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Permanent Employment-Based Immigration: Labor Certification and Schedule A

In recent years, U.S. employers have reported widespread shortages of workers in various occupations. These reported labor shortages reinforce long-standing concerns about U.S. international competitiveness, particularly in science and technology. Immigration scholars assert that immigration policy can be used to attract skilled foreign talent, foster technical innovation, and promote economic growth.

The Immigration and Nationality Act of 1952 (INA, Title 8 of the U.S. Code) governing U.S. immigration policy contains employment-based (EB) immigration provisions allowing U.S. employers to sponsor skilled foreign nationals who meet specified criteria for *lawful permanent resident (LPR) status* (i.e., a *green card*).

The INA also requires that employers take steps to ensure such employment does not adversely affect the wages and working conditions of comparatively employed U.S. workers. These INA provisions are implemented through a *labor certification* process that requires employers to demonstrate to the Department of Labor (DOL) that they have attempted to hire U.S. workers for the positions for which they seek foreign workers. Widely viewed as complicated and expensive, labor certification typically adds one to two years to the EB immigration process.

DOL maintains a list of occupations known as *Schedule A* for which DOL has pre-certified the existence of a national labor shortage and for which labor certification is not required. Schedule A currently includes only nurses and physical therapists and was last updated in 1990. Given identified labor shortages in key industries and occupations (e.g., medicine, artificial intelligence), some have proposed expanding the number of Schedule A occupations to expedite the sponsorship of skilled foreign workers.

Permanent Employment-Based Immigration

U.S. employers seeking to sponsor foreign workers for LPR status can do so through the first three of five INA employment-based *preference categories*—EB1 (persons of extraordinary or outstanding ability), EB2 (professionals with advanced degrees, persons of exceptional ability), and EB3 (professionals with bachelor's degrees, *skilled* and *unskilled* shortage workers)—according to a hierarchy of education, skills, and other qualifications. (EB4 and EB5 categories are distinct, covering certain *special* and *employment creation* immigrants, respectively.) Each EB category has an annual numerical limit and together are limited to 140,000 foreign workers and accompanying family members. Labor certification, however, applies only to most EB2 and all EB3 immigrants.

U.S. employers typically sponsor for LPR status foreign workers whom they already employ and who have been residing in the United States in a temporary (nonimmigrant) immigration status (e.g., student F-1 visa or specialty worker H-1B visa). To sponsor EB2 and EB3 foreign workers, employers follow a two-part process. First, they submit a *labor certification application* to DOL. Once approved, they then submit an immigration petition to the U.S. Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS). Some prospective EB immigrants can self-petition, but most EB2 and all EB3 immigrants require sponsoring U.S. employers to petition on their behalf. USCIS approves immigrant petitions of foreign nationals who meet their immigrant category requirements and are not inadmissible.

Labor Certification

The INA's labor certification provisions require employers to demonstrate that there are insufficient U.S. workers and that the foreign national's employment will not adversely affect wages and conditions for similar U.S. workers.

DOL implements this process through the Program Electronic Review Management (PERM) labor certification process managed by DOL's Employment and Training Administration (ETA). Employers must submit ETA Form 9089 *Application for Permanent Employment Certification* for each position. One application can be used for multiple prospective EB immigrants doing the same work.

To obtain labor certification for their prospective permanent immigrant workers, employers must undertake three steps:

1. obtain a *prevailing wage determination* (PWD), typically from DOL;
2. attempt to recruit U.S. workers for the position (*labor market test*); and
3. submit the PERM application to DOL.

First, to comply with the INA's mandate that the hiring of a foreign worker would not adversely affect the wages of comparatively employed U.S. workers, employers must offer to the foreign worker a wage that is at least as much as the *prevailing wage*, defined as the average wage paid to similarly employed workers in that occupation in the area of intended employment. Employers can request prevailing wage information from DOL's National Prevailing Wage Center or use other recognized information sources.

Second, to test the U.S. labor market for willing, available, and qualified U.S. workers, employers must attest that they met mandatory recruitment requirements, including placing

a job order for 30 days with a state workforce agency in the employment location, and advertising the job in an appropriate newspaper or journal. For some occupations, employers must take other documented recruiting steps.

Third, the employer must submit the PERM application to DOL. The *filing date* when DOL receives it is used by USCIS and the State Department as the *priority date* that establishes a prospective immigrant's place in the green card queue. If DOL certifies the application, the labor certification portion of the immigration process is concluded. If DOL denies it, the employer may appeal. If DOL audits the application, the employer typically must provide additional documentation.

Completing PERM requires considerable time. Obtaining a PWD typically requires about six months and recruitment at least two months. Submitting a PERM application to DOL currently requires 9 to 10 months. Thus, employers can expect to require at least 17 months to conclude the process.

Next, employers submit their approved PERM labor certifications to USCIS, along with a USCIS Form I-140 *Immigrant Petition for Alien Workers*, the second and final major step required for hiring a permanent foreign worker.

Schedule A

Schedule A was established in 1965 through regulation to address labor shortages during a period of technological advancement and international competition. According to one historical account, it represented “a pragmatic approach to the administrative burden of issuing individual labor certifications.” The regulations granted the DOL Secretary broad authority to revise Schedule A based on “his own initiative or upon a written petition of any person requesting the inclusion or omission of any occupation” based on “reasonable grounds.” Between 1969 and 1990, the occupations listed on Schedule A changed numerous times, but have not changed substantially since 1990.

Schedule A regulations contain two components. The first component, 20 C.F.R. §656.5, pre-certifies certain workers:

We have determined there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on *Schedule A* and the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in *Schedule A* occupations. An employer seeking a labor certification for an occupation listed on *Schedule A* may apply for that labor certification under §656.15.

20 C.F.R. §656.5 also lists two occupation groups:

- *Group 1* consists of physical therapists and professional nurses who have met the regulatory requirements for qualifications and state licensing.
- *Group 2* consists of “aliens of exceptional ability in the sciences or arts.”

The second component, 20 C.F.R. §656.15, outlines the Schedule A labor certification process. Employers seeking to hire persons employed in Schedule A occupations do not need to conduct a test of the U.S. labor market nor apply to DOL for labor certification. Instead, they submit an uncertified PERM application directly to USCIS, along with the immigrant petition.

USCIS then determines whether the employer and the foreign national have fulfilled the PERM requirements and whether the foreign national is qualified for and intends to pursue the Schedule A occupation. As such, USCIS decides whether to grant the Schedule A labor certification while adjudicating the EB immigrant petition. USCIS's Schedule A determination is final and may not be appealed. USCIS's adjudication of the PERM application is separate from its adjudication of the EB immigrant petition, and approval of the former does not guarantee approval of the latter.

Discussion and Policy Options

DOL's Schedule A ostensibly represents its determination about the measurement and existence of labor shortages. Disagreement exists over what constitutes a labor shortage. While some support more active approaches by the federal government to determining shortage occupations and applying them to immigration policy, others remain skeptical of government intervention in the labor market. Some opponents of such intervention contend that specific judgements of individual employers rather than a government entity would best determine labor market requirements. Apart from these issues surrounding Schedule A, some criticize the labor certification process itself for its cost and time. Others assert that PERM provides merely the appearance of protecting U.S. workers while actually doing little to provide competing U.S. workers with access to jobs.

Revising Schedule A raises contentious issues, including whether relatively skilled foreign workers hired as EB immigrants negatively impact the employment prospects, earnings, and working conditions of U.S. workers; whether PERM itself should be expanded or eliminated; and the degree to which any governmental entity should intercede in the U.S. labor market.

Proposed Schedule A policy options have included:

- Authorizing studies to determine whether Schedule A occupations should be modified or expanded through regulation.
- Expanding the number of occupations in Schedule A. This could involve using a methodology for determining listed occupations that would likely require continuous monitoring and revision, such as the briefly attempted 1993 Labor Market Information Pilot Program.
- Introducing a regional component to Schedule A that allows labor shortages in some parts of the country to be addressed even if they do not register nationally.

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William A. Kandel, Specialist in Immigration Policy

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