College Hiring After The Immigration Act of 1990--Immigrant Employment Categories and Procedures

IHELG Monograph
91-9

Robert E. Hopper
Attorney at Law
Suite 120, The Bienville Bldg.
3401 Louisiana St.
Houston, TX 77002
(O) 713-520-7755
(F) 713-523-1923

$5.00
University of Houston Law Center/Institute for Higher Education Law and Governance (IHELG)

The University of Houston Institute for Higher Education Law and Governance (IHELG) provides a unique service to colleges and universities worldwide. It has as its primary aim providing information and publications to colleges and universities related to the field of higher education law, and also has a broader mission to be a focal point for discussion and thoughtful analysis of higher education legal issues. IHELG provides information, research, and analysis for those involved in managing the higher education enterprise internationally through publications, conferences, and the maintenance of a database of individuals and institutions. IHELG is especially concerned with creating dialogue and cooperation among academic institutions in the United States, and also has interests in higher education in industrialized nations and those in the developing countries of the Third World.

The UHLC/IHELG works in a series of concentric circles. At the core of the enterprise is the analytic study of postsecondary institutions—with special emphasis on the legal issues that affect colleges and universities. The next ring of the circle is made up of affiliated scholars whose research is in law and higher education as a field of study. Many scholars from all over the world have either spent time in residence, or have participated in Institute activities. Finally, many others from governmental agencies and legislative staff concerned with higher education participate in the activities of the Center. All IHELG monographs are available to a wide audience, at low cost.

Programs and Resources

IHELG has as its purpose the stimulation of an international consciousness among higher education institutions concerning issues of higher education law and the provision of documentation and analysis relating to higher education development. The following activities form the core of the Institute’s activities:

Higher Education Law Library
Houston Roundtable on Higher Education Law
Houston Roundtable on Higher Education Finance
Publication series
Study opportunities
Conferences
Bibliographical and document service
Networking and commentary
Research projects funded internally or externally
College Hiring After The Immigration Act of 1990--
Immigrant Employment Categories and Procedures

I. INTRODUCTION

Effective October 1, 1991, the Immigration Act of 1990 ("The 1990 Act") raised the annual worldwide limit on employment-based immigrant (permanent-resident) visas from 54,000 to 140,000. It also restructured and expanded the visa classification system under which a foreign employee or potential employee may obtain U.S. permanent residence based on a job or a job offer. Five new job-based immigrant visa categories have now replaced the familiar 3rd/6th-preference classification system, and some structurally minor but important procedural changes have been made to the alien employment labor certification process. Of special interest to college and university employers are: (1) replacement of 3rd preference (professionals and persons of exceptional ability in the sciences or arts) with a total of five subcategories scattered among the first three new employment-based categories, and (2) retention of Schedule A Group II (aliens of exceptional ability in the sciences or arts) and special-handling labor certification procedures for college teachers.

A source of concern to those who represent college and university employers, or who administer their hiring programs, are the new law's often confusing terminology, and numerous changes and additions to the evidence required in support of employment-based immigrant visa petitions. The less-than-clear and potentially adversarial 3rd party notification requirements that have been
added to the alien labor certification and precertification processes (discussed below), are another problem. The resulting uncertainty and related potential for adverse civil or even criminal action by the government, can make in-house immigration work unassisted by experienced counsel both risky and potentially cost prohibitive.

* **Scope**

This paper discusses the newly enacted employment-based immigrant categories and subcategories that directly impact the essential teaching and research functions of colleges and universities. Accordingly, it includes an examination of the related Schedule A Group II and special handling labor-certification provisions retained and modified by implementing Department of Labor regulations. Because they generally relate to health-care providers rather than to teachers and researchers, the immigration laws governing practicing physicians, RN’s and allied health care professionals employed by university hospitals, are not covered. Also not covered are visa categories through which foreign workers may seek U.S. permanent residence by means not related to occupation, such as family relationships.

* **The Immigration Process**

  **Immigrant Visas.** Foreign workers desiring to enter the U.S. based on their occupation or a job offer must first obtain an immigrant visa. To start most job-based visa applications the
prospective employer files a form I-140 immigrant visa petition with the U.S. Immigration and Naturalization Service ("INS"). If approved, the petition is forwarded to the U.S. consular post closest to the foreign worker's home. The foreign worker ("alien") must then appear at the consulate and apply for the appropriate immigrant visa. If granted, the visa is issued as a stamp in the alien's passport. Finally, the alien must be inspected at the point of proposed entry into the U.S., which is normally the airport, seaport or border check point through which the he or she first enters the country. If the new visa appears to have been properly issued and the alien does not appear to be excludable, he or she will be admitted and will be accorded the status of an immigrant.

Adjustment of Status. Adjustment of status is an exception to the general rule that beneficiaries of approved immigrant visa petitions must apply for an immigrant visa at a U.S. embassy or consulate abroad. This statutory concession permits an eligible alien to file a form I-485 application for U.S. permanent-resident status locally, at an INS district office, and to adjust to immigrant status in the U.S. without the need to obtain, and enter on, an immigrant visa. However, an employment-based applicant who has at any time worked in the U.S. without authorization, or has ever failed (other that through no fault of his or her own or for technical reasons) to maintain lawful status, is statutorily ineligible to adjust status and must apply for an immigrant visa outside the U.S. Whether an immigrant visa (or adjustment of
status to lawful permanent resident) can be obtained at all, and if so, which employment based immigrant visa category or categories can be used to apply, will depend on the applicant's occupation, the education required for the occupation, and whether a professional license is required and is available.

**Preliminary Requirement of Labor Certification or Precertification.** To obtain permanent resident status based on most jobs, an alien employment labor certification must first be applied for and obtained from the U. S. Department of Labor ("DOL"). Putting it kindly, the labor certification application process can be an acid test of the employer's commitment to obtaining permanent residence for a foreign worker. It is expensive, time consuming, and since the 1990 Act added an adversarial provision to the process, risky. The Labor Certification application process is essentially a test of the U.S. labor market which is made by recruiting U.S. applicants for the foreign worker's position. In almost all cases, the recruitment must take place immediately after the application is filed, regardless of how heavily the employer has already recruited before the foreign worker was hired. Among other things, the process requires employers to advertise the position, including the salary, and to notify the appropriate company union representative, if there is one, that the application is being filed, including the content of the required job ad. If there is no such representative, the notice must be posted in at least two locations.
at the place of employment. The notices must expressly invite 3rd parties to contact the DOL or the state employment service with any comments they may have bearing on wages and working conditions at the facility, or to report anything in the ad that they feel is misleading. DOL is empowered to investigate adverse comments and will protect the confidentiality of commenters who request it. Any U.S. workers who apply for the job must be interviewed and screened according to rigorous DOL requirements. If a minimally qualified U.S. citizen or permanent resident is willing to accept the job on the terms offered, certification will be denied regardless of how much more qualified the foreign worker may be.¹⁰ Not surprisingly, without the assistance of experienced immigration counsel the probability of success is low.

Exempted from the labor certification requirement are aspiring immigrants who qualify for "priority worker" status or a job-offer waiver under new law (discussed below), or whose occupational status has been precertified by the Secretary of Labor as one where there is a shortage of qualified U.S. workers. Precertified occupations are listed in Schedule A of the DOL's Technical Assistance Guide No. 650: Labor Certifications ("TAG").¹¹ In addition, the 1990 Act provides for a 3-year "Labor Information Pilot Program" whereby the secretary of Labor must determine whether there are labor shortages or surpluses in up to ten "defined occupational classifications" in U.S., and must precertify those occupations determined to be in short supply.¹² If and when occupations in short supply are identified and implementing
regulations are issued under this program, labor-certification exempt immigrant-visa petitions may only be filed through September 30, 1994, unless Congress acts to extend the program. To date, no proposed regulations have been issued and the program is accordingly not yet available. Except for aliens of exceptional ability in the sciences or arts (precertified under Group II of Schedule A) college teaching and research positions are not precertified. These categories are discussed separately below.

**College-Level Teachers Qualify for Special Handling.** Although the majority of college teaching and funded research positions will therefore require a labor certification, college teachers automatically qualify for labor-certification processing under DOL’s special-handling provisions. Special handling refers to a streamlined labor certification application process based on recruitment that was already conducted before the labor-certification application is filed. The recruitment results are simply filed with the application and specified supporting documentation. The state employment-service office designated to receive the application forwards it to the DOL’s Regional Certifying Officer without opening a job order and without requiring further recruitment of any kind. To merit certification, the application need only demonstrate that the foreign worker has been selected pursuant to a competitive recruitment and selection process wherein he or she was found to be more qualified than any U.S. worker who applied for the position.13 This is extremely important to college employers, who would otherwise have to comply
with the rigorous recruitment and documentation procedures required in ordinary labor certification cases and to prove that the foreign teacher is in effect the only qualified applicant for the position. Because the "more qualified" hiring standard can be used only in special handling cases, the special-handling option can be critical to a U. S. college's ability to compete for the best available teaching talent without having to give undue weight to whether an applicant is a U.S. national or permanent resident. Yet there are indications that special handling is not always fully understood or fully utilized by academic employers. Accordingly, this paper will examine the special-handling process in detail at Part V, below.

II. THREE NEW EMPLOYMENT-BASED IMMIGRANT CATEGORIES

As noted previously, while the 1990 Act created five new categories for employment-based immigration, only three of these, and five of their subcategories, will be treated here. Accordingly, the fourth category (Special Immigrants) and the fifth category (Investors) will not be discussed.

The visa category or subcategory under which a foreign worker seeks U.S. permanent-resident status is significant for a number of reasons having to do with visa availability and time. To begin with, some categories start each fiscal year with a greater number of available visas than others. More importantly, because some visa categories have a lower minimum education/achievement threshold than others, more people are eligible for visas under
those categories than under others that are more demanding. This causes the number of visas available each year in less demanding categories to be used up faster. When this happens, waiting lines begin to form and to grow in length as new visa petitions are filed. This is because the law places numerical limits on the number of people who can immigrate to the U.S. each year under the statutory visa "preference" system, which includes employer-sponsored immigrants. 15 And because the worldwide demand for U.S. immigrant status is normally far greater than the available number of immigrant visas, even aspiring immigrants whose occupations are in short supply in the U.S. must wait, sometimes for several years after their immigrant visa petition has been approved, before they can actually immigrate. 16 In addition, so many petitions for certain U.S. immigrant visa categories have already been filed for nationals of some countries, that those countries have even longer waiting lines in the affected visa categories than the normal worldwide lines. 17 In Category 3 (discussed below), there is even a difference in the length of the waiting line within its subcategories.

Under the statutory preference system, an aspiring immigrant for whom a permanent resident visa petition has been approved cannot immigrate until his or her "priority date" becomes current. 18 The intricacies of the preference system and the movement of immigrant visa priority dates are beyond the scope of this paper. 19 However, it is useful to keep in mind that the length of time it takes for priority dates to become current is
tied to visa categories, and that a job-based priority date is established when an applicant's labor certification application (or visa petition where the occupation is precertified or where no certification is required) is properly filed. All of this means that the same visa applicant whose petition is already approved would be able to immigrate right away if qualified for category 1, for example; and perhaps in two-to-twelve months if eligible under category 2; but he or she may soon have to wait into the next century if qualified only for the third subcategory of category 3.

From the perspective of raw annual visa allocations and whether or not a given category requires a labor certification, the employment-based immigrant visa categories under consideration may be summarized as follows: (1) **Category 1** rates 40,000 visas annually plus any unused visas from categories 4 and 5; it requires no labor certification; (2) **Category 2** also rates 40,000 visas annually plus any unused visas from categories 1, 4 and 5; it requires a labor certification but this requirement may be waived by the INS "in the national interest" (not defined); (3) **Category 3** rates 40,000 visas (but only 30,000 are available collectively to skilled workers and baccalaureate-level professionals) plus any unused category 2 visas; this category always requires a labor certification.21

It is important to emphasize that both the alien and the occupation on which his or her visa application is based must fit the visa category applied for. To determine which aliens and which
occupations are eligible for a given immigrant visa category, the focus must be on the subcategories under which employment-based immigrant visa petitions are now processed. These subcategories are listed below according to the symbols the INS uses to designate them, followed by a shorthand statutory description of each (The INS symbols can be somewhat confusing: "E11", for example, means the first subcategory of employment category 1; there is no "E eleven"; E32 means the second subcategory of category 3, and so on.):

E11 Aliens with extraordinary ability in sciences, arts, education, business or athletics;

E12 Outstanding Professors and Researchers;

E13 Certain Multinational Executives and Managers (an upgraded statutory reincarnation of the now discontinued Schedule A, Group IV);

E21 Members of the professions holding advanced degrees or aliens of exceptional ability in the arts, sciences or business (no degree requirement specified for exceptional ability);

E31 Skilled workers (qualified to perform job requiring at least 2 years of experience or training);

E32 Professionals who hold baccalaureate degrees (job must require a professional).

E3W "Other Workers" (those whose jobs require less than 2 years of experience or training -- limited to 10,000 visas annually);

Those with experience in immigration law will immediately recognize much of the old 3rd/6th preference immigrant-visa classification system, and its regulatory and interpretive progeny, in these new subcategories. However the downgrading of bachelor-level degree holders, the upgrading of multinational executive and managerial
transferees, and the virtual exclusion of low-skilled workers are just some of the ways the new system differs from prior law. In addition, there are other, less obvious differences that will emerge as administrative appellate opinions interpreting key provisions of the implementing regulations begin to surface. What follows is a discussion of the enacting statutes, implementing regulations, and selected legislative history concerning subcategories E11 through E32.

* E11 - Aliens with Extraordinary Ability

Aliens seeking classification under the extraordinary ability subcategory may be sponsored by a specific petitioning employer, or they may file a petition with the INS on their own behalf without employer sponsorship.22 The alien must: (i) be able to show through "extensive documentation" that he or she has achieved "extraordinary ability in the sciences, arts, education, business or athletics, which has been demonstrated by sustained national or international acclaim"; (ii) seek to enter the U.S. to continue work in the area of extraordinary ability; and (iii) in the opinion of the INS, "substantially benefit prospectively the United States."23

The legislative history indicates that Congress intended this category to be limited to "that small percentage of individuals who have risen to the very top of their field of endeavor."24 INS final regulations echo this language, and provide that a petition for this subcategory must include supporting evidence consisting of
either: (a) "evidence of a one-time achievement (that is a major, international [sic] recognized award)" [Most likely the Nobel Prize or its near equivalent], or (b) at least three of the following ten criteria:

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) Documentation of the alien's 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;

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

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

(v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales. (emphasis added) \(^25\)

Alternatively, "comparable evidence" may be submitted to establish eligibility if these standards "do not readily apply to the beneficiary's occupation." \(^26\)

Although no job offer is required, the applicant must submit clear evidence that he or she is coming to the U.S. to continue work in the same field. Such evidence can consist of contract(s), the applicant's detailed statement, or prospective employer letter(s). \(^27\)

* **E12 - Outstanding Professors and Researchers.**

  Requires an employer to file a petition with the INS. \(^28\) A waiver of the employer sponsorship requirement is not available. The alien must: (i) be internationally recognized as outstanding in a specific academic area; (ii) have a minimum of three years of experience teaching or researching in that area; and (iii) be entering the U.S. for one of three types of positions:

(A) A tenured or tenure-track position within a university or "institution of higher education"; or

(B) A "comparable position" with a university or an institute of higher education to conduct research; or

(C) A "comparable position" to conduct research within a department, division or institute of a private employer, but the private employer must have at least three additional persons involved in full-time research activities and have achieved "documented accomplishments in
INS regulations define "academic field" as "a body of specialized knowledge offered for study at an accredited [U.S.] university or institution of higher education. Permanent, in reference to a research position, is defined as "either tenured, tenure-track, or for a term if indefinite, or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination." The regulations also detail six categories of evidence, two of which must accompany every petition to show that the professor or researcher is individually recognized internationally as outstanding in the specified academic field:

(i) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;

(ii) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;

(iii) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;

(iv) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;

(v) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or

(vi) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.
(emphasis added)\textsuperscript{31}

In addition, applicants must show that they have "at least 3 years of teaching and/or research experience in such academic field." This can include teaching or research performed while pursuing an advanced degree under circumstances specified in the regulation.\textsuperscript{32} It bears repeating that although no labor certification is necessary for this subcategory, an employment offer is.\textsuperscript{33} This subcategory of Priority Worker has advantages for colleges and other research institutions. First, it provides a no-labor-certification alternative to the special handling option for outstanding professors. More importantly for non-teaching researchers (only teachers qualify for special-handling processing), this subcategory is not limited to positions that involve teaching. Finally, this subcategory is not limited to teaching institutions, but can be used by government and private industry-supported research centers.\textsuperscript{34}

* **E13 - Certain Multinational Executives and Managers**

Because this last subcategory of Category 1 pertains to management as opposed to teaching and research, it will not be treated here. However, executive or managerial-level administrators currently or formerly employed by a foreign extension of a U.S. college, or by a foreign college with a U.S. extension, may be able to qualify to immigrate under this subcategory if he or she is contemplating transferring to the U.S. campus, or has so transferred within the last 3 years.\textsuperscript{35}
This "subcategory" is really the whole of employment category 2, and although it provides for two distinct qualifying tracks, the statute, the regulations, and the INS designation symbol, treat it as a single subcategory. A job-offer is required. Ordinarily, an employer must file a petition with the INS on behalf of the alien. However, a waiver of this requirement can be obtained if the INS determines that a waiver of a job-offer is "in the national interest". Neither the statute or the regulations define the term "in the national interest". However, the regulations do state that an alien seeking to meet this waiver standard "must make a showing significantly above that necessary to prove 'prospective national benefit.'" [which is required for E21 eligibility in all cases (discussed below)]

A labor certification is required unless the job-offer requirement has been waived by INS. Although the section of the 1990 Act creating category two is silent on this point, an "additional conforming amendment" inserts a labor certification requirement for an alien who seeks admission or status as an immigrant under either new employment category 2 or category 3.

A qualifying "professional" under category two must: (a) hold an "advanced degree", described in the legislative history as "a degree received which required initial completion of a 4-year course of undergraduate study, followed by at least one academic year of graduate study, and which is normally referred to as a
"master's degree" and (b) establish that the alien's employment will "substantially benefit prospectively the national economy, cultural or educational interests or welfare of the United States." The regulations do not provide that substantial benefit be specifically proved. Apparently the INS will determine this issue based on the petition and supporting documents as a whole. Compare this to the language of the employment-based subcategory, aliens with extraordinary ability. In this subcategory, the benefit to the United States is not limited to the specific areas of national economy, cultural or educational interest, or welfare of the country.

INS final regulations define "advanced degree" as: "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." The regulations define "profession" as "one of the occupations cited in section 101(a)(32) of the Immigration and Nationality Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation."

The following supporting evidence must accompany a petition to qualify as a professional under subcategory E21:
(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty. 45

To qualify under the exceptional ability standard, the alien must: (a) have an occupation in the sciences, arts or business; (b) show exceptional ability in the sciences, arts or business [but note: an academic degree or diploma is not necessarily required to make this showing. On the other hand, a degree or diploma or even a professional license, is not sufficient by itself. Accordingly, a given applicant holding an engineering degree or physical therapy license may not qualify, whereas a non-licensed, non-degreed but highly paid engineering technician with 20 years of experience might (see qualifying criteria below)]; and (c) likewise demonstrate substantial prospective benefit to the national economy, cultural or educational interest or welfare of the U.S. 46

INS final regulations define "exceptional ability in the sciences, arts, or business" as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business." 47

The regulations require a showing of at least three of the following six criteria in order to qualify under the exceptional ability standard:

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

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

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

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

(5) Evidence of membership in professional associations; or,

(6) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. (emphasis added)\textsuperscript{48}

"Comparable evidence" may be submitted where these standards "do not readily apply to the beneficiary's occupation."\textsuperscript{49}

Petitions under category E21 must also include a labor certification, or evidence of eligibility for Schedule A (if applicable), or for precertification under DOL's pilot precertification program. The job-offer portion of the form ETA-750 Part A must demonstrate that the job requires a professional holding and advanced degree or the equivalent or an alien of exceptional ability.\textsuperscript{50} Schedule A and pilot precertification program applications must be accompanied by a fully completed, uncertified form ETA-750 Parts A and B.\textsuperscript{51} [As noted previously, no regulations have been proposed yet for this pilot precertification program; accordingly it is not yet available to applicants.] A request for a waiver of the normal job
offer/labor certification requirement requires a completed form ETA-750 Part B, in duplicate as well as "evidence to support the claim that the exemption would be in the national interest (not defined)."\textsuperscript{52}

* E31 - Skilled Workers

(a) The job must require a minimum of two years of training or experience;
(b) The job cannot be temporary or seasonal.

* E32 - Professionals

(a) The alien must have a baccalaureate degree and be a member of a profession;
(b) Note that the Act does not use the term baccalaureate degree "or equivalent".

* Processing Petitions for E31 and E32 Classifications

Final INS regulations define "professional" (foreign-equivalent bachelor's degree added) and "skilled worker" essentially to reflect the statutory definitions, and specify that "relevant, post-secondary education" may be considered as training to meet the two-year training/experience threshold.\textsuperscript{53} In accordance with the statute, the regulations require a labor certification, Schedule A application or pilot precertification program application, along with evidence that the foreign worker meets the employer's stated education and/or experience requirements.\textsuperscript{54} A summary of what must be shown follows.
Professionals must show: (1) a bachelors degree or its foreign equivalent degree, and (2) membership in the professions, by demonstrating that "a minimum of a bachelors degree is required for entry into the profession." [It is worth repeating that combined education/experience equivalents are not mentioned. The preamble to the regulations clarifies that such equivalents are statutorily precluded in this subcategory as well as for baccalaureate-level credit in employment category 2. This would remove a licensed registered nurse with less than a bachelor's degree, for example, from the professional subgroup and place him or her into the skilled worker subgroup. It might similarly reclassify an RN who has a bachelor's degree unless the form ETA-750 Part A (submitted with the petition to obtain Schedule A status), clearly shows a bachelor's degree is required by the employer in addition to licensure.]

Skilled Workers. The two-year minimum experience/training qualification must be certified by DOL on the form ETA-750 Part A form and evidence must establish that the alien meets each qualification stated. Alternatively, where appropriate, Schedule A or pilot- precertification program eligibility must be applied for and established. In all cases evidence of the alien's qualifications must be in the form of letters from employers and/or trainers. In cases of Schedule A or pilot-precertification, the completed, uncertified duplicate ETA-750 Part A forms must show that the job requires at least two years' experience. The DOL's Dictionary of Occupational Titles, and accompanying specific
vocational preparation (SVP) ratings must always be consulted to be certain that these recognized governmental sources support the experience and/or education requirements stated on this or any ETA-750 Part A filed with INS or DOL.

III. CHANGES TO SCHEDULE A, GROUP II AND SPECIAL HANDLING

∗ Changes and Additions to Labor Certification Job-Posting Requirement. Union notification added. Schedule A and Special Handling Cases Now Included.

Final DOL regulations implemented the new union notification and revised job posting requirements for labor certifications enacted by the 1990 Act and for the first time include Schedule A and special-handling applications retroactive to October 1, 1991. The regulations also require petitioners to document as part of each such application that the notice was provided as directed.

1. Textual and Interpretive Changes

(a) Posting can now be "for 10 days" (10 business days are no longer required.).

(b) DOL interprets "locations" language in interim final regulations to require posting must be in at least 2 locations.

2. Procedure

"At the time of filing" (not defined) notice of the labor certification or Schedule A filing must be provided to the union bargaining representatives, if any, who represent applicant’s employees in the occupational classification applied for, in all of employer’s locations in the "area of employment." This term is not
defined but the definition found at 20 CFR Section 656.50 seems appropriate. If there is no bargaining representative, notice must be posted in conspicuous locations "at the facility or location of employment" for at least 10 days (the regulation enumerates suggested locations). Private households must comply if they employ at least one U.S. worker at time of application.  

3. Required Content of Union Notification or On-Site Posting

Any notice of the filing of an Application for Alien Employment Certification shall:

(i) state that applicants should report to the employer, not to the local Employment Service office;

(ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and

(iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor. (emphasis added)

Special content instructions are given for notices of four different application types (regular labor certification, reduction in recruitment, special handling, and Schedule A). Third-party document submission is open to "any person". In the case of Schedule A applications, submitters are limited to documentation of "fraud and willful misrepresentation".
* Other Changes

Schedule A, Group II is not statutory. It is a creature of regulation, and as previously noted, it was retained in interim final DOL regulations implementing the 1990 Act. Schedule A, Group II bears a close resemblance to the new statutory employment-based subcategory E11 (see Part II of this paper). However, DOL has acknowledged that at least some applicants who qualify for the former category may not qualify for the latter. Also, subcategory E11 applicants may self-petition, whereas self-petitioning is no longer allowed under Schedule A, Group II.63

An employer seeking labor precertification on behalf of an alien under Group II of Schedule A must file, as an attachment to the application for precertification that accompanies its I-140 immigrant visa petition "documentary evidence testifying to the widespread acclaim and international recognition accorded the alien by recognized experts in their field: and documentation showing that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability (emphasis added)."64 An application for precertification consists of a completed uncertified DOL form ETA-750, Parts A and B, in duplicate. The precertification application is filed with the INS (not DOL), as an attachment to the petitioning employer's I-140 immigrant visa petition.

The employer is also required to file as an attachment to the labor precertification application, documentation concerning the alien from at least two of the following seven groups:

25
1. Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.

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

3. Published material in professional publications about the alien, relating to the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material.

4. Evidence of the alien'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.

5. Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.

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

7. Evidence of the display of the alien's work in the field for which certification is sought at artistic exhibitions in more than one country.\(^{65}\)

This list tracks seven of the INS's list of ten alternative criteria for E11 "extraordinary ability" eligibility almost word-for-word, except that an alien may qualify for E11 classification based on national or international acclaim. To qualify under Schedule A, Group II, on the other hand, the alien must still be internationally recognized.\(^{66}\)

Special Handling. With the exception of the new
posting/notice requirements noted above, the new DOL regulations make only clerical changes to the special-handling labor certification provisions (see also Part V of this paper). 67

* Related Changes to Status Adjustment Procedures

INS final regulations amending adjustment of status provisions [attached] officially discontinue simultaneous "one step" filing and adjudication of I-140 petitions submitted with I-485 (permanent-resident status) applications. Previously, if the alien's immigrant-visa priority date was current, it was possible to submit the I-140 petition and I-485 application at a local INS district office and to have both items considered and approved at the time of the permanent-residence interview. This is no longer possible in employment-based cases. It was hoped when this change occurred that the INS district offices might accept I-485 applications from aliens with current priority dates if the application included proof that an I-140 petition had been accepted for filing by the appropriate INS Service Center. However, INS final regulations clearly preclude this by providing that an employment-based I-485 application will be considered "properly filed" only if accompanied by evidence of an "approved" I-140 petition. 68

IV. WHAT LIES AHEAD?

In attempting to clarify and reform the existing employment-based immigration processes and procedures, Congress ended up enacting a number of ambiguous and complex new provisions that are
likely to spawn even more of the interpretive fragmentation it had sought to overcome with The 1990 Act. In attempting to implement the often elusive legislative intent underlying these new provisions the INS and DOL have issued final and interim final regulations [cited in and attached to this outline] that appear to raise more questions for employers than they answer.

Add to this the resulting increases in the workload of the INS, DOL and Department of State, and the complexity of the new law's nonimmigrant procedures, and we have an employment-based immigration system that is likely to get worse before it gets better. However, special handling is still with us, and that is good news.

V. SPECIAL HANDLING LABOR CERTIFICATIONS FOR COLLEGE AND UNIVERSITY TEACHERS

"[T]he Committee believes that the Department of Labor has impeded the efforts of colleges and universities to acquire outstanding educators or faculty members who possess specialized knowledge or a unique combination of administrative and teaching skills. As a result, this legislation includes and amendment to [INA] Section 212(a)(14), which requires the Secretary of Labor to determine that "equally qualified" American workers are available in order to deny a labor
certification for members of the teaching profession or for those who have exceptional ability in the arts and sciences."\textsuperscript{69}

This section examines the special handling regulations found at Title 20 Code of Federal Regulations ("CFR") Section 656.21a, as they apply to labor-certification applications for college and university teachers. Although intended primarily as a practical guide, it incorporates the significant reported decisions and as much developmental history as is necessary to account for differences in the occupations covered by the special handling regulations and the enabling statute. This section updates and reproduces, with permission, a previous article by the author.\textsuperscript{70}

* BACKGROUND *

In 1976, Congress amended Section 212(a)(14) [now 212(a)(5)] of the Immigration and Nationality Act ("INA") to create a distinct standard to be applied when testing the labor market for members of the teaching profession and aliens of exceptional ability in the sciences or the arts. Under the resulting "equally qualified [U.S. worker]" standard, an employer can obtain a labor certification for an eligible alien by showing that the alien is more qualified than competing U.S. applicants, rather than having to show that he or she is the only qualified applicant.\textsuperscript{71} In reporting out the amendment, which took effect January 1, 1977, the House Judiciary Committee admonished the Department of Labor to work closely with leading representatives of industry, government, and higher
education to develop appropriate standards and criteria to carry out its purpose.\textsuperscript{72} However, the purpose of the amendment proved to be less clear than its stated provisions (see, for example, the above-quoted excerpt from the House Report), and it took four years to develop the implementing final regulations that have been in use since 1981.

Initial final regulations published January 18, 1977, expanded 20 CFR Section 656.10 ("Schedule A"), to provide for precertification of aliens of exceptional ability in sciences or arts, and removed performing artists from this group in response to adverse comments to the proposed rules.\textsuperscript{73} In compliance with the statutory mandate, members of the teaching profession were given benefit of the "equally qualified" standard. However, they were not accorded precertification. Additionally, in response to a reported comment from the House Subcommittee on Immigration, Citizenship, and International Law regarding the intent of Congress, applicability of the new "equally qualified" standard to teachers was limited to educators at the college and university level.\textsuperscript{74} No special processing was provided for college/university teachers or exceptional performing artists.

The final regulations presently in use became effective, prospectively only, on January 19, 1981. The new regulations left exceptional scientists and non-performing artists in Schedule A, Group II (see Part III of this paper), and expanded the group to expressly include "college and university teachers of exceptional ability who have been practicing their science or art during the
year prior to the application and who intend to practice the same science or art in the United States." Exceptional performing artists, certain sheep herders, and all other college and university teachers (hereinafter "college teachers") were designated for special handling under newly created Section 656.21a of Title 20.75

* **Distinguished from Reduction of Recruitment and Schedule A, Group II**

Although sometimes confused with Reduction of Recruitment under 20 CFR Section 656.21(i), special handling is unrelated to this provision, which applies to all occupations not listed on DOL's Schedule B, and often involves modification rather than elimination of post-filing recruitment.76

Unlike Schedule A, Group II, which involves precertification by the INS and applies only to college teachers who can show exceptional ability in the sciences or arts, special handling applies to all full-time college teachers whose positions involve "some actual classroom teaching".77 With respect to these positions, qualitative evaluations are necessary only to the extent necessary to meet the "more qualified" test with respect to U.S. applicants.78 Also, unlike some Schedule A occupations, college teachers qualify alternatively for processing under the normal labor certification procedure (20 CFR Section 656.21), in which case the alien must be shown to be the only qualified applicant.79
* Analysis--Advantages of Special Handling Unavailable Under 20 CFR Section 656.21

The freedom to select the most qualified job applicant regardless of nationality or immigrant status is by far the most valuable substantive advantage of Special Handling for the academic employer, and one which strikes a reasonable balance among the competing interests involved in the labor certification process. The hiring employer, while still objectively accountable for his or her choice of a non-U.S. worker, is given the latitude reasonably expected by all parties involved in an arms-length job recruitment procedure; procedures are provided to ensure that U.S. workers have been given reasonable notice of job availability and the opportunity to apply and be considered; the job opportunity is scrutinized to ensure that U.S. workers similarly employed are not adversely affected; the job is awarded on the basis of comparative ability; and the public interest in quality education is protected and enhanced.

There are a number of purely procedural advantages as well. Since no post-filling recruitment is required in a qualifying special handling case, the local state employment service office need only determine whether the prevailing wage has been met and the required documentation submitted before forwarding the application to the Regional Certifying Officer for adjudication. Moreover, the applicable regulations and accompanying instructions in the U.S. Department of Labor’s Technical Assistance Guide No. 656 ("TAG") provide more streamlined and less burdensome documentation requirements than those found at 20 CFR Section
In fact, with the exception of subsections (d) and (e) relating to date stamping the application and calculating the prevailing wage, Section 656.21 is expressly inapplicable to the processing of Special Handling submissions. This means, for example, that an employer can attest to the alien's qualifications and experience in a separate written statement in lieu of submitting diplomas, transcripts, experience letters from the alien's former employers and similar third party documents [Educational credentials, though not technically required, are something the DOL is used to seeing in these applications and it is less problematic to submit them than to appeal a denial for failure to do so.] It also means that the resumes, job application forms, and names and addresses of competing U.S. applicants need not be submitted, and that the familiar requirement to state the offered wage in all recruitment sources does not apply. However, as discussed in Section IV of this paper, contemporaneous notice of filing must now be provided to union bargaining representatives of the college's teachers or if there is no such representative, posted internally, in all labor certification cases, including special handling.

The absence of the applicant name/address/resume requirement can be particularly helpful where the employing institution is governed by internal procedures or state laws requiring the written applications and even the identities of job seekers to be held in confidence. Because 20 CFR Section 656.21a(a)(1)(iii)(A)(1), and (2) require employers to list only the total number of applicants
and the specific, job-related reasons why the alien is more qualified that each U.S. worker, there is no reason why an employer could not identify each U.S. applicant by number or a similarly anonymous indicator, as long as their qualifications are clearly stated and specifically compared to those of the alien. Of course, in such a case, the employer would have to be prepared to disclose the identity of an applicant if the Certifying Officer needs this information to verify disputed evidence or for some other recognized valid reason, but routine demands for applicant identities or resumes by a CO are not legally supportable in cases governed by Section 656.21a. However, as in the case of educational credentials, applicant names are routinely required by regional Cos and the practice is probably too entrenched to successfully challenge except in a case with compelling privacy concerns.

Similarly, the minimum-job-qualifications provisions, according to which the employer must document that its job requirements are not restrictive, fall under Section 656.21. This includes the rule disallowing job requirements that involve experience gained by the alien in the job offered. The same holds true for the rule deeming employer preferences to be job requirements. Although at least one reported ALJ decision refers to (and rejects) a Certifying Officer's finding that an employer's bilingual requirement was "unduly restrictive", an adverse finding based on minimum job qualifications criteria
contained in Section 656.21 is clearly inapplicable to a special-handling case, and it has been so held.\textsuperscript{88}

This does not mean, however, that there are no controls governing the job requirements an employer may impose in special handling cases. In special-handling cases the employer must still indicate the specific lawful, job-related reasons why the alien was deemed to be more qualified that U.S. applicants, and must prove that the job opportunity has been and is clearly open to any [equally] qualified U.S. worker.\textsuperscript{89} Either of these rules would authorize the Certifying Officer to reject a clearly inappropriate job requirement, at least where it has been used to screen a U.S. applicant.

Nevertheless, the employer has significant discretion both in determining what job requirements are appropriate and in assessing how much weight to give to each when selecting a college teacher. The regulations require only that the employer state a valid reason why the alien is more qualified than U.S. applicants.\textsuperscript{90} The employer may, for example, evaluate an applicant's teaching potential based on research performance, classroom performance, published scholarship, or a combination of these.\textsuperscript{91} In making the evaluation, a subjective criterion, such as the employers' or a third party's personal observation or recommendation, may be sufficient.\textsuperscript{92} And, although an employer's purely conclusory statements will ordinarily not be deemed specific, job related, reasons for considering the alien more qualified,\textsuperscript{93} attempts by COs to disregard or second-guess an employer's facially valid
selection criteria in favor of criteria deemed more objective by the CO are not likely to be upheld.\textsuperscript{94}

Even the requirement to document that the alien was selected pursuant to a competitive recruitment and selection process is less involved than it may sound. The TAG acknowledges that recruitment programs will vary from one college to another and directs only that the employer: (1) advertise the position in a (national) professional journal and (2) use "a systematic approach to evaluate and rate" each applicant's qualifications.\textsuperscript{95} In addition, acceptable evidence of competitive recruitment is defined in the regulations to include a list of specific items, which are generally all that is needed.\textsuperscript{96} In fact, at least one attempt to impose an additional recruitment requirement was rejected on the ground that a single advertisement in a relevant national journal was sufficient.\textsuperscript{97}

* Applicability Generally: Who Qualifies?

Positions for which labor certification is sought, including those qualifying for special-handling, must be full-time, permanent positions.\textsuperscript{98} In the case of college teachers, there may be concern about whether a full-time faculty member who teaches only part of the time is considered to occupy a full-time teaching position for purposes of these requirements, or whether the position will qualify as permanent if it is based on a grant or similar impermanent funding.
Although the regulations governing permanent labor certifications do not define what is meant by a permanent position, the DOL has adopted INS H-2B standards to determine whether an employers's need is temporary. In providing that in applications for temporary labor certifications proposed employment should not exceed 364 days, the amending memorandum expressly states that "job opportunities of 12 months or more are presumed to be permanent in nature."  

Thus, a position should ordinarily qualify as permanent if the employer's need of the alien's services equals or exceeds one year. The fact that even tenure-track faculty positions normally must be renewed each academic year should not change this, provided the employer intends to renew the position for as long as funding is available. Conversely, a permanent labor certification would seem inappropriate for a position that exists solely by virtue of a grant lasting less than a year, absent a reasonable expectation of renewed funding or an additional grant.  

Regarding the question of what is a full-time teaching position, the TAG expressly recognizes that college faculty positions often combine teaching, research and other duties, and provides that a position qualifies for special-handling as long as part of the position's responsibilities involve "some actual classroom teaching." Incidentally, the TAG is equally clear that non-teaching positions "such as researchers, librarians and other administrative positions" do not qualify.
Still, concerns have been expressed that there may be differing opinions among the various regional Cos regarding what is meant by "some" classroom teaching and whether a "de minimis" standard has been developed within the DOL, below which a position will not be deemed to involve teaching. The question has also been raised regarding whether a teaching worksite, such as a laboratory or surgical suite, is considered to be a classroom for purposes of this provision.\textsuperscript{103} Both of these questions were raised in November, 1989, in a telephone interview with Mr. Denis Gruskin, Manpower Development Specialist at DOL's Washington headquarters. Mr. Gruskin stated that his office is unaware of any "de minimus" requirement, and that such a requirement would seem inappropriate in light of the unequivocal standard expressed in the TAG. On the subject of teaching worksites as classrooms, Mr. Gruskin stated he was similarly unaware of a DOL policy or of the question having ever been raised. Both statements were subsequently confirmed in a letter from Mr. Thomas Bruening, Chief of DOL's Division of Foreign Labor Certifications (attached).

In addition, it would seem that since information regarding how much teaching is performed and precisely where it takes place is not requested on the ETA-750 forms or other required special-handling documentation, it is unlikely that either question will be raised by the adjudicating Cos. (Comments from anyone whose experience indicates otherwise would be appreciated.)

* \textbf{Applicability Where the Alien was Recruited Through a Non-Conforming Process}
In a letter responding to an attorney inquiry on October 14, 1987, Mr. Bruening stated unequivocally that an alien hired not in accordance with required procedure would not for that reason alone be precluded from special-handling processing where a subsequent test of the labor market is made through a competitive process.\textsuperscript{104} The previous year, in a DOL opinion entitled \textit{University of Houston},\textsuperscript{105} the ALJ ruled that the hiring of an alien through a nonconforming recruitment and selection process did not by itself invalidate the employer’s subsequent test of the labor market, where the application was filed within 18 months of the alien’s original hiring date. However, the decision clearly implies that the result would have been different had the alien originally been hired more than 18 months before the application was filed, even if the subsequent test of the labor market had occurred within the 18 month filing period specified in 20 CFR Section 656.21a(a)(1)(iii)(E). This does not seem sound. The TAG at page 70, states that:

The employer who cannot provide the documentation prescribed in 656.21a (a)(iii) may make a current test of the labor market according to requirements of Section 656.21 or the employer may withdraw the application, recruit through a competitive recruitment and selection process, and refile the application later.
(emphasis added)

This language would clearly seem to permit an employer, whose special-handling application has been or would be returned because he or she cannot show the alien was selected pursuant to the required competitive process, to re-recruit according to the
requirements for competitive recruitment and to refile the application based on the alien's subsequent conforming retest of the labor market. If this is so, and the decision seems to acknowledge that it is, it would make no sense to deny special-handling based on the fact that the alien's original hire took place more than 18 months before the application was filed. Indeed, the TAG expressly predicates the 18-month requirement on the need to test the labor market for recent availability of U.S. workers. If this test is properly made, and the alien can be shown to be more qualified than any U.S. workers who respond to the current market test, then the express purpose of the 18-month time limit has been satisfied, all of the other requirements of 20 CFR Section 656.21a(a)(1)(iii) have been met, and certification would seem to be in order without regard to when the alien was originally hired for the position. To hold otherwise would deprive the employing college of the benefit of the "equally qualified" selection standard mandated by Congress in the enabling statute; nothing in the statute or the regulations requires that this be done. In the University of Houston[107] decision, the ALJ also held that the failure of the employer's subsequent labor-market test to conform to the regulatory definition of competitive recruitment did not preclude special-handling. This also appears unsound in light of 20 CFR Section 656.21a(c), which is not mentioned and which appears to preclude having it both ways. It is also contrary to another ALJ decision entitled University of Guam[108] on this same point.
* What Needs to be Filed

It's all in the TAG. Pages 67 through 70 and 73 set out virtually everything you will normally need to know to prepare and file a special-handling labor certification application for a college teacher. In addition, 20 CFR Section 656.20 contains filing instructions for all permanent labor certification applications, and 656.21(d) and (e), relating to forwarding applications and calculating prevailing-wage rates by the local state employment service office should also be consulted, as should the accompanying TAG commentary, and the General Program Procedures, beginning on page 125 of the TAG. Although Section 656.21(h) relating to the 45-day deadline for submitting requested documents and information to the local office may be technically inapplicable to special-handling, it appears to be regularly applied. And, of course, Sections 656.24 through .32 and 656.40 apply to all labor certifications.

To process a special handling application the employer files completed forms ETA-750 Parts A and B as directed, with the local state employment service office with jurisdiction over the place wherein the alien will be employed. Part A form must include a full description of the job offered,\textsuperscript{109} and should include the title, duties and requirements as stated in the employer's previous published advertisement.\textsuperscript{110} However, because Section 656.21 is inapplicable, the job requirements need not be broken down into specific minimum criteria, and it is common for academic job advertisements to list the desired qualifications and areas of
academic concentration in preferential order, without requiring specific periods of experience. Although not expressly required, the preferred or required academic degree should be clearly stated, and the alien should either have this degree, or a valid reason for waiving the required degree should be shown to exist and to be available to all applicants.\textsuperscript{111}

Exactly where to list desired qualifications or areas of concentration on the form ETA-750 Part A can sometimes be a problem. In at least one unreported Louisiana case, the local Job Service remanded Part A for correction where the desired experience was stated in item 14 without stating a specific time period in the job-offered or related occupation blocks. In that case, merely moving the preferred experience to item 15 cured the objection. It would generally seem that item 15 is an appropriate place to list desired qualifications that are not gained through employment or are not time-specific, especially since the business-necessity questions normally triggered by item 15 are inapplicable to special-handling cases.\textsuperscript{112} Since prevailing-wage determinations do apply, the wage must be stated Part A and the number of months comprising the contract year must be specifically stated.\textsuperscript{113} Form ETA-750 Part B is completed in the normal manner, except that in item 14 it should be sufficient to refer to the employer’s statement of the alien’s qualifications required by 20 CFR Section 656.21a(a)(1)(iii)(D). However, it is worth repeating that COs are used to seeing applicants’ educational credentials, and refusal to include them is likely to result in a denial.
As previously discussed, 20 CFR Section 656.21a(a)(1)(iii) is clear about the supporting documents which must accompany the form ETA-750 Parts A and B, and these are:

1. A written statement by an official of the college who has actual hiring authority, describing in detail the recruitment procedure used. A form statement outlining the school’s normal recruiting and screening procedures is sufficient as long as these procedures were actually followed in selecting the alien, and the statement should state that is was. Most of the colleges have designated the person or title with actual hiring authority to the regional CO in writing. If your client employer has not done this, it should be done, since many if not all Cos apparently now require it. The person so designated then must sign the above statement with a full signature. The recruitment procedures statement must also include (a) the total number of applicants (U.S., or otherwise) and (b) the specific, lawful job-related reasons why the alien was found to be more qualified than each U.S. applicant, if any.

2. A final report of the faculty, student and/or administrative body recommending or selecting the alien. Some schools may not have such a written report on file. However, there is no reason why a written memorandum of the selection process cannot be made after the fact, as long as it is dated to conform with the school’s valid, contemporaneous record of the date the selection was made following recruitment. The selection date is used by DOL to determine when the 18-month filing window opens. This report seems to be the more appropriate place to compare the alien’s qualifications with those of U.S. applicants, but since the regs require this information to be included in the statement describing the recruitment procedure, the employer may want to repeat the information in both documents. Another possibility would be to attach and incorporate the committee report by reference into the recruitment statement, but this probably will not be accepted unless the designated person with hiring authority signs both documents. This report is usually
made to the dean, department head or similar executive officer, and is signed by the selection committee chair, who may be a permanent or ad hoc appointee.

3. A copy of at least one advertisement for the job opportunity placed in a national, professional journal. The wage need not be stated, but the name and dates of the publication and the job title, duties and requirements must be listed (TAG, p.70, Note 1).

4. Evidence of all other recruitment sources utilized. This is only required if additional recruitment sources were, in fact, used. Additional recruitment sources are not, however, required.

5. A written statement attesting to the degree of the alien's education or professional qualifications and academic achievements. This must be submitted in addition to Part B of Form ETA-750. Since it is the only required evidence of the alien's qualifications, it should be specific and detailed.

6. A written statement or other evidence that contemporaneous notice of the labor certification filing has been provided to the bargaining representative, if any, of the school's teachers, or if there is no such representative, to the employees by posting in at least two locations in the area of intended employment (see Part III of this paper).

7. In addition, the TAG, not the regulation, requires that an offer of employment be included (pg. 68).

That's it. Of course as previously noted, the application must be filed within 18 months of the date the alien was selected following competitive recruitment. In light of the University of Houston holding (discussed above), every attempt should be made to file the
application within 18 months of the date the alien's original hire, in cases where the labor market has been subsequently retested.

* Conclusion

Indications are that the special-handling regulations may not by clearly understood or uniformly interpreted by all of the various state employment service and regional DOL offices. Accordingly, it is likely that practitioners who adhere to the relatively spare documentation requirements of Section 656.21a will encounter some resistance. However, I have personally found that diplomatic, but firm, arguments supported by authoritative references have been generally successful in holding the line on what is required. It is important to note that often-repeated prescriptions for "overkill" in documenting alien applications are most probably a disservice in these cases, where confusion already appears to exist regarding what parts of the regulations are applicable. It took four years following enactment of the enabling statute to develop workable regulatory procedures that permit colleges to select the best available teachers without excessive and costly involvement in a recruitment process designed to implement 20 CFR Section 656.21. The resulting gains for academic employers and qualified aliens are important enough to be actively preserved.

For this same reason, it is equally important that any temptation to cut corners in light of the reduced accountability allowed by the special-handling regulations be scrupulously avoided.
by employers and practitioners. In spite of the fact that the special-handling process has survived the DOL's post-1990-Act rule-making essentially unchanged, there are concrete indications that the Labor Department is not happy with Congress' application of the "equally qualified" standard to college teachers who are not unique or preeminent. In light of the adverse economic changes that have taken place since the enabling statute was enacted, documented instances of abuse may be all that would be needed to convince Congress to take this special protection away from colleges or to restrict its availability to persons who might already qualify for precertification under Schedule A.
REFERENCES


2 INA § 204(a)(1)(C) and (D), 8 USC § 1154 (a)(1)(C) and (D).

3 INA § 221, 8 USC § 1201.

4 INA § 212(a), 8 USC § 1182(a).


6 INA § 245, 8 USC § 1255. See generally Wernick supra note 5.

7 Title 8 Code of Federal Regulations ("CFR"), §§ 245.1 and 245.2(a).

8 INA § 245(c)(2), 8 USC § 1255(c)(2).


11 See supra note 9.


13 TAG. p. 36, note 8; 20 CFR § 656.21a(a)(2).

14 TAG. p. 68, note 1.

15 INA §§ 202, 203; 8 USC §§ 1152, 1153, see also infra Note 17.
Id.


Id.

Id.

Id.


INA § 204(a)(1)(C), 8 USC § 1154(a)(1)(C).

INA § 203(b)(1)(A), 8 USC § 1153(b)(1)(A).


8 CFR § 204.5(h)(4).

8 CFR § 204.5(h)(5).

INA § 204(a)(1)(D), 8 USC § 1154 (a)(1)(D).

INA § 203(b)(1)(B), 8 USC § 1153(b)(1)(B); 8 CFR § 204.5(i)(3)(iii).

8 CFR § 204.5(i)(2).

8 CFR § 204.5(i)(3)(i)(A)-(F).

8 CFR § 204.5(i)(3)(ii).

8 CFR § 204.5(i)(3)(iii).

8 CFR § 204.5(i)(iii)(C).

See generally 8 CFR § 204.5(k)(3)(ii)(A)-(F).
The 1990 Act § 162(b)(1).

INA § 203(b)(2)(B), 8 USC § 1153(b)(2)(B) added by the 1990 Act. § 121(a). See also, the Immigration Technical Corrections Act of 1991, § 204(b), making "professions" expressly eligible for this waiver.


The 1990 Act § 162(e).


8 CFR § 204.5(k)(2).

Id.

8 CFR § 204.5(k)(3)(i).

INA § 203(b)(2)(A) and (C), 8 USC § 1153(b)(2)(A) and (C).

8 CFR § 204.5(k)(2).

8 CFR § 204.5(k)(3)(ii).

Id.

8 CFR § 204.5(k)(4)(i).

Id.

8 CFR § 204.5(k)(4)(ii).

8 CFR § 204.5(1)(2).

8 CFR § 204.5(1)(3)(ii).

The 1990 Act § 122(b)(1).


20 CFR § 656.22(b)(2).
20 CFR § 656.20(g)(1)(i) and (ii).

20 CFR § 656.20(g)(2).

20 CFR § 656.20(g)(3).

20 CFR § 656.20(g)(4) through (g)(8).

20 CFR § 656.20(h)(1) and (2).


20 CFR § 656.22(d).

Id. See also H.R. Rep. No. 723, 101st Cong., 2nd Sess., 59 (new statutory E11 "extraordinary ability" subcategory intended to be comparable to DOL's schedule A, Group II).

20 CFR § 656.22(d).


Pub. L. No. 94-571, Sec. 5, 90 Stat. 2703 (Codified at 8 USC).


42 Fed. Reg. 3440, comment No. 6; see also Matanuska-Susitna Borough School, 87-INA-557 (BALCA Jan. 20, 1988).


TAG, p. 62, Note 9. Schedule B is DOL's extensive and somewhat ancient list of occupations it considers to be chronically oversupplied with U.S. workers and therefore
inappropriate for labor certification. Schedule B occupations are listed in TAG, pp. 21-29.

TAG, p. 68, Note 1.

Although not expressly stated in the regulations or the TAG, special handling is also appropriate where no U.S. workers have applied, in which case the alien must presumably be shown to meet the employer's qualifications stated on the ETA-750A form. *Rice University*, 87-INA-281 (BALCA June 17, 1982). See also instruction letter from DOL Region VI (includes Texas) cited infra at Note 83.

20 CFR § 656.21a(c); TAG, p. 70, Note 1.

20 CFR § 656.21a; TAG, pp. 67-70.

TAG, pp. 39 and 68; 20 CFR § 656.20(a)(2) and 656.21(b); *Central Michigan University*, 85-INA-340 (Labor Dep't ALJ Nov. 5, 1985), n. 1; However, language in Sec. 656.21(a) stating "except as otherwise provided by . . . Sec. 656.21a. . ." appears slightly ambiguous on this point.

TAG, p. 70, Note 1; 20 CFR § 656.21a(a)(1)(iii)(D).

See note 13 supra. But see, attached letter dated 7/22/91, from Charlene Giles, Certifying Officer, Region VI AILA Texas Chapter Chair, Kathleen Walker, enclosing letter of instruction to college/university employers discussing most common "errors" in special-handling applications. Submission of applicant names is stated as a requirement. The letter is reproduced as an attachment to this paper. It also appears in the AILA Texas Chapter Monthly Mailing for August 1991.

TAG, p. 33, Note 1.

See DOL letter cited supra at Note 83.

*Central Michigan University*, 85-INA-340 (Labor Dep't ALJ Nov. 5, 1985).

*University of Guam*, 85-INA-20 (Labor Dep't ALJ July 8, 1985).

*Central Michigan University*, (supra, n.1.); *University of Guam*, 85-INA-120 (Labor Dep't ALJ Oct. 21, 1985); but see *Northeast Louisiana University, College of Pharmacy & Health Sciences*, 86-INA-650 (Labor Dep't ALJ Oct. 21, 1986), which appears to approve a CO's inquiry into whether a job requirement was the employer's "actual minimum."

20 CFR §§ 656.21a(a)(1)(iii)(A)(2) and 656.20(c)(8).
Northeast Louisiana University, College of Pharmacy and Health Sciences, (supra).

Rice University, 87-INA-300 (BALCA June 17, 1987).

Rice University, (supra).

Lewis University, 88-INA-75 (BALCA June 20, 1988); University of Texas at San Antonio, 88-INA-71 (BALCA May 9, 1988); New Jersey Institute of Technology, 87-INA-650 (BALCA Feb. 8, 1988); University of Arkansas, 86-INA-480 (BALCA Sept. 15, 1986).

Northeast Louisiana University (supra); Rice University, (supra); CSU Stanislaus, 90-INA-506 (BALCA Oct. 7, 1991).

TAG page 69, Note 1.


University of Tulsa, 87-INA-506 (BALCA Mar. 8, 1988). See also CSU Stanislaus (supra).

TAG, pp. 136 and 137.


See DOL, Region VI instruction letter cited above at Note 83.

TAG, p. 68.

Id.


Published in Interpreter Releases 1387-88 (Dec. 14, 1987).

University of Houston, 86-INA-421 (Labor Dep’t ALJ Aug. 15, 1986).

TAG, p. 70.

See supra Note 105.

See supra Note 87.

20 CFR § 656.21a(a)(1)(ii).
Id.; TAG, p. 70, Note 1.

See Central Michigan University, supra; Rice University, supra.

See supra Note 13.

Tuskegee University, 87-INA-561 (BALCA Feb. 23, 1988); University of Montevallo, 87-INA-438 (BALCA June 23, 1987); Voorhees College, 88-INA-201 (BALCA Aug. 8, 1988); Matter of Talledega College, 89-INA-209 (BALCA Apr. 9, 1990). See also DOL Region VI instruction letter cited supra at Note 83.

20 CFR § 656.21a(a)(1)(iii)(A).

Selected Bibliography of Cases for Schedule A

Group II and Special Handling Labor Certifications

Schedule A, Group II

Matter of Medical University of South Carolina, 17I & N Dec. 266 (Reg.Comm’r. 1978)

Special-Handling Labor Certifications

Central Michigan University, 85-INA-340 (Labor Dep’t ALJ Nov. 5, 1985).
Lewis University, 88-INA-75 (BALCA June 20, 1988).
New Jersey Institute of Technology, 87-INA-650 (BALCA Feb. 8, 1988).
Northeast Louisiana University, College of Pharmacy & Health Sciences, 86-INA-650 (Labor Dep’t ALJ Oct. 21, 1986).
Rice University, 87-INA-281 (BALCA June 17, 1982).
Rice University, 87-INA-300 (BALCA June 17, 1987).
Tuskegee University, 87-INA-561 (BALCA Feb. 23, 1988).
University of Arkansas, 86-INA-480 (BALCA Sept. 15, 1986).
University of Guam, 85-INA-120 (Labor Dep’t ALJ July 8, 1985).
University of Houston, 86-INA-421 (Labor Dep’t ALJ Aug. 15, 1986).
University of Montevallo, 87-INA-438 (BALCA June 23, 1987).
University of Texas at San Antonio, 88-INA-71 (BALCA May 9, 1988).
University of Tulsa, 87-INA-506 (BALCA Mar. 8, 1988).
Voorhees College, 88-INA-201 (BALCA Aug. 8, 1988).
I. INS Final Rule Implementing 1990 Status-Adjustment Changes

II. DOL Interim Final Rule Implementing 1990 Labor Certification (Including Special Handling) Changes and Changes to Schedule A.


IV. Letter dated 11/15/89, from Robert Hopper to Mr. Dennis Gruskin, Manpower Development Specialist, U.S. Department of Labor, restating content of telephone conference concerning what is meant by the regulatory term "some classroom teaching," and related questions.

V. Letter dated 12/19/89, from Mr. Thomas Bruening, Chief, Division of Foreign Labor Certification, responding to and confirming content of telephone conference restated in Gruskin letter, above.

VI. Letter dated 7/22/91 from Ms. Charlene Giles, DOL Certifying Officer, Region VI, to Ms. Kathleen Walker, AILA Texas Chapter Chair, enclosing general letter of instruction from DOL Region VI to college/university employers, discussing most common "errors" in special-handling submissions.

** Attachments I, II, and III are available from IHELG and are not included in this IHELG monograph due to length considerations.
November 15, 1989

Mr. Denis Gruskin
Manpower Development Specialist
U.S. Department of Labor
OFLC-ETA-USES
200 Constitution Avenue, N.W. Room N-4456
Washington, D.C. 20210

Dear Mr. Gruskin:

Thank you for taking the time to discuss my questions regarding special handling labor certification applications for college teachers on Monday, November 13th. As we discussed at that time, the questions were prepared in connection with a question that came up in research for an article I am writing for submission to the AILA Immigration Journal, and I am writing to confirm the substance of the answers given before incorporating them into the article.

The questions concerned the Labor Department's view of certain TAG language defining the types of positions that qualify for special handling under 20 CFR Sec. 656.21a. Specifically, I inquired whether a nontemporary college faculty position qualifies as long as it involves any classroom teaching, regardless of the amount, and whether instructing university students at teaching worksites such as working laboratories and surgical operating rooms would normally be considered "classroom teaching."

I understood the answer to the first question to be yes, that the TAG language means just what it says, and no minimum amount of teaching is implied or has been imposed, and that there is no departmental policy statement on the subject. Regarding the second question I understood that this issue has not been addressed by the Labor Department in any known administrative decision or departmental policy statement, and that any determination regarding this question would have to turn on the facts of a particular case.
It was also suggested that both questions may be nonissues, since the amount of teaching and its physical situs would normally not come into question except in unusual circumstances where the facts themselves would likely provide whatever guidance is needed.

Please advise if any of the above information appears inaccurate or in need of further development. Its treatment in the article will amount to only a few sentences, but it's the best information we have concerning two questions raised at the 1989 AILA National conference. Thanks again for your time and your input.

Sincerely,

[Signature]

ROBERT E. HOPPER

REH/ma
Robert E. Hopper, Esq.
Attorney At Law
3030 MCorp Plaza
333 Clay Street
Houston, Texas 77002

Dear Mr. Hopper:

This is in response to your letter dated November 15, 1989, addressed to Denis Gruskin of my staff, regarding applications filed on behalf of college and university teachers pursuant to the special handling procedures at 20 CFR 656.21a.

You inquired as to the minimum amount of time in instructional duties acceptable for such job opportunities, and whether instructional situs outside a physical classroom are acceptable for the performance of such duties. Technical Assistance Guide No. 656 Labor Certification provides at page 69, that "part of the position's responsibilities (must) involve actual classroom teaching" (emphasis added). As to whether instruction situs such as you describe are "actual classrooms," you are correct in noting that the answer would turn on the facts of the individual case.

This office has nothing further to add at this time to your summary of Mr. Gruskin's comments provided to you over the telephone on November 13, 1989.

I hope this information is helpful to you.

Sincerely,

THOMAS M. BRUENING
Chief
Division of Foreign Labor Certifications
July 22, 1991

Ms. Kathleen Walker
American Immigration Lawyers Association
Texas Chapter Chair
416 N. Stanton, Suite 700
El Paso, Texas  79901-1210

Re: College and University Issues

Dear Ms. Walker:

Recently, our office has noticed an increase in the number of Notice of Findings being issued to colleges and universities employers.

Subsequently, we have mailed a letter to all those colleges and universities which have, at one time or another, submitted an Application for Alien Employment Labor Certification in Region VI. This letter details the most common issues employers fail to address when filing an application under the special handling process. The intent of the letter is to provide guidance and information with regard to those specific recurring issues which subsequently cause undue delays to the employer.

For your information, I have enclosed a copy of the letter and a listing of those college and university employers to whom it was mailed.

Sincerely,

CHARLENE G. GILES
Certifying Officer
While I realize this is a rather lengthy letter, it is crucial that all parties concerned with filing applications for Alien Labor Certification take time to review what we deem to be the most common issues encountered by employers when filing an application under the special handling process. The intent of this letter is to provide guidance and information with regard to these specific recurring issues which subsequently cause undue delays to the employer.

As you are aware, the federal regulations at 20 CFR 656.21a allow college and university employers to file Alien Employment Certification applications for teaching positions through the "special handling process" rather than the basic process. Essentially, the difference between these two procedures is that the special handling process enables college and university employers to hire the most qualified applicant while the basic process does not. In addition, college and university employers are able to file their Alien labor certification applications within 18 months after a selection is made while the basic process, recruitment for the job opportunity is not initiated until after the application is filed with the State agency.

The special handling process dictates that employers apply for a labor certification to employ an alien as a college or university teacher by filing an Alien Employment Certification form and any attachments required. The employer must set forth on Form ETA 750, Part A and B and in appropriate attachments the following information:

1) The employer shall submit a full description of the job offer for the alien employment.

2) The employer must show that the alien was selected pursuant to a competitive recruitment and selection process and was found to be more qualified than each U.S. worker who applied for the job opportunity. Evidence of the competitive recruitment and selection process shall include:

   a) A recruitment results statement outlining the complete recruitment procedure and signed by the official who has actual hiring authority. The statement shall set forth:

   1) Total number of applicants
   2) The specific job-related reasons why the alien is more qualified than each U.S. worker who applied for the job;
   3) A report of the faculty, student, and/or administrative body making the body making the selection of the alien, at the end of the competitive recruitment and selection process.

   B) A copy of at least one advertisement for the job opportunity placed in a national professional journal giving the name and date of the publication and which states the job title, duties, and requirements.

   C) Evidence of all other recruitment sources utilized; and

   D) A written statement attesting to the degree of the alien's educational or professional qualifications and academic achievements.

   E) Applications shall be filed within 18 months after a selection is made pursuant to a competitive and recruitment process.

Our review of the special handling applications during the past year reveal that a number of college and university employers have recruited for a Ph.D. position but have selected a Ph.D. candidate. In these instances, the Certifying Officer has issued a Notice of Findings in which the employer was requested to demonstrate how the alien was found to be more qualified than each U.S. worker who applied for the job opportunity when it was evident that the alien did not meet the Ph.D. requirement at the time of recruitment and selection. Additionally, the employer was requested to submit documented evidence which showed that despite the alien not having a Ph.D. at the time of recruitment and selection, the alien was more qualified than each U.S. worker who applied for the position.

In special handling cases, the primary focus is on whether the U.S. applicant is at least as qualified as the alien beneficiary (or whether or not the alien) is more qualified than the U.S. applicant. This, as you know, differs from the basic process where the focus is on whether or not the U.S. applicants are qualified for the employer's job opportunity.

Since the focus is on whether or not the alien is more qualified than the U.S. applicant, the fact that an alien does not have a specific job requirement listed in Item 14, e.g., Ph.D., is not by itself, determinative of the issue as to whether or not the U.S. worker is at least as qualified as the alien (or that the alien is more qualified). Such factors as reputation of the institutions attended by the applicants, relevancy of work experience, relevancy of academic work, etc., would also be significant variables to consider.

If educational institutions are selecting aliens without a Ph.D. for positions for which attainment of a Ph.D. is a requirement, the employer should be willing to consider U.S. workers in similar circumstances who do not have a Ph.D. It should be clearly indicated on Part A (Offer of Employment) of the Application for Alien Employment Certification and in the ad required by Section 656.21a(e)(1)(ii) (B) of the Department's regulations in what circumstances failure to have met all Ph.D. requirements is acceptable. Failure to provide such information in the required ad and in the application form, would prevent the alien from being
selected for the job opportunity "pursuant to a competitive selection and recruitment process" as contemplated by the Department’s regulations at 20 CFR 656.31a(4)(i)(iii).

Additionally, we have advised employers that documented evidence in support of the alien’s qualifications must be included with the application. Merely stating that the alien is more qualified than each U.S. worker who applied for the position is not considered to be sufficient evidence. Therefore, to avoid the possibility of receiving a Notice of Findings, the employer has been advised to include documentation which demonstrates a) that it is a common practice for the institution to recruit and hire Ph.D. candidates (if applicable); b) that at the time of selection the alien had made sufficient progress in his dissertation; and c) that the alien is more qualified than each U.S. worker who applied for the job opportunity.

The recruitment results statement must list the total number of applicants. In addition, the list must show the name of each applicant. Moreover, the employer must show how the alien is more qualified than each U.S. worker who applied for the position. Merely stating that the U.S. worker “did not fit the department’s needs” is not sufficient evidence to warrant rejection of a U.S. worker, specifically if the U.S. worker meets the actual minimum requirements for the job opportunity. Therefore, the employer must state in more specific terms how the alien is more qualified than each U.S. worker who applied for the position and was rejected.

Allen Employment Certification applications will be returned to the State agency in cases where the employer has failed to meet the prevailing wage rate or when the job title is not stated in the announcement and posting. Stating the job title in the advertisement affords potential applicants an idea of what the salary will be since college and university employers do not have to state the wage rate in the publication. When placing the advertisement, the employer should state the specific job title available such as Assistant, Associate, or Professorial position. However, in instances where the only position available is commensurate to qualifications and/or experience, the employer may state “all ranks.” In addition, the advertisement should state the duties and requirements for the job opportunity exactly as they are stated on the application. The employer must not impose additional requirements and/or reject U.S. workers for not meeting requirements that are not stated on Form ETA 750, Part A, and in the posting/announcement.

When placing the advertisement, employers may wish to consider using the words “or equivalent” if they anticipate hiring an applicant whose degree was not obtained in the United States. Alternatively, when filling the application for alien employment, the employer can submit an educational equivalency evaluation report which shows that the alien’s degree is comparable to the required degree stated on Form ETA 750, Part A. Failure to submit the educational equivalency evaluation report on the alien’s foreign degree will result in the issuance of a Notice of Findings. In this instance, the employer may be required to re-advertise the job opportunity in order that a true test of the labor market is made. In addition, if applicable, English translations of the alien’s educational credentials must be submitted if said credentials are in a foreign language.

While the following deficiencies are minor issues, failing to address them prior to submitting the application to the State agency can result in a Notice of Findings which will subsequently cause undue delays to the employer since the position will have to be re-advertised.

When choosing a publication in which to advertise the position, the employer should note that the publication and/or journal should be in line with the occupation for which the employer is recruiting. When compiling the documentation for submission to the State agency, the employer should include an original tear sheet of the advertisement giving the name and date of the publication. If the original tear sheet is not available, the employer may submit a certified true and correct photocopy of the entire page.

In many instances, applications will be returned to the State or a Notice of Findings will be issued in cases where information in the correspondence and/or documentation, which pertains to the requirements, is not consistent with the information set forth on the ETA 750, Part A or Part B. In these specific instances, a Notice of Findings will be issued and/or the State agency will be cited. Essentially, the employer will be asked to clarify the issue raised and/or correct any inconsistencies in the correspondence.

Applications (Form ETA 750, Part A&B) which do not have original handwritten signatures which have not been countersigned by the appropriate signatory will be returned to the State agency or to the employer. Failure to submit applications which are not properly signed will delay the review process and will result in undue delays to the employer.

Also, there has been some question regarding who should sign the Notice of Entry of Appearance as attorney or representative. Form G-28. Some employers have submitted a letter stating that as an arm of the State of Texas, their college/university is represented by the Texas Attorney General Office and therefore no one is authorized to sign the G-28 form. In this instance, all correspondence will be mailed directly to the college/university.

There have been instances where the G-28 submitted with the application indicates that the college/university is represented by an attorney who in reality the attorney does not represent the college. It should be noted that according to Section 24 of Form ETA 750, Part A, the delegated signatory, the application is responsible for the accuracy of any representations made by G-28 form. Therefore, college/universities which are not being represented by an attorney should not submit a G-28 which states otherwise.

In addition, employers are reminded that Section 556.21a(1)(i)(D) of the Federal Regulations require that a written statement attesting
to the degree of the alien's educational and professional qualifications and academic achievements be submitted with the application.

With regard to those applications and their advertisements which specify that "funding is subject to renewal," the employer must provide sufficient documentation and/or clarification regarding the following questions: a) is the alien presently working for the employer; and if so, b) was the alien actively involved in the research proposal for the current year; and c) is the funding contingent on the alien's availability. Moreover, the college/university should submit documentation which shows that the position for which certification is being sought is indeed a bonafide permanent job opportunity.

If you should need further information and/or clarification regarding special handling procedures, please contact Bertha Cavazos at (214) 767-4989.

Sincerely,

CHARLENE G. GILES
Certifying Officer