)(1).

<sup>83</sup> 20 CFR §656.15(d)(2).

## National Interest Exemption from Job Offer and Labor Certification

The national interest waiver (NIW) is a waiver of the job offer requirement for individuals wishing to immigrate to the United States in the second-preference category who are members of the professions holding advanced degrees or individuals of exceptional ability in the arts, sciences, or business.<sup>84</sup> Neither the INA nor the governing regulations define “national interest,” but a waiver request requires a showing “significantly above that for prospective national benefit.”<sup>85</sup> In a nonprecedent decision,<sup>86</sup> legacy INS enumerated factors to consider in evaluating the “national interest.”<sup>87</sup> However, the number of NIW cases approved had been somewhat limited following the 1998 Administrative Appeals Office (AAO) precedent decision, *Matter of New York State Department of Transportation (NYSDOT)*.<sup>88</sup>

The self-petitioner in *NYSDOT* was a civil engineer employed since 1993 by the New York State Department of Transportation. The petitioner held an M.S. in civil engineering with expertise in the “prestressed concrete construction and design of post-tensioning and of curved bridges.” The application was initially denied by the Vermont Service Center (VSC) and then by the acting associate commissioner for programs in Washington, D.C. The decision is lengthy, but the standards for approval of an NIW were stated in a three-part test:

- It must be shown that the noncitizen seeks employment in an “area of substantial intrinsic merit”—Legacy INS/USCIS has not explained how satisfaction of this prong should be determined. In *NYSDOT*, however, the AAO held that the engineering of bridges fulfills the criteria.
- It must be shown that the proposed benefit is “national in scope”—the impact from the activity must be felt on a national scale. The AAO held that although the noncitizen’s employment was limited to a specific geographical area, New York’s bridges and roads connect to the state and national transportation system. The AAO went on to state that proper maintenance and operation of bridges and roads serves the interest of other regions of the United States.
- The petitioner seeking the waiver must demonstrate that the national interest would be adversely affected if labor certification were required for the noncitizen—the AAO opined that “an alien seeking exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process.” The AAO went on to state, “with regard to the unavailability of qualified workers, the job offer based on national interest is not warranted solely for the purpose of ameliorating a local labor shortage.”

After reviewing the evidence presented in *NYSDOT*, the AAO concluded that the petitioner had not met the last requirement. *NYSDOT* has deeply affected USCIS’s consideration of NIW petitions. While the decision purported to provide definition to the term “national interest,” it resulted in as much confusion as existed before the decision. NIW petitions continued to be approved by USCIS, but with variance in adjudication standards among individual officers and USCIS service centers.

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<sup>84</sup> INA §203(b)(2)(B)(i).

<sup>85</sup> See 56 Fed Reg. 60900 (Nov. 29, 1991).

<sup>86</sup> *Matter of [name not provided]*, EAC 92 091 50126 (AAU July 21, 1992), reprinted in 69 *Interpreter Releases* 1364 (Oct. 26, 1992). This case is commonly known as *Mississippi Phosphate*.

<sup>87</sup> In *Mississippi Phosphate*, the Administrative Appeals Unit (AAU) provided seven nonexhaustive factors to consider, including: (1) improvement of the U.S. economy; (2) improvement of the wages and working conditions of U.S. workers; (3) improvement of education and training programs for U.S. children and under-qualified workers; (4) improvement of health care; (5) provision of more affordable housing for young and/or older, poorer U.S. residents; (6) improvement of the environment and making more productive use of natural resources; or (7) a request from a U.S. government agency. *Matter of [name not provided]*, EAC 92 091 50126 (“*Mississippi Phosphate*”) (AAU July 21, 1992), reprinted in 69 *Interpreter Releases* 1364 (Oct. 26, 1992).

<sup>88</sup> Int. Dec. 3363 (Comm’r 1998).

***Matter of Dhanasar***

In *Matter of Dhanasar*,<sup>89</sup> a precedent decision issued in December 2016, the AAO announced a new analytical framework for determining whether a foreign national pursuing employment-based permanent residence in the EB-2 category as a member of the professions holding an advanced degree or as an individual of exceptional ability in the sciences, arts, or business is eligible for a waiver of the job offer and labor certification requirements through a national interest waiver. This decision appears to make NIWs more broadly available to entrepreneurs and the self-employed. *Matter of Dhanasar* vacates the framework set forth above in *NYSDOT*.<sup>90</sup>

Under the new test, in order to be granted an NIW, a petitioner must meet all of the following criteria:

- The foreign national’s proposed endeavor must have both substantial merit and national importance. A wide range of fields of endeavors may qualify, including business, entrepreneurs, science, technology, culture, health, and education.
- The foreign national is well-positioned to advance the proposed endeavor. To determine whether the foreign national meets this requirement, USCIS will look to their education, skills, knowledge and record of success in related or similar efforts, a model or plan for future activities, progress toward achieving the end, progress toward achieving the endeavor, and the interest of potential customers, users, investors or other relevant entities or individuals.
- On balance, it would be beneficial to the United States to waive the job-offer and labor-certification requirements of the EB-2 category. To meet this requirement, USCIS will consider (among other factors) whether the U.S. would benefit from the foreign national’s contributions even if qualified U.S. workers are otherwise available, and whether the national interest of the foreign national’s contributions is sufficiently urgent to warrant foregoing the labor certification process.

The AAO also noted that the petitioner must show that a favorable exercise of discretion is warranted. In addition, the beneficiary must qualify as a member of the professions holding an advanced degree or as an individual of exceptional ability in the sciences, arts, or business.

In sum, practitioners should carefully evaluate a foreign national’s eligibility under the current NIW standards when determining the viability of such a petition.

**THIRD PREFERENCE: Skilled Workers, Professionals, and Other Workers****Statutory Definition**

By statute, 28.6 percent of the total employment-based immigrant visas per year are allocated to third preference workers in three subcategories:

- Skilled workers (at least two years of experience required);
- Professionals (baccalaureate degree required for position and noncitizen); and
- Other workers (less than two years’ experience required for position).<sup>91</sup>

For purposes of determining availability of visas, there is no allocation between professionals and skilled workers.<sup>92</sup> There is a perennial backlog of visas for EB-3 “other workers.” Moreover, since the July 2007 “Visa-gate,” there has been a backlog in EB-3 visas for noncitizens from every country in the world. The wary practitioner must carefully take these and other visa retrogressions into account. Where the backlog

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<sup>89</sup> 26 I&N Dec. 884 (AAO 2016)

<sup>90</sup> AILA Doc. No. 17021734, March 8, 2017, Practice Pointer: National Interest Waivers under *Matter of Dhanasar*.

<sup>91</sup> INA §203(b)(3)(A).

<sup>92</sup> INA §203(b)(3)(B) limits the “other workers” classification to 10,000 visas annually.

is significant, the practitioner should seriously consider other visa alternatives before seeking EB-3 classification.

In October 2015, DOS sought to reduce the likelihood that some visas would go unused in a given year. It changed the *Visa Bulletin's* format so as to create a chart known as the "Dates for Filing." Such dates for filing preceded the dates when a visa number was to become current in a given month and thus putatively enabled an applicant to file an adjustment of status before his or her priority date became current. DOS's purpose was to create a pool of cases at USCIS that could be processed and thus ready for approval when the actual priority date became current. However, USCIS has been reticent to allow employment-based applicants to utilize the "Dates for Filing" chart. Therefore, for all practical purposes, the EB-3 backlog problem remains.

## Regulations

The regulations for EB-3 workers are found at 8 CFR §204.5(l).

## Skilled Workers

Skilled workers are those in positions that require a minimum of two years of training or experience. Relevant post-secondary education counts as training. The requirements of the job offer as stated on the labor certification (ETA-9089) determine whether a job is skilled or unskilled. In drafting a labor certification, the employer should determine whether the job matches a position in the O\*NET, available online at <http://online.onetcenter.org>, and be sure that the job zone is at least a three (corresponding to a specific vocational preparation (SVP) code of greater than six and less than seven from the old *Dictionary of Occupational Titles* (DOT) (two to four years of experience)), so that the position will be classified as skilled. If the position is precertified under Schedule A, the petitioner must show—by either industry standards or its own past practice—that the job requires at least two years of experience.<sup>93</sup>

## Professionals

Professionals must possess a baccalaureate degree or foreign degree equivalent, and the petitioner must demonstrate that such a degree is the normal requirement for entry into the occupation. Unlike the EB-2 advanced degree professional or the nonimmigrant H-1B category, there is no provision for equivalency to a baccalaureate degree based on a combination of education and experience at the EB-3 professional level.<sup>94</sup> Thus, if Form ETA-9089 specifies a minimum educational level of "bachelor's degree or equivalent," a non-citizen will not qualify for EB-3 classification as a professional if he or she lacks a bachelor's or a foreign degree evaluated as the equivalent to a U.S. bachelor's degree.<sup>95</sup>

## Other Workers

"Other workers" include those whose positions require less than two years of higher education, training, or experience. Although in early 2004 there was no backlog in this category, the number of "other worker" immigrant visas has traditionally backlogged substantially and remains so today. To offset visa numbers allocated under the Nicaraguan and Central American Relief Act (NACARA),<sup>96</sup> the annual numerical limit of 10,000 in this category is subject to a temporary reduction of 5,000, beginning once a cutoff date of November 19, 1997, is applied to the other worker category.<sup>97</sup> Practitioners should be aware that waiting periods in this category have exceeded 10 years in the recent past, and should work closely with the foreign national and sponsoring employer to determine if alternative routes to permanent residence exist.

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<sup>93</sup> 8 CFR §204.5(l)(4).

<sup>94</sup> 8 CFR §204.5(l)(3)(C).

<sup>95</sup> *Matter of [name not provided]*, WAC-92-126-50232 (AAU July 6, 1992).

<sup>96</sup> Pub. L. No. 105-100, 111 Stat. 2160, 2193; as amended by Pub. L. No. 105-139, Pub. L. No. 106-386, and Pub. L. No. 106-554.

<sup>97</sup> See 78 *Interpreter Releases* 813 (May 24, 2001).



## Procedures

The correct filing location of the I-140 can change often without notice. Thus, it is wise to always check the USCIS website prior to filing.<sup>98</sup>

A labor certification or Schedule A application and a permanent, full-time job offer are required for all EB-3 I-140 petitions. There are no exceptions. The petition also should include evidence that the individual meets the requirements for the job set forth in the labor certification or meets the definition of a position eligible for Schedule A.

## OTHER ISSUES

### Concurrent Filing

On July 31, 2002, legacy INS published an interim final rule allowing for concurrent filing of I-140 petitions with I-485 applications for adjustment of status in certain circumstances.<sup>99</sup> Concurrent filing is permitted when an immigrant visa is immediately available, or would be immediately available if the I-140 were approved on the date of filing.<sup>100</sup> USCIS has clarified that only if the priority date is current based upon the “Application Final Action Dates” chart may a concurrent I-140 and I-485 be filed.

### Premium Processing

On June 22, 2009, USCIS announced it would accept premium processing with respect to Form I-140 petitions in the EB-1 (except multinational executives and managers), EB-2 (except those seeking an NIW), and EB-3 categories.<sup>101</sup>

### Filing Petitions in More than One Category

It is sometimes an appropriate strategy to file two immigrant petitions in the alternative, such as an EB-1 worker of extraordinary ability, and an EB-2 worker who will serve the national interest. In some cases, the sponsoring employer may wish to proceed with labor certification while an EB-1 or EB-2 petition is pending. The regulations do not limit the number of immigrant petitions that may be filed on behalf of a foreign national worker.

In the past, there have been times when immigrant visas have been available under EB-3, but not EB-2. In such an instance, an EB-3 petition could have been submitted for “second preference” applicants to take advantage of the fact that visas were available under the third preference, a category for which they also qualify.<sup>102</sup> Today, while the March 2017 *Visa Bulletin* in its “Dates for Filing” chart indicates that third-preference workers from all countries other than India, China, and the Philippines are current, USCIS has nevertheless indicated that, for the month of March 2017, it will only allow the filing of adjustment petitions by those workers whose priority dates are current under the “Application Final Action Dates” chart. Under this chart, all third-preference cases are backlogged. Thus, as of this writing, the filing by an EB-2 worker in an EB-3 category due to the latter’s availability and the former’s unavailability is not material.

If a labor certification is required, the priority date is the date the labor certification is accepted for processing at [www.plc.doleta.gov](http://www.plc.doleta.gov). Otherwise, the priority date is the date the I-140 petition is filed with USCIS.

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<sup>98</sup> See [www.uscis.gov/i-140-addresses](http://www.uscis.gov/i-140-addresses).

<sup>99</sup> 67 Fed. Reg. 49561 (July 31, 2002).

<sup>100</sup> *Id.*

<sup>101</sup> USCIS Update, “USCIS to Resume Premium Processing for I-140s,” AILA Doc. No. 09062263.

<sup>102</sup> Unfortunately, the reverse is not true because it is what the job requires that counts, not what the noncitizen has. In other words, if the labor certification position requires only a bachelor’s degree and the foreign worker holds a master’s, the employer cannot petition to classify the worker as an EB-2, which would clearly exceed the requirements of the position in the labor certification.

The priority date attaches to the foreign national upon approval of the I-140.<sup>103</sup> Approved I-140s are valid indefinitely unless revoked. However, practitioners should be aware that priority dates may be lost through such occurrences as failure to timely respond to DOL or USCIS requests for evidence during processing, employer's notice of withdrawal due to lack of intent to employ the noncitizen following approval of adjustment of status, or automatic revocation of the I-140 due to termination of the employer's business.<sup>104</sup>

### Ability to Pay Wage

Any immigrant petition filed by a U.S. employer must include evidence that the employer was able to pay the offered wage as of the noncitizen's priority date and continuing until the noncitizen obtains lawful permanent status. This evidence shall consist of the employer's annual report, federal income tax return, or audited financial statements. If the petitioner has more than 100 employees, a statement from the organization's financial officer may suffice.<sup>105</sup>

This requirement can cause difficulty in start-up companies that show substantial growth between the time of filing and the completion of the process. Similarly, a downturn in the economy can lead to previously successful companies now having difficulty meeting the ability-to-pay standards. The regulations, however, permit some flexibility to accommodate such circumstances in that they allow petitioners to submit additional evidence, such as profit/loss statements, bank records, or personnel records.<sup>106</sup> The petitioner should be prepared to submit evidence of ability to pay the salary as of the date the labor certification was filed and the date of filing the I-140 petition.

Significantly, the AAO has broadened its view by holding that as long as the employer is actually paying the proffered wage when the priority date is established, the case should not be denied for lack of ability to pay.<sup>107</sup> Finally, a USCIS memorandum stated that adjudicators should make a positive ability-to-pay determination in any one of the following circumstances:

- Net income—Petitioner's net income is equal to or greater than the proffered wage;
- Net current assets—Net current assets are equal to or greater than the proffered wage; or
- Employment of the beneficiary—the record contains credible verifiable evidence that the petitioner is employing the beneficiary, and has paid or currently is paying the proffered wage.<sup>108</sup>

Thus, where the foreign worker has been employed by the employer, copies of payroll checks, W-2 forms, and/or the beneficiary's tax returns substantiating that the foreign worker has actually been paid the proffered wage should evidence the employer's ability to pay. *Beware:* If the foreign worker has been employed without authorization, this might expose the employer to an I-9 investigation.

### Portability of Certain Green Card Cases in Final-Stage (Form I-485) Processing

Section 106(c) of AC21 permits certain employment-based adjustment-of-status applicants, whose I-485 applications have been pending for more than 180 days, to change jobs and/or employers as long as they remain in the same or a similar occupational classification.<sup>109</sup> Thus, a noncitizen with an application for adjustment of status may "port" to another employer or location provided the still-pending I-485 remains unadjudicated for 180 days or more. In November 2016, DHS implemented a final rule that, among other things, pro-

<sup>103</sup> 8 CFR §204.5(d).

<sup>104</sup> 8 CFR §§204.5(e), (n)(3), and 205.1(a)(3)(iii)(A)–(D).

<sup>105</sup> 8 CFR §204.5(g)(2).

<sup>106</sup> *Id.*

<sup>107</sup> *Matter of Quintero-Martinez*, A29-928-323 (AAU Aug. 4, 1992). See also 8 CFR §204.5(g)(2).

<sup>108</sup> USCIS Memorandum, W. Yates, "USCIS Issues Guidance on Determination of Ability to Pay," AILA Doc. No. 04051262.

<sup>109</sup> The definition of what is a "same or similar occupational classification" was discussed in the USCIS Policy Memorandum, "Determining Whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Job Portability," AILA Doc. No. 16032161. It applies to all Section 204(j) petitions filed or pending as of March 21, 2016.

vided some guidance on AC21 permanent portability under Section 106(c) of AC21.<sup>110</sup> The regulation provides that a beneficiary who has a pending application for adjustment of status based on an approved I-140 petition must have a valid offer of employment based on a valid immigrant petition at the time adjustment is filed and adjudicated, and that the beneficiary of that petition must intend to accept that offer of employment. The rule further provides that USCIS may require the applicant for adjustment of status, to affirmatively demonstrate to USCIS, on Form I-485, Supplement J, and supporting documentation, that:

- The application for adjustment of status has been pending for 180 days or more; and
- The qualifying immigrant petition has been approved and not revoked, or is pending when the beneficiary notifies USCIS of a new job offer 180 days or more after the adjustment application was filed and is subsequently approved.

Alternatively, the applicant may choose to affirmatively submit Form I-485, Supplement J without waiting for USCIS to request the form. Supplement J was posted on USCIS website<sup>111</sup> on November 18, 2016, the same date that the new regulation was issued. According to the Supplement J instructions, this supplement should be used in the following circumstances:

- To confirm that the job offered in the Form I-140 remains a bona fide job offer that the beneficiary intends to accept once the I-485 is approved; or
- To request job portability under INA §204(j) to a new full-time permanent job offer that the beneficiary intends to accept once the Form I-485 is approved.

Prior to the issuance of this new regulation, USCIS had issued two internal guidance memoranda as interim procedures.<sup>112</sup> In the new regulation, as well as these guidance memos, USCIS retreated from its earlier position that for concurrent filings, the I-140 must be approved before the employee may port. According to the regulations and the 2005 memorandum, the I-140 remains valid even where the foreign national changes jobs but remains in the same or a similar occupational classification, as long as the I-485 has been pending 180 days. Because the regulations do not contravene the memorandum, the policy memorandum can still provide helpful guidance in these situations. In these circumstances, USCIS is to determine whether the I-140 is or was approvable but for the ability to pay and, if so, to approve the petition and adjudicate the I-485.<sup>113</sup>

The current guidance also makes it clear that:

- Geographic location of the new employment is not relevant;
- A difference in the wage offered is not relevant unless it is significant, which suggests that the position may not be “same or similar”;
- The portability provisions of AC21 are available to multinational managers and executives, even to unrelated businesses;
- Ability to pay is not relevant with regard to the new employer (except to determine legitimacy of the job offer);
- An individual can “port” to self-employment; however, this could raise questions about the intent of the parties at the time of filing the application for labor certification;
- Porting when the I-485 has been pending less than 180 days cannot be the sole basis for denial, so long as the I-485 has been pending for 180 days by the time of I-485 adjudication; however, this could raise questions about the intent of the parties at the time of filing the application for labor certification;

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<sup>110</sup> “Retention of EB-1, EB-1, and EB 3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,” 81 Fed. Reg. 82398 (Nov. 18, 2016).

<sup>111</sup> See [www.uscis.gov/i-485supj](http://www.uscis.gov/i-485supj).

<sup>112</sup> USCIS Memoranda, W. Yates, “BCIS Guidance on AC21 Applicability to Concurrent Filings / Revoked I-140s,” AILA Doc. No. 03081114, and Interoffice Memo, W. Yates, “USCIS Memorandum on AC21,” AILA Doc. No. 05051810.

<sup>113</sup> *Id.*

- An I-140 petition is no longer valid for porting if it is withdrawn, denied, or revoked. There is one exception to this. If the I-140 is denied or revoked based upon a withdrawal submitted after the I-485 has been pending 180 days or more, the I-140 may still be used to port; and
- A new job offer is required in the “same or similar” occupation at the time the I-485 is being adjudicated under the adjustment portability provisions.<sup>114</sup>

Interestingly, although the employer must intend to employ the foreign national at least through the approval of the I-140 petition, there is no requirement that the beneficiary of the I-140 actually be employed until permanent residence is authorized. Therefore, it is possible for a foreign national to qualify for the provisions of §106(c), even if he or she has never been employed in the initial, sponsored position.

### **Labor Certification Substitutions**

On May 17, 2007, DOL published a final rule that became effective on July 16, 2007, eliminating substitutions on labor certifications.<sup>115</sup> Accordingly, labor certifications are now only valid for the foreign national named in the original labor certification.

### **CONCLUSION**

The first three preferences provide a wide range of employment-based immigration alternatives. Some clients may qualify under several categories. Others may have significant job skills and a job offer but be unable to demonstrate that there are no qualified U.S. workers available. All of these things will rely on the practitioner’s expertise to predict whether a filing under one or more employment-based categories will be successful, and to resolve issues related to agency time frames, visa retrogression, changes in employment, international travel, and work authorization during the process.

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<sup>114</sup> *Id.*

<sup>115</sup> 72 Fed. Reg. 27903 (May 17, 2007).

**APPENDIX: SUMMARY OF REQUIREMENTS**

<b>Employment-Based First Preference</b>	
<p><b>Outstanding Professor or Researcher</b></p> <p>Be internationally recognized as outstanding, have a minimum of three years of experience teaching or researching in that area, be entering the U.S. in tenure or tenure-track teaching or comparable research position at a university or other institute of higher education, or a company with at least three full-time research employees.</p> <p>The foreign national must provide documentation from at least two of the following six groups:</p> <ul style="list-style-type: none"> <li>• Receipt of major prizes or awards.</li> <li>• Membership in associations that require outstanding achievements.</li> <li>• Published material in professional publications/journals written by others about foreign national's work.</li> <li>• Evidence that the foreign national participates as a judge of the work of others in the field.</li> <li>• Evidence of the foreign national's original scientific or scholarly research contributions to the field.</li> <li>• Authorship of scholarly books or articles in journals with international circulation in the field.</li> </ul>	<p><b>Extraordinary Ability Noncitizen</b></p> <p>A level of expertise indicating that the individual is one of that small percentage who has risen to the very top of the field of endeavor.</p> <p>The foreign national must provide documentation from at least three of the following 10 groups:</p> <ul style="list-style-type: none"> <li>• Receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.</li> <li>• Membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.</li> <li>• Published material about the foreign national in professional or major trade publications or other major media referring to the foreign national's work in the field for which classification is sought. Such evidence shall include the title, date and author of the materials and any necessary translations.</li> <li>• Evidence of the foreign national's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.</li> <li>• Evidence of the foreign national's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.</li> <li>• Evidence of the foreign national's authorship of scholarly articles in the field, in professional or major trade publications, or other major media.</li> <li>• Evidence of the display of the foreign national's work in the field at artistic exhibitions or showcases.</li> <li>• Evidence that the foreign national has performed a leading or critical role for organizations or establishments that have a distinguished reputation.</li> <li>• Evidence that the foreign national has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.</li> <li>• Evidence of commercial success in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.</li> </ul> <p>If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.</p>

Employment-Based Second Preference	
<p><b>Schedule A, Group II</b></p> <p>Recognized, outstanding performance well above the standard for professional competence in the occupation.</p> <p>For occupations in the arts and sciences (other than performing arts) the noncitizen must provide documentation of current widespread acclaim and international recognition, documentation showing work in the past year required exceptional ability and documentation from at least two of the following seven groups:</p> <ul style="list-style-type: none"> <li>• Receipt of international recognized prizes or awards for excellence in the field for which certification is sought.</li> <li>• 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 in their disciplines or fields.</li> <li>• Published material in professional publications about the noncitizen, relating to the noncitizen's work in the field for which certification is sought, which shall include the title, date, and author of such published material.</li> <li>• Evidence of the noncitizen's participation on a panel or individually as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought.</li> <li>• Evidence of the noncitizen's original scientific or scholarly research contributions of major significance in the field for which certification is sought.</li> <li>• Evidence of the noncitizen'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.</li> <li>• Evidence of the display of the noncitizen's work, in the field for which certification is sought, at artistic exhibitions in more than one country.</li> </ul>	<p><b>Exceptional Ability Noncitizen</b></p> <p>A degree of expertise significantly above that ordinarily encountered in the sciences, arts or business (or athletics).</p> <p>The foreign national must provide documentation from at least three of the following six groups:</p> <ul style="list-style-type: none"> <li>• An official academic record showing that the noncitizen 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.</li> <li>• Evidence in the form of a letter(s) from current or former employer(s) showing that the noncitizen has at least 10 years of full-time experience in the occupation.</li> <li>• A license to practice the profession or certification for a particular profession or occupation.</li> <li>• Evidence that the noncitizen has commanded a salary, or other remuneration for services, that demonstrates exceptional ability.</li> <li>• Evidence of membership in professional associations.</li> <li>• Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.</li> </ul> <p>If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.</p>

***Schedule A, Group II, continued***

For occupations in the performing arts (including, but not limited to, occupations in theater, motion pictures, drama, comedy, music, dance, opera, magic, martial arts, visual arts, and the marching arts), the noncitizen must provide documentary evidence that the noncitizen's work experience during the past 12 months did require, and the noncitizen's intended work in the United States will require, exceptional ability and must submit documentation to show this exceptional ability, such as:

- Current widespread acclaim and international recognition accorded to the noncitizen, and receipt of internationally recognized prizes or awards for excellence;
- Published material by or about the noncitizen, 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);
- Evidence of earnings commensurate with the claimed level of ability;
- Playbills and star billings;
- Evidence of the outstanding reputation of theaters, concert halls, nightclubs, and other establishments in which the noncitizen has appeared or is scheduled to appear; and/or
- Documents attesting to the outstanding reputation of theaters or repertory companies, ballet troupes, orchestras, or other organizations in which or with which the noncitizen has performed during the past year in a leading or starring capacity.