Guidance for Schedule A Blanket Labor Certifications effective February 14, 2006.

(C) Schedule A Blanket Labor Certifications. [The following chapter and its subheadings will appear in the *Adjudicator's Field Manual* as part of an upcoming and completely revised Chapter 22 (Employment-Based Petitions, Entrepreneurs and Special Immigrants. The following information is critical; thus, it is being posted now.]

Schedule A is a list of pre-certified occupations codified in 20 CFR 656.10 and 20 CFR 656.22 in the pre-PERM regulations and in 20 CFR 656.5 and 656.15 in the PERM regulations for which the Secretary of the Department of Labor previously has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens in such occupations. The IMMACT '90 amendments to the Immigration and Nationality Act (Act) gave separate visa classifications to some groups that previously were included in Schedule A. As a result, DOL eliminated these groups from Schedule A, leaving only Group I, registered nurses and physical therapists, and Group II, aliens of exceptional ability. Under the PERM regulations, the Schedule A, Group II designation is limited to aliens of exceptional ability in the sciences or arts (656.5(b)(1)) and aliens of exceptional ability in the performing arts (656.5(b)(2)). Because the PERM regulations changed various aspects of the Schedule A evidence requirements, the discussion below separately discusses the requirements for pre-PERM and post-PERM filings based on a filing date either before or beginning with March 28, 2005 (the effective date of the PERM regulations) and then provides some policy guidance that applies regardless of filing date.

(1) Petitions Filed Prior To March 28, 2005:

In order to apply for certification under Schedule A for petitions filed before March 28, 2005, the petitioner should complete and submit:

- The Form I-140 petition, with appropriate filing fees,
- An uncertified Form ETA-750 A and B, in duplicate, signed in the original by an authorized official of the petitioning entity and by the alien,
- A copy of the notice sent to an applicable collective bargaining unit, or a copy of the posted notice posted with attestation of posting for at least ten consecutive calendar days (see general discussion below concerning posting locations and related issues), and
- Evidence of the alien's qualifications:

- For Form I-140 petitions filed for registered nurses, an unrestricted permanent license to practice nursing in the state of intended employment, CGFNS certificate issued by the Commission on Graduates of Foreign Nursing Schools or evidence that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

- For Form I-140 petitions filed for physical therapists, a permanent license to practice in the state of intended employment or a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating that the beneficiary is qualified to take that state's written licensing examination for physical therapists.

- For Form I-140 petitions filed for Schedule A Group II for aliens of exceptional ability, evidence of widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field and evidence that alien's prior and intended work requires exceptional ability.

For Form I-140 petitions filed before March 28, 2005, the pre-PERM DOL regulations at 20 CFR 656.22(b)(2) and 656.20(g)(1) required that an employer provide notice of the position(s) it seeks to fill under Schedule A, Group I or II, to the bargaining representative or, if there is no such representative, to the employer's employees via a notice that must be posted for at least 10 consecutive days at the facility or location of the employment. In order to be in compliance with DOL's notification requirements, the notice must be posted for at least 10 consecutive calendar days. The notice must be clearly visible and unobstructed while posted and be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. The notice must contain a description of the job and rate of pay and state that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant position. The notice must also state that any person may provide documentary evidence bearing on the Schedule A labor certification application to the appropriate DOL Certifying Officer of holding jurisdiction over the location where the alien beneficiary will be physically working.

In the absence of evidence supporting a petition filed before March 28, 2005, adjudicators should issue a request for evidence (RFE) that requests evidence of compliance with DOL's notification requirements in the form of a notice of posting that conforms to the conditions noted above. If all posting requirements are met and the notice has been posted the requisite 10 days prior to the date of the RFE response, the posting will be considered timely for

adjudication purposes. Issuing an RFE for this documentation is preferable to the issuance of a notice of intent to deny (NOID), to minimize the impact on Service Center resources as opposed to the more resource intense process for the issuance of an NOID. Note: the issuance of an RFE specified in this memorandum supercedes the guidance provided in the December 23, 2004 memorandum instructing Service officers to issue a NOID.

(2) Petitions Filed On Or After March 28, 2005:

DOL Regulations Effective March 28, 2005: On December 27, 2004, DOL published a final rule, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, which significantly restructures the permanent labor certification process. This final rule deletes the current language of 20 CFR part 656 and replaces the part in its entirety with new regulatory text, effective on March 28, 2005. Many of the evidentiary requirements relating to Schedule A petitions have been changed as of that date.

Pursuant to new 20 CFR 656.10 and 20 CFR 656.15, in order to apply for certification under Schedule A for petitions filed on or after March 28, 2005, the petitioner should complete and submit:

- The Form I-140 petition, with appropriate filing fees,

- An uncertified Form ETA-9089, in duplicate, signed in the original by an authorized official of the petitioning organization, the alien, and the representative, if any,

- A wage determination issued by the State Workforce Agency (SWA) having jurisdiction over the proposed area where the job opportunity exists or by the SWA having jurisdiction over the petitioner's headquarters if the prevailing wage will be derived from the area of the employer's headquarters in the situation of roving employees.

- A copy of the notice sent to an applicable collective bargaining unit, or a copy of the notice posted with attestation of posting for at least ten consecutive business days within the period between 30 and 180 days preceding the petition filing (see general discussion below concerning posting locations and related issues), and

- Copies of any and all in-house media, whether electronic or printed, in accordance with the normal procedures used in the employer's organization for the recruitment of similar positions to the position specified in the Form 9089.

- Evidence of the alien's qualifications:

- For petitions filed for registered nurses, a full unrestricted permanent license to practice nursing in the state of intended employment; CGFNS certificate issued by the Commission on Graduates of Foreign Nursing Schools; or evidence that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

- For petitions filed for physical therapists, a permanent license to practice in the state of intended employment or, a letter or statement, signed by an authorized state physical therapy licensing official, stating that the beneficiary is qualified to take that state's written licensing examination for physical therapists.

- For petitions filed for Schedule A Group II for aliens of exceptional ability, evidence of widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field and evidence that alien's prior and intended work requires exceptional ability.

New Labor Certification Form: Pursuant to the new 20 CFR 656.17, the Application for Permanent Employment Certification (ETA Form 9089) has replaced the Application for Alien Employment Certification (Form ETA-750). In support of Schedule A, Form I-140 petitions, the Form 9089 should be provided in duplicate, signed in the original by an authorized official of the petitioning entity, the alien, and the representative, if any. In the event that the Form I-140 petition is approved, one copy of the Form ETA-9089 must be forwarded by USCIS to the Chief, Division of Foreign Labor Certification, identifying the occupation, the Immigration Officer who made the determination, and the date of the determination. See 20 CFR 656.15(f).

State Prevailing Wage Determination: In accordance with 20 CFR 656.15(b)(i), the Form 9089 provided with the Form I-140 from the petitioning employer must be accompanied by a prevailing wage determination issued by the SWA having jurisdiction over the proposed area where the job opportunity exists. See 20 CFR 656.40 and 20 CFR 656.41. The petitioner will request a prevailing wage determination from the appropriate SWA using the form required by the state where the job opportunity exists. (See general discussion below concerning posting and prevailing wage locations).

A completed SWA form must reflect the date on which the SWA made the prevailing wage determination in order for it to be valid for purposes of being submitted to USCIS together with the Form 9089 in support of a Form I-140 petition. A properly completed SWA form, in all cases, must specify on its face the validity of the prevailing wage, and the date on which the SWA made the determination, which may not be less than 90 days or more than 1 year

from the date of the SWA determination. The Form I-140 must be filed within this timeframe in order for the prevailing wage determination to be valid. Adjudicators should notify their supervisors in the event the SWA determination is valid for less than 90 days from the date of issuance, and the supervisor will contact the Department of Labor, Employment and Training Administration (ETA) for further guidance. The purpose of the validity date for the prevailing wage determination is to ensure that the prevailing wage determination is reflective of the wages being offered for comparable positions in the location where the job offer exists at the time that the Form I-140 petitioner recruits the alien worker.

For the purposes of evaluating the validity of the petitioner's proffered wage, be advised that the past practice of allowing a 5 percent variance of the wage actually paid relative to the prevailing wage has been eliminated by the enactment of the H-1B Visa Reform Act of 2004, contained in Public Law 108-447. This Act amended the INA (Section 212(p)(3), 8 USC 1182(p)(3)) by specifying that "…the prevailing wage required to be paid pursuant to 212(a)(5)(A), (n)(1)(A)(i)(II) and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections." Therefore, for petitions filed after March 8, 2005, the prevailing wage to be paid must be no less than 100 percent of the prevailing wage determination.

Labor Application Notice: In order to comply with 20 CFR 656.10(d), the petitioner must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided to either:

1. The bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment, (documentation of this may consist of a copy of the letter that was sent to the bargaining representative(s) and a copy of the Application for Permanent Employment), or

2. If there is no such bargaining representative, by posted notice to the employer's employees at the facility or physical location of the employment. Such notice:

    - must be posted for at least 10 consecutive business days (Monday through Friday, regardless of whether the facility operates seven days a week);

    - must be clearly visible and unobstructed while posted; and

- must be posted in conspicuous places within the location of the job where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment.

The documentation requirement in support of the I-140 petition may be satisfied by providing a copy of the posted notice and an attestation executed by an authorized official of the employer that identifies the physical location(s) where the notice was posted and the date of publishing.

PERM rules also require that the employer publish the notice in all in-house media, whether electronic or print, that the employer normally uses to announce similar positions within the employer's organization. The Form I-140 petition for Schedule A must include the employer's attestation of such in-house publication. The attestation may be, but need not be, provided in the same document as the proof of worksite posting.

The notice must state that it is being provided as a result of the filing of a petition for the relevant position. (The DOL regulations refer to an application for labor certification, which technically is also filed, and notices referring to a labor certification application to DOL rather than a petition to USCIS are equally acceptable). It must also state that any person may provide documentary evidence bearing on the Schedule A labor certification application to the DOL Certifying Officer holding jurisdiction over the location of the proposed employment. (At one point, USCIS guidance reflected that the notice should drive complaints to USCIS; thus, such notices should be accepted as sufficient).

Pursuant to 20 CFR 656.10(d)(3)(iv), such notice must be posted between 30 days and 180 days prior to the filing of the Form I-140 petition. The last day of the posting must fall at least 30 days prior to filing in order to provide sufficient time for interested persons to submit, if they so choose, documentary evidence bearing on the application. Adjudicators should deny the Form I-140 and any concurrently filed I-485 in instances where the notice was not posted between 30 and 180 days prior to the filing of the petition.

(3) Special Considerations For All Schedule A Petitions:

(A) Household Workers

In the case of a private household, notice is required only if the household employs one or more U.S. workers at the time the application for labor certification is filed.

(B) Minimum Requirements

Remember that qualifying for Schedule A means only that the labor

certification requirement has been met. You must make a separate determination on the alien's qualification for the specific visa classification requested using the evidence described above. The “minimum requirements” in Schedule A cases as listed in Item 14 and 15 of Part A of the ETA-750 for petitions filed before March 28, 2005 and in Item H of the ETA-9089 for petitions filed on or after March 28, 2005 may not be a true reflection of the actual education, training and experience needed to perform the job. In many cases a Schedule A petitioner will give the particular alien's qualifications rather than actual minimum requirements, and, because the labor certification form is sent directly to USCIS, this will not be reviewed first by DOL and corrected through DOL involvement. This point is important because many classifications require that the petitioner establish that the position requires a person of a particular caliber. As long as the ***duties*** shown on the labor certification application are appropriate for a position that requires licensure as a registered nurse, licensure as a physical therapist or performance of a worker of exceptional ability, the petition should not be denied and a request for evidence need not be sent to confirm the precise minimum job requirements.

(C) Separate Posted Notices for Every Occupation or Job Classification

A separate notice must be posted for every *occupation or job classification* that will be the subject of a Schedule A petition, but not for every nurse or physical therapist Schedule A petition. Thus, for example, separate notices would be posted for an attending nurse and a supervisory nurse (i.e., nurses having different job duties and wage rates). An employer can satisfy notice of filing requirements with respect to several nurses in each of these job classifications with a single posting, as long as the posting complies with the regulation for each application (e.g., contains the appropriate prevailing wage and was posted for the requisite period of time).

(D) Posting and Prevailing Wage Locations.

All Schedule A petitions must each meet specific notice of posting requirements which are described below. Effective February 15, 2006, the location of the intended employment for notification purposes will be determined as follows:

1. ***If the employer knows where the Schedule A employee will be placed:***

   The employer must post the notice at the work-site(s) where the employee will perform the work ***and*** publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question.

The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.

2. ***If the employer currently employs relevant workers at multiple locations and does <u>not</u> know where the Schedule A employee will be placed:***

   The employer must post the notice at the work-site(s) of ***all*** of its locations or clients (i.e., clients under contract to the staffing employer at the time the employer seeks to post a timely notice of filing for a Schedule A employee) where relevant workers currently are placed, ***<u>and</u>*** publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters.

3. ***If the work-site(s) is unknown and the employer has no current locations or clients:***

   The application would be denied based on the fact that this circumstance indicates no *bona-fide* job opportunity exists. The employer cannot establish an actual job opportunity under this circumstance. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application.

In support of the petition, the employer may provide a copy of one posting notice, supported by a list of all locations where the notice was posted and dates of posting in each location, rather than a copy of each notice in support of the petition.

Exception: If, on March 20, 2006, the I-140 is pending or was denied and a timely filed motion to reopen or reconsider is pending, and the employer timely posted a notice but not in correct location(s) of intended employment as described above, adjudicators should issue an RFE to allow the employer to comply with DOL's notification requirements. If all posting requirements are met and the notice has been posted the requisite 10 business days prior to the date of the RFE response, the posting will be considered timely for adjudication purposes. For all petitions filed <u>after</u> March 20, 2006 (or motions to reopen filed <u>after March 20, 2006</u>, to reopen a petition that was <u>filed and</u> denied after March 28, 2005), employers must comply with the posting requirements set forth above.

(E) <u>Sample Notice of Posting</u>.

There is no specific form that petitioning employers must use to comply with the notice of posting requirements for Schedule A petitions. The following is a sample notice of posting which petitioners may elect to use for their posting notices. USCIS worked with DOL to develop the sample as a customer service convenience. Adjudicators should accept posting notices that are modeled after the sample, but should not require use of the sample. Petitioning employers may use other forms as long as they comply with the DOL regulations. Petitions already approved should not be reopened and revoked for failure to comply with posting requirements.

SAMPLE NOTICE OF FILING OF APPLICATION UNDER THE U.S. DEPARTMENT OF LABOR'S PERMANENT LABOR CERTIFICATION PROGRAM

An application concerning the employment of one or more alien workers for the following permanent position will be filed with the Department of Labor (for non-schedule A positions) or with the Department of Homeland Security (for Schedule A positions). This Notice of Filing will be posted for 10 consecutive business days, ending between 30 and 180 days before filing the permanent labor certification application.

POSITION TITLE: _____

POSITION DUTIES: _____
_____
_____

RATE OF PAY: $_____ per _____
The employer will pay or exceed the prevailing wage, as determined by the U.S. Department of Labor

LOCATION OF EMPLOYMENT: _____

This notice is provided in compliance with 20 CFR 656.10(d). Any person may provide documentary evidence bearing on the application to the Certifying Officer of the U.S. Department of Labor holding jurisdiction over the location of the proposed employment. Contact information for these offices can be found on the Internet at http://www.foreignlaborcert.doleta.gov/foreign/contacts.asp.

This notice is being provided to workers in the place of intended employment by the following means:

☐ Posting a clearly visible and unobstructed notice, for at least ten (10) consecutive business days, in conspicuous location(s) in the workplace, where the employer's U.S. workers can readily read the posted notice, including but not limited to locations in the immediate vicinity of the wage and hour notices.

AND

☐ Publishing the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

DATE POSTED: _____

DATE REMOVED: _____

LOCATIONS WHERE THE NOTICE WAS POSTED: _____

MEANS OF IN-HOUSE NOTICE, if applicable: _____

EXPLANATION OF ANY LACK OF IN-HOUSE NOTICE: _____
_____
_____

I attest, under penalty of perjury, that the above notice was provided as shown.

_____ _____
[PRINTED NAME AND TITLE] **[SIGNATURE]**

DATE: _____