

## STRATEGICALLY THINKING ABOUT THE RETROGRESSION OF SCHEDULE A OCCUPATIONS

*By Christopher T. Musillo\**

If a true alien, say a Martian economist, were to examine the current American employment-based immigrant visa system, he certainly would not look to replicate our system on Mars.<sup>1</sup> Our Martian economist would see a quota system that lumps all occupations into overly broad employment-based classifications and then limits the whole system through an irrational visa cap that works against foreign nationals from large countries. A good example of the system's irrationality is that a nurse or physical therapist from Iran or North Korea can often obtain a U.S. immigrant visa more quickly than an identically qualified nurse or physical therapist from India or the Philippines, sometimes by several years.

A rational system would more elegantly meet the needs of U.S. employers and foreign-trained workers, and would not absurdly prejudice nationals from large countries that are friendly to the United States. Such a system would also provide reasonable protections to U.S. workers in impacted industries. A case that illustrates the current system's inherent weakness is its treatment of occupations in short supply: Schedule A – Group I workers.<sup>2</sup>

### CURRENT PROCEDURAL FRAMEWORK

#### Listing on Schedule A

When the Department of Labor finds that there are insufficient U.S. workers available to meet employers' demand, and so the wages and working conditions of existing US workers will not be adversely affected by immigration, it lists these occupations on Schedule A.<sup>3</sup> "Professional nurses" and "Physical Therapists" have been listed on Schedule A since 1980.<sup>4</sup> Since the addition of "professional nurses" in 1980, the only other occupation to appear on Schedule A is "shortage-area specialist physician," which was taken off the list in 1987.<sup>5</sup> Twenty-seven years later the Department of Labor (DOL) continues to find that the U.S. does not supply enough professional nurses and physical therapists to meet either U.S. employer or U.S.

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<sup>1</sup> A funnier man might say that our Martian would not be green with envy.

<sup>2</sup> 20 C.F.R. §656.5.

<sup>3</sup> Nurses and Physical Therapists are on Schedule A – Group I. Schedule A – Group II is for aliens of exceptional ability in the sciences or arts. Group

II is beyond the scope of this article except where specifically relevant and discussed. Readers should assume the author only refers to Group I cases whenever the term "Schedule A" is used without reference to a Group.

<sup>4</sup> 45 FR 83926 (Dec. 19, 1980).

<sup>5</sup> 52 FR 20593 (Jun. 2, 1987); "Dieticians" was taken off of Schedule A in 1980; 45 FR 83926 (Dec. 19, 1980).

consumer demand. Both occupations remain on Schedule A.<sup>6</sup> The DOL expects that these two occupations will remain in short supply for the foreseeable future.<sup>7</sup>

### **Exemption from the Labor Market Test and Visa issuance**

The DOL excuses petitioners of Schedule A occupations from the protracted Labor Certification labor market test.<sup>8</sup> The reason for the excuse is obvious: since the importation of these workers will not negatively impact U.S. workers' wages and working conditions, there is no reason to require petitioning employers to test the labor market. Doing away with the labor market test benefits the DOL as well, since it can shift scarce resources into areas that better fulfill its aims.

The DOL has devised a neat procedural trick to avoid the traditional labor market test. An Application for Alien Labor Certification is still filed, but it is filed directly with the USCIS, as an attachment to the Form I-140, Petition for Alien Worker.<sup>9</sup> The DOL delegates its legal Labor Certification authority to the USCIS, which ordinarily rubber-stamps the Application.<sup>10</sup> Even in the current PERM age, this 'non-DOL Labor Certification' artfully blends the Department's findings and process: since the supply of U.S. workers is in short supply, Petitioners are relieved from testing labor market conditions.

The clever blend of aim and process sadly ends there. Instead of simply issuing the immigrant visa to the needed worker, the Department of State (DOS)<sup>11</sup> takes all of the USCIS' approved employment-based cases and allocates visas according to the Congressionally-mandated preference system.<sup>12</sup> Under this system the DOS is not allowed to issue more than seven percent of the total visas to any single country's natives.<sup>13</sup> This preference-and-cap-by-nationality system has been criticized by academics, business leaders, and economists.<sup>14</sup>

### **RECENT HISTORY: EX VISA AND THE SUBSEQUENT SCHEDULE A BLACKOUT**

Each fiscal year between 2001 and 2004, about 35,000-40,000 annual visas were authorized by Congress but unallocated by the DOS. This 150,000 visa shortfall

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<sup>6</sup> 20 C.F.R. §656.5.

<sup>7</sup> See Occupational Outlook Handbook, 2007, *Registered Nurses* (available at <http://www.bls.gov/oco/ocos083.htm>, last visited Mar. 18, 2007); Occupational Outlook Handbook, 2007, *Physical Therapists*, (available at <http://www.bls.gov/oco/ocos080.htm> last visited Mar. 18, 2007).

<sup>8</sup> 20 C.F.R. §656.15.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Three different government agencies have their hand in the review, distribution, and issuance of employment based immigrant visas: the DOL, USCIS, and the DOS. Briefly, their roles are: (1) the DOL is charged with certifying that US workers' wages and working conditions are not negatively impacted by the approval of the application; (2) the USCIS confirms that the Petitioner and Beneficiary meet the basic requirements as employer and employee; and (3) the DOS allocates and issues the visas. The visa allocation is governed by the described preference-and-cap-by-nationality quota system.

<sup>12</sup> INA §203(b).

<sup>13</sup> INA §202 (a)(2).

<sup>14</sup> See, e.g., Chen, Jack, "The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965," 75 N.C. L. Rev. 273 (1996); Sam Goldfarb, "Immigration cap is taking 'best, brightest' Gates says," Seattle Times, [http://seattletimes.nwsourc.com/html/business/technology/2003606830\\_billgates08m.html](http://seattletimes.nwsourc.com/html/business/technology/2003606830_billgates08m.html) (last visited Mar. 14, 2007).

was caused by USCIS technological and manpower challenges. During those years it was not unusual for employment-based Adjustment of Status applicants to wait several years before the USCIS approved the beneficiary's adjustment application. Consular cases tended to move faster because the USCIS understandably prioritized those cases ahead of adjustment applications.

In the October 2004 Visa Bulletin, the DOS noted that because employment-based immigrant visa demand had diminished in 2003 and 2004, the USCIS allocated resources toward approving large numbers of backlogged employment-based Adjustment of Status cases.<sup>15</sup> In turn, the DOS warned, employment-based visa numbers would "cut-off" or "retrogress" in January 2005.<sup>16</sup> Sure enough, the DOS' January 2005 Visa Bulletin established a cut-off date of January 1, 2002 for EB-3 immigrant applicants from India, the Philippines, and China, since those three countries were exceeding their seven percent country allocation. Overnight, the processing time of an Indian, Philippine, or Chinese nurse tripled, from one year to three.<sup>17</sup>

This country-specific retrogression led to the bizarre result hinted at earlier. Between January 2005 and June 2005, an Iranian or North Korean nurse would have had her case processed in one year, while an identical Indian, Philippine, or Chinese nurse's case took three years.

Since the nonimmigrant visa is an inadequate option for nurses,<sup>18</sup> Congress took quick action to solve this nurse visa blackout and end the absurdity.<sup>19</sup> On May 11, 2005, President Bush signed the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005.<sup>20</sup> Section 502 of this Act included a provision to create a new EB visa class, the EX category.<sup>21</sup> The EX visa category provided a one-time grant of 50,000 visas for Schedule A occupations.<sup>22</sup> This put all nurses, regardless of country of birth, in the same processing queue.

For the short run, this solved the problem. DOS turned the visa faucet back on in June 2005, and US employers promptly filed visa petitions. Needed foreign-trained nurses and physical therapists recommenced entering the US. But this period of perfect blend of aim and process ended quickly; the 50,000<sup>th</sup> visa was used in a scant 18 months.<sup>23</sup> In November 2006 the nurse visa blackout returned.

As of the time of this writing, several different attempts have been made to cure the nurse visa blackout.

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<sup>15</sup> See Department of State Visa Bulletin, October 2004, Section D.

<sup>16</sup> *Id.*

<sup>17</sup> In general a non-premium processed I-140 Schedule A case takes about one year from the filing of the I-140 until the issuance of the immigrant visa at the Consulate, if the category is not retrogressed.

<sup>18</sup> The limited use of nonimmigrant visas for nurses is discussed later in the article.

<sup>19</sup> Pub. L. No. 109-13, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Sec. 502, Visas For Nurses.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; EX is shorthand for EXempt from the immigrant visa quota.

<sup>22</sup> *Id.*; Using the rule of thumb that 1.5 dependent visas is granted for every one approved primary Beneficiary visa, one can reverse-compute that about 20,000 of the 50,000 visas that were issued under the EX category were for nurses and physical therapists. The vast majority of those 20,000 visas were for nurses.

<sup>23</sup> The November 2006 Visa Bulletin made EX visas unavailable. The December 2006 Visa Bulletin provided a retrogressed EX visa cut-off date. The January 2007 Visa Bulletin announced the permanent exhaustion of the EX category.

- The Senate’s 2006 version of Comprehensive Immigration Reform, which included a section that exempted Schedule A cases from the employment-based immigrant visa quota until 2017.<sup>24</sup>
- Sen. Hutchison offered an amendment that would have provided about 61,000 visas for Schedule A occupations under a revived EX visa quota.<sup>25</sup>
- Sen. Coleman introduced the Rural Nurse Protection Act. Like the Senate’s 2006 CIR, the RNPA takes Schedule A occupations outside the employment-based visa quota until 2017.<sup>26</sup>
- Rep. Shadegg introduced the Nursing Relief Act of 2007, which seeks to create a new nonimmigrant visa class, the W visa.<sup>27</sup> If passed, the W visa provides a TN-like process for nurse visas, with LCA-like wage protections.

## STRATEGIES FOR COPING WITH THE SCHEDULE A VISA BLACKOUT

Coping with a capped visa system is a problem that certainly is not unique to Schedule A occupations. The reader will find other articles in this volume that discuss the specific action needed to execute each of the below-listed strategies.

### H-1B Visa for Nurses

Professional nurses are rarely eligible for H-1B visas. On November 27, 2002, the USCIS published an excellent Guidance outlining approvable H-1B nurse petitions.<sup>28</sup> The USCIS will approve H-1B petitions for: certified advance practice nurses;<sup>29</sup> nurses in administrative positions; and nursing specialists.<sup>30</sup>

Practitioners are encouraged to explore with their facility-clients to see if any of these listed exemptions are appropriate in their cases. Keep in mind that all nurse nonimmigrant and immigrant visa beneficiaries must comply with the Healthcare Certification requirements at INA §212(a)(5)(C).<sup>31</sup>

### H-1B Visa for Physical Therapists

<sup>24</sup> See S. 2611 (2007), Sec. 505.

<sup>25</sup> See S.4, SA 364 (2007).

<sup>26</sup> See S. 646, Sec. 4 (2007).

<sup>27</sup> See H.R. 1358 (2007).

<sup>28</sup> USCIS Memorandum for Regional Directors, Service Center Directors, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P, issued by Johnny N. Williams, Exec. Assoc. Commissioner, Nov. 27, 2002, posted on AILA Infonet Doc. No. 02121746 (Dec. 17, 2002).

<sup>29</sup> The Guidance specifically lists these advance practice nursing positions: Clinical Nurse Specialists, Nurse Practitioners, Certified Registered Nurse Anesthetists, and Certified Nurse Midwives.

<sup>30</sup> The Guidance also confirms that if any state requires a bachelors degree as a prerequisite to licensure, then the USCIS ought to approve H-1B petitions for nurses in that state. At the time of the guidance’s issuance, North Dakota was the only state that met this standard. North Dakota since has removed the bachelor degree prerequisite, and allows non-bachelor degreed nurses. Therefore H-1B visas for North Dakota nurses are no longer approved. No other states have a bachelor degree licensing prerequisite.

<sup>31</sup> INA §212(a)(5)(C). CGFNS is currently the only organization that is allowed to issue Healthcare Certification to nurses. The CGFNS certificate is known by its trade name, the “Visa Screen.” Much like “Xerox” (for photocopying), “Kleenex” (for facial tissue), and “Google” (for internet search), the specific trademarked term “Visa Screen,” is often used shorthand for “Healthcare Certificate.”

Since all states require physical therapists to obtain a bachelors degree prior to sitting for the National Physical Therapy Examination (NPTE), physical therapists do qualify for H-1B status. Practitioners ought to keep in mind that, technically, the USCIS can strictly apply the licensing requirements of 8 C.F.R. §214.2(h)(4)(v) and deny any physical therapist H-1B cases unless the beneficiary holds the destination state's license at the time of the I-129 filing.<sup>32</sup> That having been said, USCIS has historically approved I-129 Petitions if the beneficiary holds the destination state's Letter of Eligibility.<sup>33</sup>

Foreign national physical therapists may find it difficult to sit for the NPTE. In October 2006 the Federation of State Boards of Physical Therapy's (FSBPT) announced that the NPTE would no longer be offered overseas.<sup>34</sup> Practitioners are encouraged to file an H-1B petition under the job title "Physical Therapist Intern" or "Physical Therapist Trainee." These designations are only open to bachelor degreed professionals and do not require licenses. This strategy avoids tangling with the licensing requirements at 8 C.F.R. §214.2(h)(4)(v). Yet because the proffered position still requires a bachelor degree, compliance with 8 C.F.R. §214.2(h)(4)(iii) is automatic. Since some states require a one-year 'intern period' prior to issuing a full state license,<sup>35</sup> this approach has a collateral benefit. Petitioning healthcare facilities can employ physical therapist interns or trainees during their intern period and establish a relationship with their future PT. Once the PT passes the NPTE and is conferred a full state license, it is necessary to file a new H-1B petition to reflect the change in designation and job title of "Physical Therapist." The Healthcare Certification requirements at INA §212(a)(5)(C) also attach with the new designation.<sup>36</sup>

## **Labor Certification**

The Department of Labor regulations specifically disallow conventional PERM labor certification filings on behalf of Schedule A applicants.<sup>37</sup> The only strategic reason to file a labor certification application is to qualify the occupation under the EB2 category. EB2 cases ordinarily have more favorable cut-off dates than the EB3 cases.

Credible arguments can be made on behalf of sub-classes of nurses and physical therapists who are engaging in job duties that do not require a license. For instance, a PERM case may be filed for the Physical Therapist Intern. Similarly, if a state does not require a Director of Nursing to hold a state nursing license, the petitioner can comfortably file this case under PERM. The clever practitioner can make convincing cases for healthcare managers, officers, and executives. The key question to ask is

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<sup>32</sup> Practitioners should note that this is a considerably stricter standard than the "letter of eligibility" standard for an application for permanent residency. *Cf.* 20 C.F.R. §656.15(c)(1).

<sup>33</sup> My own experience is that the USCIS will approve the H-1B petition for one year. Presumably this gives the beneficiary ample time to take and pass the NPTE.

<sup>34</sup> See <http://www.fsbpt.org/exams/index.asp> (last visited Mar. 19, 2007) ("Effective October 18, 2006 exam scheduling will no longer be available at test sites in the U.S. territories and Canada. If you are currently scheduled to take an exam in the U.S. territories or Canada, you will be able to sit for the exam as scheduled. All future examinations may be scheduled at any of the approximately 300 testing centers in the United States").

<sup>35</sup> See, e.g. Va. Code Ann. § 54.1-3479; 18 VAC 112-20-50 ("An applicant for initial licensure as a physical therapist or a physical therapist assistant who is not a graduate of an approved program shall also submit verification of having successfully completed a full-time 1,000-hour traineeship as a "foreign educated trainee" under the direct supervision of a licensed physical therapist. The traineeship shall be in a facility that serves as an education facility for students enrolled in an accredited program educating physical therapists in Virginia and is approved by the board").

<sup>36</sup> INA §212(a)(5)(C). Two entities, CGFNS and FCCPT, are authorized to issue Certification to Physical Therapists.

<sup>37</sup> 20 C.F.R. §656.15(c)(1) and (2).

whether the position requires a state license to perform the job duties. If the state does not require a license to perform the job duties, then a PERM case is suitable.

Another clever idea is for petitioners to substitute current nurses and physical therapists if the employer has an approved I-140 petition from a past beneficiary with an earlier priority date. The petitioner must take care to remind the USCIS to obtain the prior labor certification from its archives.<sup>38</sup> This approach is controversial since it is unlikely that the DOL and USCIS contemplated a Schedule A substitution case when each agency first permitted substitutions of labor certifications.

### **Country-Specific NIVs: TN, H-1B1, E-3**

There are several country-specific nonimmigrant visa options for Schedule A workers:

- The NAFTA rules allow TN status to be conferred upon Canadian and Mexican nurses and physical therapists.<sup>39</sup>
- The H-1B1 rules allow qualification for Chilean and Singaporean advance practice nurses and physical therapists.<sup>40</sup>
- Advance practice nurses and physical therapists who are Australian nationals meet the E-3 visa standard.

All of these categories are either quota-free nonimmigrant visa classes, or have never exceeded their allocation. Unfortunately, recruiters rarely will find a deep pool of these types of applicants from these countries, although there are some Canadian and Australian nurses and physical therapists. As with all applications or petitions for nurses and physical therapists, INA §212(a)(5)(C) certification must be obtained prior to entry into the U.S.<sup>41</sup>

### **Adjustment of Status Applications filed prior to the retrogression of visa numbers**

Applicants who filed for Adjustment of Status prior to the retrogression of numbers, and who do not have their permanent residency, are in an unusual, albeit advantageous, legal situation.

These applicants are allowed continual work and travel authorization, provided that their Employment Authorization Document and Advance Paroles are timely approved, even though the conference of their permanent residency may be years away. Practitioners are encouraged to mark-up these cases in order to make sure that there is no lapse in benefit.

Pending adjustment beneficiaries can also take advantage of the flexible AC21 rules.<sup>42</sup> AC21 provides that individuals with approved I-140 petitions may switch

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<sup>38</sup> Labor Certification substitutions may soon end. See *AILA InfoNet at Doc. No. 07013170 (posted Jan. 31, 2007)*.

<sup>39</sup> NAFTA Chapter 16, Annex 1603, Appendix 1603.d.1.

<sup>40</sup> INA §101(a)(15)(H)(i)(b1); INA §214(g)(8)(A).

<sup>41</sup> INA §212(a)(5)(C).

<sup>42</sup> INA §204(j).

employers provided that their adjustment application has been pending with USCIS for at least 180 days. The applicant must work in an occupation that is the “same or similar” to the one listed in the underlying approved labor certificate. The applicant should notify the USCIS prior to such a change of employer.

## **CONCLUSION**

Because of the well-documented and undeniable U.S. supply shortages, the limited nonimmigrant options for nurses, and to a lesser extent physical therapists,<sup>43</sup> and the undesirability of a new H-1B-like nonimmigrant visa class, Congress ought to create a specific immigrant visa track for Schedule A occupations that is quota-free. An approach that calls for the DOL to regularly reconfirm this occupation remains in short supply is probably a middle ground that balances the array of policy concerns. Until that day the practitioner is left with a limited range of tactics.

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<sup>43</sup> Managing around the H-1B quota is increasingly difficult.