May 11, 2024

Via Regulations.gov
Brian Pasternak
Administrator
Office of Foreign Labor Certification
Employment and Training Administration
200 Constitution Avenue NW
Washington, DC 20210
Docket Number ETA-2023-0003

RE: Labor Certification for Permanent Employment of Foreign Workers in the United States; Modernizing Schedule A To Include Consideration of Additional Occupations in Science, Technology, Engineering, and Mathematics (STEM) and Non-STEM Occupations.

Docket Number: ETA-2023-0006 – RIN 1205-AC16 – 88 Federal Register 88290 et seq.

Dear Mr. Pasternak:

Americans for Prosperity Foundation (AFPF), the Cato Institute and Angelo A. Paparelli submit this comment as our response to the December 21, 2023 Request for Information (RFI) issued by the Department of Labor (DOL or Department) soliciting public comments from employers and other interested parties as the DOL considers revising Schedule A of the permanent labor certification process.

AFPF is a nonpartisan organization dedicated to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society.

The Cato Institute is a nonpartisan, nonprofit public policy research organization. For nearly half a century, Cato has produced original research on immigration, finding that immigrants make the United States a more prosperous country.

Angelo Paparelli is certified as a Specialist in Immigration and Nationality Law by the State Bar of California's Board of Legal Specialization and blogger at www.nationofimmigrators.com who joins in this comment solely in his personal capacity and not on behalf of any other person or entity.

Introduction

We commend the DOL for complying with Executive Order 14110 on the "Safe, Secure and Trustworthy Development and Use of Artificial Intelligence" which, among other things, directed the Secretary of Labor to "publish a request for information (RFI) to solicit public input, including from industry and worker-advocate communities, identifying AI and other STEM-related occupations, as well as additional occupations across the economy, for which there is an insufficient number of ready, willing, able, and qualified United States workers."

As the RFI notes, Schedule A – which has not been updated since 2004 – has been comprised of occupational listings and geographic locations where (1) DOL determined that there were insufficient U.S. workers able, willing, qualified, and available for hire, and (2) the employment of noncitizens would not adversely affect the wages and working conditions of similarly employed U.S. workers.

Without question, the U.S. economy and labor market have changed dramatically in the two decades since Schedule A was last updated. We therefore urge DOL to act with dispatch – not merely in gathering information from the public, but more importantly, by promptly publishing a final rule that updates and vastly expands the listing of "shortage" occupations in both STEM and non-STEM fields.[1]

I. DOL must update Schedule A to remain compliant with its PERM regulation and Congressional intent.

In its original 2004 PERM regulation, DOL created the goal that "an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the date the application was initially filed."[2] DOL has completely departed from this regulatory goal. Instead of 60 days, these applications took an astounding 397 days—up from only 96 days in the second quarter of 2019. Instead of meeting the 60-day limit announced in the regulation, the wait time is growing by almost 60 days every six months.

Given that an employer must wait 30 days after they are finished advertising for the job vacancy, DOL would certify PERM petitions within 90 days after recruitment in a scenario where the agency actually complied with its own 60-day limit for certifying applications. This 90-day period corresponds with DOL's Bureau of Labor Statistics' own practice of updating wage and employment data every three months to remain current amid changing economic conditions.[3]

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[1] Throughout this comment, "shortage" will be used in a colloquial, non-technical sense, as the Department of Labor does.

[2] 69 Fed. Reg. 77326, 77328, December 2004, https://www.federalregister.gov/d/04-27653/p-34. (All hyperlinks last visited May 11, 2024).

[3] *See* National Compensation Survey (NCS) Respondents; Frequently Asked Questions, https://www.bls.gov/respondents/ncs/faqs.htm#:~:text=office%2C%20see%20Contacts.-,How%20often%20is%20this%20survey%20updated%3F,June%2C%20September%2C%20and%20December.

The failure of DOL to timely certify PERM petitions also runs afoul of Congressional intent. Congress tasked DOL with ensuring that "there are not sufficient workers who are able, willing, qualified and available at ***the time of application*** for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor."[4] If DOL certifies the PERM petition 397 days after the employer's labor market test was completed, the agency's determination is not being made "at the time of application for a visa" and is decided in an economic environment more likely to be substantially different from the one in which the labor market test was initially conducted.

The PERM delays also undermine the initial purpose of the PERM process, which was to prevent wages and working conditions of domestic workers from being adversely affected. The PERM process has grown so long that it impedes beneficiaries' ability to switch jobs, contributing to an uneven playing field that disenfranchises both domestic and foreign workers in favor of some employers.[5]

Under current law, an individual whose adjustment of status has been pending for over 180 days is eligible to change employers.[6] This 180-day clock, however, may only begin once DOL certifies the PERM petition. While it is true that guest workers waiting for permanent residency earn within the top 10 percent of U.S. wage earners and find success switching employers,[7] their job portability would be greater if not for PERM delays, thereby preventing the labor market from being as competitive as it would otherwise be under a system in which PERMs were adjudicated on time.

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[4] *See* INA § 212(a)(5)(A).

[5] Peter Norlander, "Do guest worker programs give firms too much power?" *IZA World of Labor*, June 2021, https://wol.iza.org/uploads/articles/572/pdfs/do-guest-worker-programs-give-firms-too-much-power.pdf.

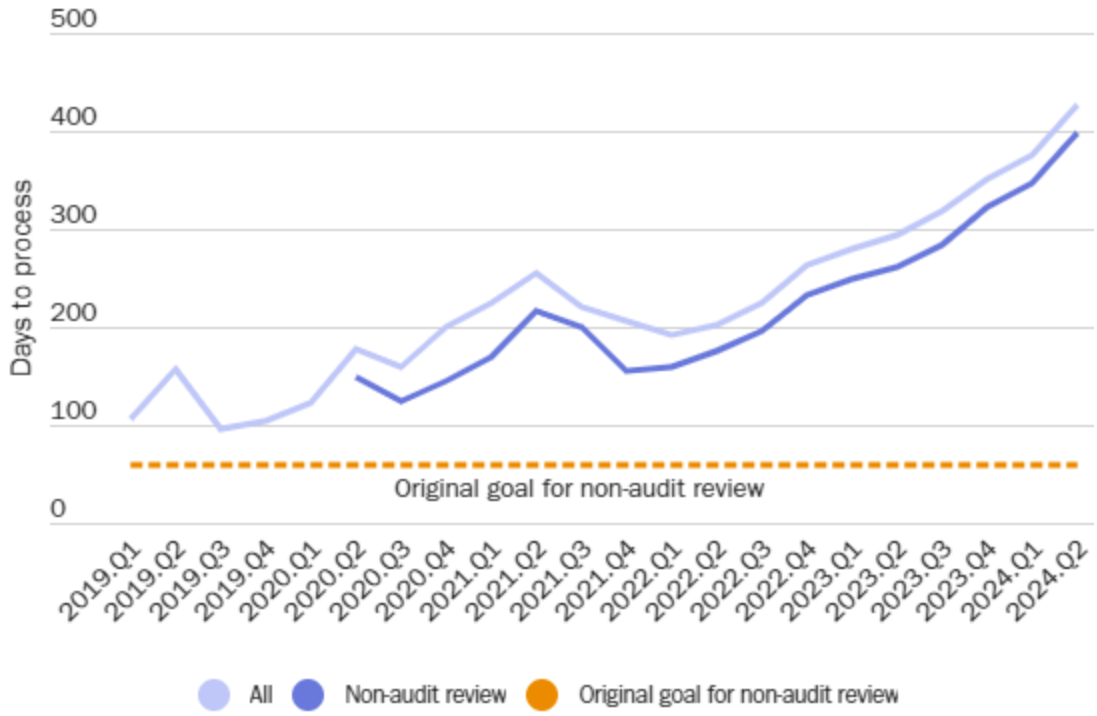
[6] *See* 8 U.S.C. § 1154(j).

[7] David J Bier, "Not Indentured: Most New H-1B Hires Are Changing Jobs," *Cato at Liberty* Blog, August 16, 2024, https://www.cato.org/blog/not-indentured-most-new-h-1b-hires-are-changing-jobs.

Figure 1

Waits for labor certification applications far exceed the DOL's target

Average days to process a permanent labor certification by quarter, FY 2019–2024



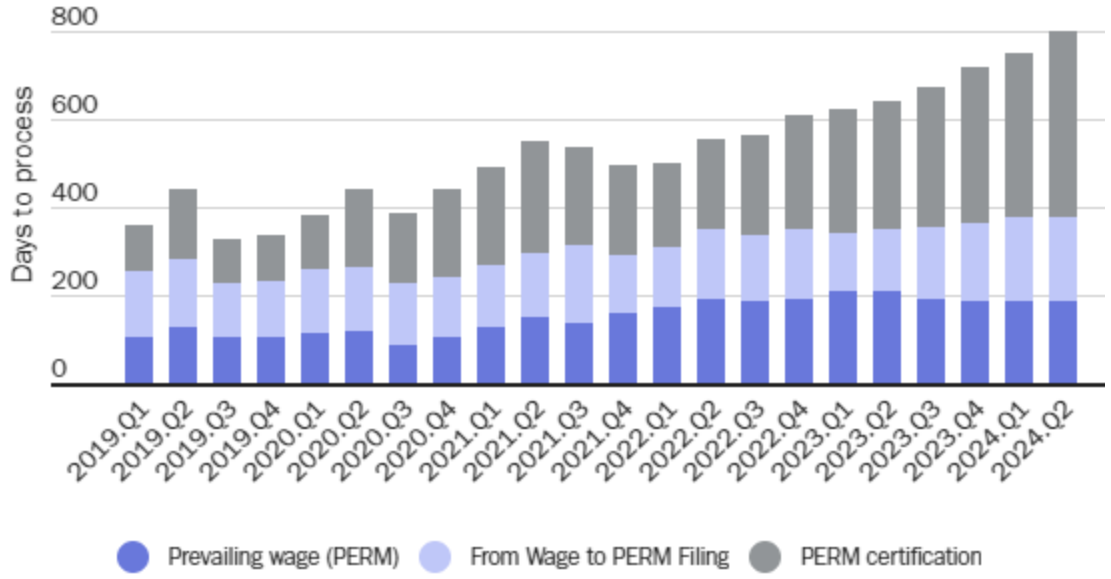
Source: "Performance Data," Department of Labor, 2024; "Processing Times," Department of Labor, 2024; 69 Fed. Reg. 77325 (2004).

The reality, however, is that these waits are actually misleadingly *short*. A prevailing wage determination is a prerequisite for a permanent labor certification, and DOL is taking an exceedingly long period to adjudicate these applications (186 days) in FY 2024. Because of the uncertainty in the prevailing wage determination process, most employers are also waiting until that process is complete to begin recruitment, which is taking an average of 189 days to complete after the prevailing wage determination. Altogether, in FY 2024, it is taking an employer an average of 800 days to complete the entire PERM process. This ignores the additional processing and waiting periods for petitions and applications to the Department of Homeland Security and State Department after PERM is over.

Figure 2

Days to process permanent labor certifications and prevailing wage requests

FY 2019-2024



Source: "Performance Data," Department of Labor, 2024.

Notes: DOL = Department of Labor Office of Foreign Labor Certification.

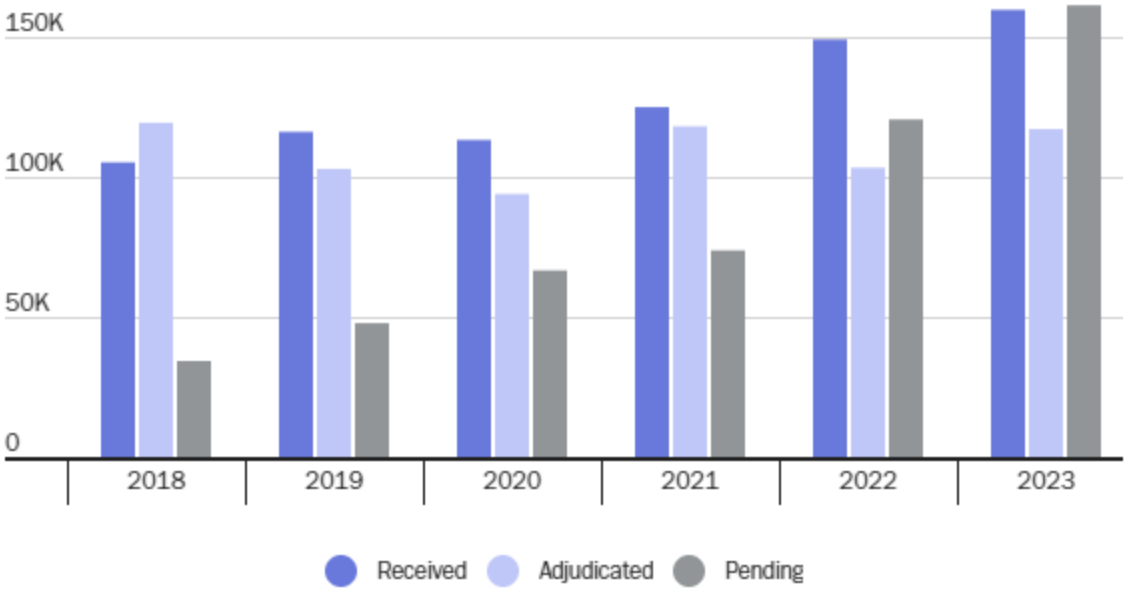
Naturally, the result of the PERM delays is that a huge backlog has developed, increasing from about 27,000 in 2019 to over 161,000 in the first quarter of FY 2024.[8] This is now more than an entire year's worth of filings and adjudications. It's likely that at the current pace, none of the filings being submitted right now will be reviewed by the DOL for a year and a half or more.

DOL is not increasing adjudications in response to this crisis. From calendar year 2019 to 2023, DOL has not adjudicated as many applications as in 2018 (Figure 3). In total, just keeping up with the 2018 pace would have reduced a cumulative 61,000 backlogged cases. That pace would have been insufficient to keep up with demand, but it would be better than where the agency is at the moment. Given that it has proven incapable of increasing adjudications through the individualized procedure, it must update Schedule A to meet its legal obligations to issue certifications and follow its own regulations as well as the intent of Congress.

[8] https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2024_Q1.pdf.

Figure 3

Permanent labor certification cases, received and pending, CY 2018–2023



Sources: "Selected Statistics," Department of Labor, Office of Foreign Labor Certification, 2012–2024 (archived); and "Foreign Labor Certification, Annual Report," Department of Labor.

II. Beyond external, readily available data sources, DOL has long possessed, and indeed now has access to abundant information and resources needed to refresh the Schedule A listing of "shortage" occupations.

We note DOL's statement in the RFI that the Department's own data sources and those maintained by the U.S. Census Bureau "do not appear to be sufficient for determining appropriate revisions to Schedule A." (88 Fed. Reg. at 88291.) This comes as a surprise, given that as far back as 1993, as the RFI acknowledges in Footnote 6, the Department published a proposed rule that contained an extensive list of shortage occupations then prevalent across the United States. [9]

Much like the invitation extended by Executive Order 14110 to develop a new listing of occupations in short supply, the "Labor Market Information Pilot Program for Employment-Based Immigrants" was an invitation – tendered by Congress in § 122(a) of the Immigration Act of 1990 (IMMACT) – authorizing the Department for three fiscal years to list labor shortages in up to 10 defined occupational classifications in the United States and, with respect to such jobs, to grant labor certifications to be used by employers sponsoring qualified noncitizens for employment-based permanent residency.

Although this congressional authorization was terminated in § 219(ff) of the Immigration and Nationality Technical Corrections Act of 1994, the Department, for reasons not apparent in the public

[9] *See* Proposed Rule, *Labor Certification Process for the Permanent Employment of Aliens in the United States; Labor Market Information Pilot Program,* 58 FR 15242, 15242 (Mar. 19, 1993), *available at https://www.govinfo.gov/content/pkg/FR-1993-03-19/pdf/FR-1993-03-19.pdf*.

record, never published a final rule implementing the pilot program. The DOL's inaction, however, was not mirrored by the legacy agency, the Immigration and Naturalization Service, which contemporaneously finalized 8 CFR §§ 204.5(a)(2), 204.5(k)(4) and 204.5(l)(3)(ii)(B) – provisions inherited by the successor immigration-benefits agency, U.S. Citizenship and Immigration Services – that regrettably persist today as dead letters. It is perhaps a fair inference to conclude, therefore, that Congress eliminated the program because the Department never published a final and effective list of shortage occupations.

This unfortunate history aside, DOL now has the opportunity and capability, with prodding from President Biden in Executive Order 14110, to make amends and publish an updated and expanded Schedule A.

Contrary to the DOL's assertions in the RFI, it possesses occupational shortage data derived from 102,286 approved labor certifications issued in Fiscal Year 2023.[10] Indeed, this data source will only grow as more labor certifications are approved over time. We therefore urge DOL to do what it should have done in 1993 and continuously since then, namely, to speedily publish a final rule which updates and significantly expands Schedule A with comprehensive listings of STEM and non-STEM shortage occupations. The U.S. economy and American workers deserve no less.

III. DOL should grant Schedule A to any occupations with an approval rate of 98 percent or higher.

DOL approves nearly all permanent labor certifications. In the first quarter of FY 2024, it approved 94 percent of all permanent labor certifications that it adjudicated.[11] From FY 2015 to FY 2024, it approved nearly 95 percent of all adjudicated applications. This means that DOL is reviewing and approving about 20 applications to find a single denial. This undermines the idea that expanding Schedule A would undermine a critical safeguard for U.S. workers.[12]

But for many occupations, the difference is even more extreme. Table 1 is a list of 83 occupations accounting for two-thirds of all labor certifications, which have denial rates of two percent or less (including only occupational codes with at least 20 applications). DOL is reviewing 57 applications for each denial in these occupations. This is totally unjustifiable. Moving these 83 occupations to Schedule A would speed up the other one-third of applications and give the agency more time to review the applications with higher denial rates. These occupations have demonstrated that there is a shortage, so there is no need to subject them to an individualized review.

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[10] *See* Employment and Training Administration, Office of Foreign Labor Certification publication, "Permanent Employment Program – Selected Statistics, Fiscal Year (FY) 2023," accessible here: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2023_Q4.pdf.

[11] DOL, "Performance Data," 2024, https://www.dol.gov/agencies/eta/foreign-labor/performance.

[12] A portion of this comment can be found as originally published here: David J. Bier, "DOL Must Update Its Shortage Occupation List to Streamline Green Cards," *Cato at Liberty* Blog, April 30, 2024, https://www.cato.org/blog/dol-must-update-its-schedule-shortage-occupation-list-streamline-green-cards.

This is not the only way that DOL should consider whether an occupation is a shortage occupation, but it is a useful place to start. This is something that DOL has directly measured over a long period of time and bears directly on the question of whether it is worth DOL's limited resources to review these particular applications. The current processing is absorbing an enormous amount of agency resources to deny a tiny fraction of applicants.

Table 1

Permanent labor certifications, occupations with 2% or lower denial rate, Cumulative, 2019-2024.Q1

Title and Code	Certified	Denied	Denial_Rate
All Occupations with 2% or Less Denial Rate	**332,618**	**5,843**	**2%**
Software Developers, Applications 15-1132	129,160	2,664	2%
Software Developers, Systems Software 15-1133	54,520	634	1%
Information Technology Project Managers 15-1199	35,673	562	2%
Computer Systems Analysts 15-1121	31,657	680	2%
Statisticians 15-2041	13,039	164	1%
Electronics Engineers, Except Computer 17-2072	10,860	149	1%
Computer And Information Systems Managers 11-3021	7,823	182	2%
Mechanical Engineers 17-2141	6,880	172	2%
Software Developers 15-1252	5,159	37	1%
Database Administrators 15-1141	3,172	69	2%
Information Security Analysts 15-1122	2,753	45	2%
Financial Quantitative Analysts 13-2099	2,405	27	1%
Materials Engineers 17-2131	2,308	25	1%
Engineers, All Other 17-2199	2,125	48	2%
Physicians And Surgeons, All Other 29-1069	2,120	40	2%

Computer Network Architects 15-1143	1,822	34	2%
Business Teachers, Postsecondary 25-1011	1,596	27	2%
Operations Research Analysts 15-2031	1,416	31	2%
Computer Hardware Engineers 17-2061	1,355	19	1%
Computer And Information Research Scientists 15-1111	1,288	18	1%
Health Specialties Teachers, Postsecondary 25-1071	956	11	1%
Computer Science Teachers, Postsecondary 25-1021	873	19	2%
Engineering Teachers, Postsecondary 25-1032	871	17	2%
Economists 19-3011	826	9	1%
Computer Systems Analysts 15-1211	798	4	0%
Regulatory Affairs Specialists 13-1041	726	17	2%
Mathematical Science Teachers, Postsecondary 25-1022	637	13	2%
Natural Sciences Managers 11-9121	592	15	2%
Project Management Specialists 13-1082	504	2	0%
Economics Teachers, Postsecondary 25-1063	489	5	1%
Data Scientists 15-2051	483	3	1%
Software Developers, Applications, Non Rd 15-1034	481	8	2%
Bioinformatics Scientists 19-1029	478	9	2%
Foreign Language And Literature Teachers, Postsecondary 25-1124	456	6	1%
Actuaries 15-2011	448	9	2%
Nursing Assistant 31-1131	414	8	2%
Software Quality Assurance Analysts And Testers 15-1253	382	-	0%
Family And General Practitioners 29-1062	336	6	2%
Animal Scientists 19-1011	290	6	2%
Pediatricians, General 29-1065	278	6	2%
Psychiatrists 29-1066	248	6	2%
Biological Science Teachers, Postsecondary 25-1042	235	3	1%
Communications Teachers, Postsecondary 25-1122	233	4	2%
Database Architects 15-1243	221	1	0%
Surgeons 29-1067	202	2	1%
Political Science Teachers, Postsecondary 25-1065	194	-	0%
Education Teachers, Postsecondary 25-1081	181	4	2%
Physics Teachers, Postsecondary 25-1054	158	1	1%
Psychology Teachers, Postsecondary 25-1066	153	1	1%
Chemistry Teachers, Postsecondary 25-1052	146	-	0%
English Language And Literature Teachers, Postsecondary 25-1123	130	2	2%
Woodworking Machine Setters, Operators, And Tenders, Except Sawing 51-7042	126	1	1%

Mathematicians 15-2021	123	3	2%
Geoscientists, Except Hydrologists And Geographers 19-2042	123	3	2%
Area, Ethnic, And Cultural Studies Teachers, Postsecondary 25-1062	113	-	0%
Recreation And Fitness Studies Teachers, Postsecondary 25-1193	104	-	0%
Agricultural Sciences Teachers, Postsecondary 25-1041	100	1	1%
Architecture Teachers, Postsecondary 25-1031	95	2	2%
History Teachers, Postsecondary 25-1125	90	-	0%
Molding, Coremaking, And Casting Machine Setters, Operators, And Tenders, Metal And Plastic 51-4072	82	2	2%
Highway Maintenance Workers 47-4051	80	-	0%
Sociology Teachers, Postsecondary 25-1067	78	-	0%
Information Security Analysts 15-1212	77	-	0%
Atmospheric, Earth, Marine, And Space Sciences Teachers, Postsecondary 25-1051	73	1	1%
General Internal Medicine Physicians 29-1216	72	-	0%
Social Work Teachers, Postsecondary 25-1113	68	1	1%
Statistical Assistants 43-9111	66	1	1%
Environmental Science Teachers, Postsecondary 25-1053	56	1	2%
Information Technology Project Managers 15-1299	54	1	2%
Nursing Instructors And Teachers, Postsecondary 25-1072	52	-	0%
Financial Risk Specialists 13-2054	47	-	0%
Optometrists 29-1041	46	1	2%
Extruding, Forming, Pressing, And Compacting Machine Setters, Operators, And Tenders 51-9041	45	-	0%
Geography Teachers, Postsecondary 25-1064	45	1	2%
Solar Photovoltaic Installers 47-2231	38	-	0%
Anthropology And Archeology Teachers, Postsecondary 25-1061	35	-	0%
Computer Network Architects 15-1241	32	-	0%
Library Science Teachers, Postsecondary 25-1082	27	-	0%
Chemical Technicians 19-4031	26	-	0%
Computer Programmers 15-1251	25	-	0%
Industrialorganizational Psychologists 19-3032	25	-	0%
Radiologic Technologists 29-2034	25	-	0%
Oral And Maxillofacial Surgeons 29-1022	20	-	0%

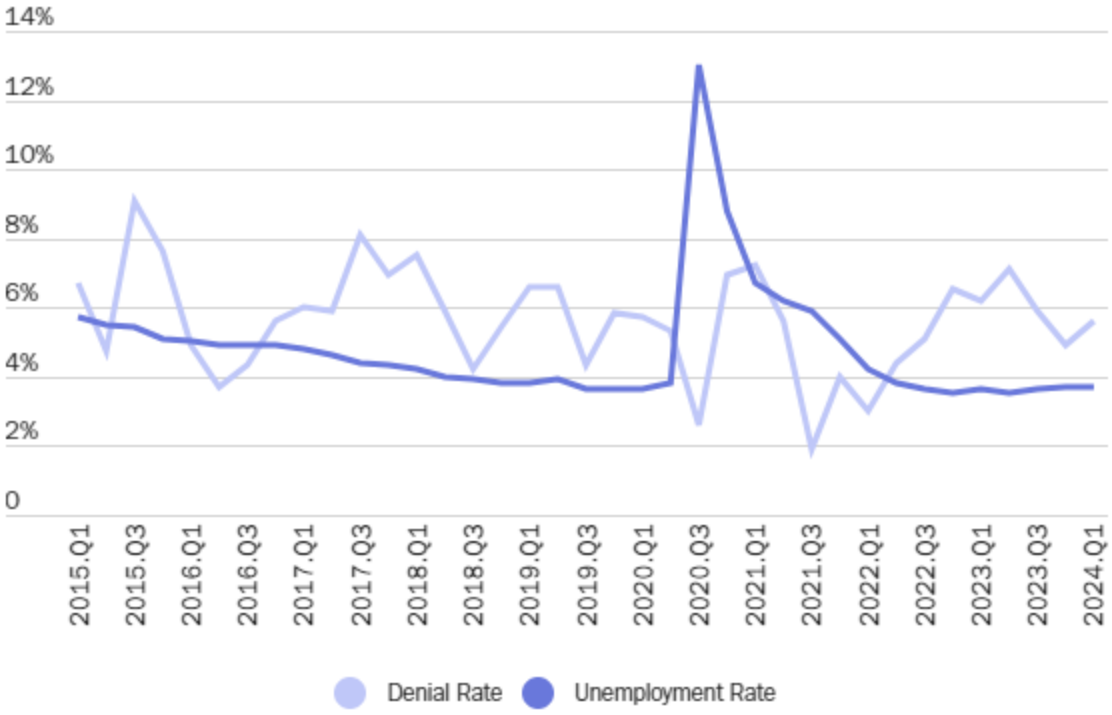
Source: Department of Labor, "Performance Data," 2024

Of course, the employment situation in the United States is not static, but the unemployment rate is almost irrelevant in these highly specialized jobs that seek permanent labor certification. In 2020, when the unemployment rate increased, the permanent labor certification denial rate actually went down (Figure 4). There is no statistically significant correlation between the quarterly unemployment rate and permanent labor certification rate from 2015 to the first quarter of FY 2024.

Figure 4

Unemployment rate and permanent labor certification denial rate

FY 2015–2024.Q1



Source: "Performance Data," Department of Labor, 2024; U.S. Bureau of Labor Statistics, Unemployment Rate [UNRATE], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/UNRATE, April 26, 2024.

IV. DOL must update the Schedule A list to include founders and owners of startup and existing businesses.

The DOL's PERM regulations have long imposed a strong presumption against granting a labor certification in situations where there is any "alien influence and control over [the] job opportunity." These situations include instances where "the employer is a closely held corporation or partnership in which the alien has an ownership interest, or . . . [where] there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or . . . [where] the alien is one of a small number of employees." *See* 20 CFR § 656.17(l). This regulation, which follows an administrative tribunal decision, *Matter of Modular Container Systems, Inc.*, 89-INA-288 (BALCA 1991) and its progeny, is premised on the duty of the sponsoring employer to demonstrate the existence of a bona fide job opportunity, i.e. to prove that the job is available to all U.S. workers.

Unfortunately, however, the Department's presumptive bar to standard labor certification for noncitizen founders of small businesses flies in the face of numerous research studies that have

established the salutary and oversize contributions of immigrant entrepreneurs to the U.S. economy and U.S. labor market.[13]

DOL should remedy this defect in the standard labor certification process by amending Schedule A to list such occupations as Chief Executives, Chief Financial Officers, Operation Vice President, Information Technology Project Managers, and other professions under which founders are commonly classified. The Department's O*Net already lists job codes for these positions at https://www.onetonline.org/link/summary/11-1011.00 and https://www.onetonline.org/link/summary/15-1299.09 which should be incorporated into Schedule A as available for founder occupations that are in shortage.

Such an amendment to Schedule A for small business and startup founders would not duplicate other existing immigration programs which provide overly limited or no options for permanent residency in the U.S., such as the E-2 treaty investor, the international entrepreneur parolee, the EB-2 national-interest-waiver self-petitioner or employer-sponsored petitioner, and the EB-5 immigrant investor, as noted below:

- The E-2 provides no option to qualify for lawful permanent resident status – indeed, it requires that the applicant express "an unequivocal intent to depart the United States upon termination of E status . . . [and that s/he intends] to depart the United States at the end of their authorized

[13] See, e.g., Azoulay, Pierre, Benjamin F. Jones, J. Daniel Kim, and Javier Miranda. 2022. "Immigration and Entrepreneurship in the United States." American Economic Review: Insights, 4 (1): 71-88 (Abstract: "A simple model provides a measurement framework for addressing the dual roles of immigrants as founders and workers. The findings suggest that immigrants act more as 'job creators' than 'job takers' and play outsized roles in US high-growth entrepreneurship"), accessible here: https://www.aeaweb.org/articles?id=10.1257%2Faeri.20200588; Kerr, Sari Pekkala, and Kerr, William R., "Immigrant Entrepreneurship," Harvard Business School, Working Paper 17-011 (June 20116)(Abstract: "Our work quantifies immigrant contributions to new firm creation in a wide variety of fields and using multiple definitions"), accessible here: https://www.hbs.edu/ris/Publication%20Files/17-011_da2c1cf4-a999-4159-ab95-457c783e3fff.pdf; Vandor, Peter, "Research: Why Immigrants Are More Likely to Become Entrepreneurs," Harvard Business Review (August 4, 2021)(" Summary[:]
We know that immigrants around the world are more likely to start companies than native-born populations . . . New research suggests . . . [findings to] policy makers, who might want to extend support beyond beyond the small group of later-stage international entrepreneurs who are usually the target of entrepreneurship visa programs and investment promotion agencies"); Anderson, Stuart, "Immigrants and Billion-Dollar Companies," National Foundation for American Policy (October 2018)("Executive Summary[:] Immigrants have started more than half (50 of 91, or 55%) of America's startup companies valued at $1 billion or more and are key members of management or product development teams in more than 80% of these companies"), accessible here: https://nfap.com/wp-content/uploads/2019/01/2018-BILLION-DOLLAR-STARTUPS.NFAP-Policy-Brief.2018-1.pdf; Anderson, Stuart, "Immigrants and Nobel Prizes," National Foundation for American Policy (October 2023)("Executive Summary[:] Immigrants have been awarded 40%, or 45 of 112, of the Nobel Prizes won by Americans in chemistry, medicine and physics since 2000 . . ."), accessible here: https://nfap.com/research/immigrants-and-nobel-prizes-1901-2023/; Anderson, Stuart, "AI and Immigrants," National Foundation for American Policy (June 2023)("Executive Summary[:] Immigrants have founded or cofounded nearly two-thirds (65% or 28 of 43) of the top AI companies in the United States . . .").

stay, and not stay in the United States to adjust status or otherwise remain in the United States."[14]

- The international entrepreneur parolee may be granted only temporary parole entries of not more than five years in total with no prescribed pathway to lawful permanent residency.[15]
- The EB-2 self-petitioner or employer-sponsored petitioner must prove to a USCIS adjudicator by a preponderance of the evidence that the "proposed endeavor has substantial merit and national importance" – thereby excluding many small business founders.[16]
- The EB-5 immigrant investor category requires capital investment sums that are far in excess of what many noncitizen startup founders and small business owners require for initial capital, as well as a commitment to hire at least 10 U.S. workers, a payroll which may be more than necessary for the success of the enterprise – thereby likewise excluding many noncitizen entrepreneurs.[17]

We urge the Department to expand Schedule A to include labor certification waivers that benefit noncitizen owners of small businesses and startups.

V. DOL should include L-1B intracompany transferees with specialized knowledge in Schedule A.

The Department should include in its Schedule A waiver of labor certification an avenue for noncitizens in the L-1B visa category who have "specialized knowledge" to obtain lawful permanent residency through the employment-based immigrant visa process. This action would do more than that which the DOL proposed in 1976 when it included these individuals in what was then Group IV of Schedule A:

> Group IV: Immigrant aliens who have been admitted to the United States under section 1101(a)(15)(L) of the Act [INA § 101(a)(15)(L)] and who are currently working temporarily in . . . positions requiring specialized knowledge with the same international corporations or organizations as when they were admitted.[18]

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[14] *See* 9 Department of State's *Foreign Affairs Manual*, Note 9 FAM 402.9-4(C)("Intent to Depart Upon Termination of Status").

[15] *See* 8 CFR § 212.19(f):

> Limitations. No more than three entrepreneurs may be granted parole under this section based on the same start-up entity. An alien shall not receive more than one initial grant of entrepreneur parole or more than one additional grant of entrepreneur re-parole based on the same start-up entity, **for a maximum period of parole of five years**. (Emphasis added.)

[16] See USCIS Policy Manual, Volume 6, Part F, Chapter 5 ("*First Prong: First Prong: The Proposed Endeavor has both Substantial Merit and National Importance*[.]")(Italics in original.)

[17] See USCIS Policy Manual, Volume 6, Part G, Chapter 2 ("Required Amount of Investment").

[18] *See* Department of Labor Notice of Proposed Rule, 41 Fed. Reg. 48938 (Nov. 5, 1976), accessible here: https://www.govinfo.gov/content/pkg/FR-1976-11-05/pdf/FR-1976-11-05.pdf.

L-1B nonimmigrants now may remain in the U.S. for an aggregate period of only five years.[19] To qualify a noncitizen beneficiary who has been employed abroad for at least one of the preceding three years by an employer that is part of a "qualifying organization" for L-1B visa status, a U.S. petitioning employer must persuade USCIS that the demanding legal requirement of "specialized knowledge" has been satisfied.

As the USCIS Policy Manual prescribes, this standard requires extensive evidence:

> A beneficiary may establish specialized knowledge by possessing either special or advanced knowledge, or both. Determining whether a beneficiary has special knowledge requires review of the beneficiary's knowledge of how the petitioning organization manufactures, produces, or develops its products, services, research, equipment, techniques, management, or other interests (or in brief, its products or services).
>
> Determining whether knowledge is special or advanced inherently requires a comparison of the beneficiary's knowledge against that of others. The petitioner bears the burden of establishing such a favorable comparison. Because special knowledge concerns knowledge of the petitioning organization's products or services and its application in international markets, the petitioner may meet its burden through evidence that the beneficiary has knowledge that is distinct or uncommon in comparison to the knowledge of other similarly employed workers in the particular industry.
>
> Alternatively, because advanced knowledge concerns knowledge of a petitioning organization's processes and procedures that is not commonly found in the relevant industry, the petitioner may meet its burden through evidence that the beneficiary has knowledge of or expertise in the petitioning organization's processes and procedures that is greatly developed or further along in progress, complexity, and understanding in comparison to other workers in the employer's operations.[20]

L-1B noncitizens admitted to the U.S. who possess specialized knowledge based on at least a year of employment abroad within a qualifying organization of related companies during the three years preceding entry present no threat to the job opportunities, wages and working conditions of U.S. workers who very likely do not have such prior experience or knowledge. Therefore, there is no need to require a standard recruitment test under the PERM labor certification rules. We urge that Schedule A be amended to include an employment-based option for L-1B noncitizens to qualify for U.S. permanent residency.

VI. DOL must create a process to expedite Schedule A prevailing wage determinations.

As DOL reports, "Prevailing Wage Determination Processing Times (as of 1/31/2024)" take several months to be issued following submission of ETA Form 9141.[21] In FY 2024, it is taking 186 days to

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[19] *See* 8 CFR § 214.2(l)(12)(i).

[20] *See* USCIS Policy Manual, Volume 2, Part I, Chapter 4 ("B. Application of Specialized Knowledge"), accessible here: https://www.uscis.gov/policy-manual/volume-2-part-l-chapter-4 (last visited on May 11, 2024).

[21] See "Prevailing Wage Determination Processing Times (as of 1/31/2024)," accessible here: https://flag.dol.gov/processingtimes (last visited on May 11, 2024).

process a prevailing wage determination request (Figure 2). Under current DOL regulations, a prevailing wage determination is a prerequisite to qualify for a Schedule A waiver of the standard labor certification process. The delay in securing from the Department a prevailing wage determination results in a corresponding delay before the triggering of a Schedule A "priority date" under the likewise backlogged employment-based immigrant visa quota system.

By contrast, DOL has established an expeditious means of securing a prevailing wage for purposes of the H-1 B visa category under its Labor Condition Application (LCA) regulations, including by securing online an "Occupational Employment Statistics (OES) Prevailing Wage" or "Another Legitimate Source (Other than OES) or an Independent Authoritative Source."[22] A prevailing wage contained in an H-1B LCA must be certified by the Department within seven days unless the Secretary of Labor determines that the LCA is incomplete or contains obvious inaccuracies.[23]

DOL should amend Schedule A so that a similarly expeditious process for prevailing wage determinations be included or incorporated by reference to the Department's H-1B LCA regulations.

* * *

DOL's goal should always be to optimize its resources and avoid the lengthy delays that harm U.S. companies that file labor certification applications. According to DOL data, these companies employ over 84 million people,[24] and harming these companies only harms their existing employees who work alongside immigrant workers. It also harms countless U.S. consumers who use the products and services that these immigrants produce in the United States.

For all of the foregoing reasons, DOL must expeditiously finalize regulations to expand Schedule A listings of occupational classifications in STEM and non-STEM fields.

Sincerely,

Sam Peak
Americans for Prosperity

David Bier
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Angelo A. Paparelli

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[22] *See* "Labor Condition Application for H-1B, H-1B1 and E-3 Nonimmigrant Workers Form ETA-9035CP –General Instructions for the 9035 & 9035E," Instructions to Item 11 "Prevailing Wage," accessible here: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/eta_form_9035cp.pdf.

[23] *See* INA § 212(n)(1)(G).

[24] DOL, "Performance Data," 2024, https://www.dol.gov/agencies/eta/foreign-labor/performance