U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

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Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFIT CENTER
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, GLYNCO
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, ARTESIA

From: William R. Yates
Associate Director
Operations

Date: JUN 15 2005

Re: Current Processing of Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with U.S. Department of Labor (DOL) Notification/Posting Requirements and Guidance Effective March 28, 2005 pursuant to new DOL regulations at 20 CFR Part 656 Regarding the New Process for Blanket Labor Certification for Schedule A

Revisions to *Adjudicator's Field Manual* (*AFM*) Chapters 22.2(b)(3)(C) and 22.2(b)(7) (AFM Update AD 05-08)

This memorandum revises Chapters 22.2(b)(3)(C) and 22.2(b)(7) of the *Adjudicator's Field Manual* (*AFM*), superseding USCIS Interoffice Memorandum, Guidance for Processing Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with DOL Notification/Posting Requirements, dated December 23, 2004. Based on consultation with the U.S. Department of Labor (DOL) Employment and Training Administration, and DOL regulations dated December 27, 2004, this memorandum provides interim policy guidance regarding the notice of posting that is required in support of I-140 petitions filed on behalf of Schedule A beneficiaries before March 28, 2005. The guidance relating to I-140s filed before March 28, 2005 is prospective. In addition, guidance regarding the evidentiary requirements for Form I-140 Schedule A petitions filed on or after March 28, 2005 is also provided. Note that Chapter 22.2 was originally designated as Chapter 22.7.

Questions regarding this memorandum may be directed through appropriate channels to Service Center Operations.

Please ensure that appropriate personnel within your jurisdiction are aware of this update. Accordingly, the *AFM* is revised as follows:

☞ 1. Chapter 22.2(b)(3)(C) is revised to read:

(C) Schedule A Blanket Labor Certifications. Schedule A is a list of pre-certified occupations codified in 20 CFR 656.10 and 20 CFR 656.22 for which the Secretary of the Department of Labor previously has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens in such occupations. The IMMACT '90 amendments to the Immigration and Nationality Act (Act) gave separate visa classifications to some groups that previously were included in Schedule A. As a result, DOL eliminated these groups from Schedule A, leaving only Group I, registered nurses and physical therapists, and Group II, aliens of exceptional ability.

The use of the terms "extraordinary" and "exceptional" ability in both the Immigration and Nationality Act and the DOL regulations resulted in considerable confusion. In writing the regulations for employment based immigrants, it was determined that Congress intended for the "extraordinary ability" classification to be comparable to DOL's "exceptional ability" standard in Schedule A, Group II. "Exceptional ability" as used in the Act is a less restrictive standard. The evidentiary requirements for the two classifications reflect this interpretation.

PETITIONS FILED PRIOR TO MARCH 28, 2005:

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

- The Form I-140 petition, with appropriate filing fees,
- An uncertified Form ETA-750 A and B, in duplicate, signed in the original by an authorized official of the petitioning entity and by the alien,
- A copy of the posted notice, and
- For Form I-140 petitions filed for registered nurses, an unrestricted permanent license to practice nursing in the state of intended employment, CGFNS certificate issued by the Commission on Graduates of Foreign Nursing Schools or evidence that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing

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

For Form I-140 petitions filed before March 28, 2005, the DOL regulations 20 CFR 656.22(b)(2) and 656.20(g)(1) require that an employer provide notice of the position(s) it seeks to fill under Schedule A, Group I or II, to the bargaining representative or, if there is no such representative, to the employer's employees via a notice that must be posted for at least 10 consecutive days at the facility or location of the employment. In connection with the adjudication of Forms I-140 for occupations listed in Schedule A/Group I (nurses and physical therapists) or Group II (aliens of exceptional ability in the sciences or arts), USCIS requires evidence of compliance with DOL's notification requirements.

In order to be in compliance with DOL's notification requirements, the notice must be posted for at least 10 consecutive days. The notice must be clearly visible and unobstructed while posted and be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. The location of employment for notification purposes must be at the location where the alien beneficiary is actually going to be physically working, e.g., for a Schedule A nurse, the hospital or other facility where the alien beneficiary will be providing services, and not at the corporate headquarters or other office of the employer.

The notice must contain a description of the job and rate of pay and state that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity. The notice must also state that any person may provide documentary evidence bearing on the Schedule A labor certification application to the appropriate USCIS office, i.e. the office where the Form I-140 petition has been filed.

In light of the prolonged period of time in which many Schedule A petitions have been awaiting adjudication for cases filed with the Service prior to March 28, 2005, where a petitioner has failed to provide evidence of compliance with the posting requirements at the time of filing the Form I-140, adjudicators should issue a request for evidence (RFE) that requests evidence of compliance with DOL's notification requirements in the form of a notice of posting that conforms to the conditions noted above. If all posting requirements are met and the notice has been posted the requisite 10 days prior to the date of the RFE response, the posting will be considered timely for adjudication purposes. Issuing an RFE for this documentation is preferable to the issuance of a notice of intent to deny (NOID), so as to minimize the impact on Service Center resources as opposed to the more resource intense process for the issuance of an NOID. Note: the issuance of an RFE specified in this memorandum supercedes the guidance provided in the December 23, 2004 memorandum instructing Service officers to issue a NOID.

PETITIONS FILED ON OR AFTER MARCH 28, 2005:

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

On March 28, 2005, DOL effectively amended its regulations governing the filing and processing of labor certification applications for the permanent employment of aliens in the United States to implement a new system for filing and processing such applications. Many of the evidentiary requirements relating to Schedule A petitions have been changed as of that date.

Schedule A Requirements for petitions filed on or after March 28, 2005:

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

- The Form I-140 petition, with appropriate filing fees,
- An uncertified Form ETA-9089, in duplicate, signed in the original by an authorized official of the petitioning organization, the alien, and the representative, if any,
- A Wage Determination issued by the State Workforce Agency (SWA) having jurisdiction over the proposed area where the job opportunity exists,
- A copy of the posted notice, and
- Copies of any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions to the position specified in the Form 9089 in the employer's organization.
- For petitions filed for registered nurses, a full unrestricted permanent license to practice nursing in the state of intended employment, CGFNS certificate issued by the Commission on Graduates of Foreign Nursing Schools or evidence that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.
- For petitions filed for physical therapists, a permanent license to practice in the state of intended employment or, a letter or statement, signed by an authorized state physical therapy licensing

official, stating that the beneficiary is qualified to take that state's written licensing examination for physical therapists.

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

Validation Date for ETA-9089 and Scope of Validity: 20 CFR 656.30(b)(2) specifies that an ETA-9089 Labor Certification for a Schedule A occupation will be validated as of the date the application is dated by the USCIS Adjudications Officer.

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

A completed SWA form must reflect the date on which the SWA made the prevailing wage determination in order for it to be valid for purposes of being submitted to USCIS together with the Form 9089 in support of a Form I-140 petition. A properly completed SWA, in all cases, must specify on its face the validity of the prevailing wage, and the date on which the SWA made the determination. At the date of filing the Form I-140, for a supporting SWA wage determination to be valid, the ending validity date of the SWA determination may not be less than 90 days or more than 1 year from the date of the SWA determination at the time of filing with USCIS. The purpose of the validity date for the prevailing wage determination is to ensure that the prevailing wage determination is reflective of the wages being offered for comparable positions in the location where the job offer exists at the time that the Form I-140 petitioner recruits the alien worker.

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