



May 13, 2024

Brian Pasternak  
Administrator  
Office of Foreign Labor Certification  
Employment and Training Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW, N-5311  
Washington, DC 20210

**Re: Request for Information, Employment and Training Administration (ETA),  
Department of Labor; 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 (88 Fed. Reg. 88,290-  
88,295, RIN 1205-AC16, December 21, 2023)**

Dear Administrator Pasternak:

The U.S. Chamber of Commerce appreciates the opportunity to comment on the above-referenced request for information. Schedule A was established back in 1965 with the purpose of identifying certain occupations and categories of qualifications for which there were a) insufficient numbers of workers who were able, willing, qualified, and available to fill those job openings in the U.S. and b) the employment of foreign nationals in these specific fields would not adversely affect similarly employed U.S. workers.<sup>1</sup>

The U.S. Department of Labor (“Department” or “DOL”) last updated Schedule A in 2004,<sup>2</sup> even though the Labor Secretary has broad authorities to amend the list. There are very few occupations that are covered by Schedule A; the list currently

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<sup>1</sup> U.S. Department of Labor, Final Rule, *Availability of, and Adverse Effect on American Workers*, 30 Fed. Reg. 14979, 14979-80 (Dec. 2, 1965), available at: [https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/INA/REFERENCES/FEDERAL\\_REGISTER/30\\_FED. REG. 14979 \(DEC. 3, 1965\).PDF](https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/INA/REFERENCES/FEDERAL_REGISTER/30_FED. REG. 14979 (DEC. 3, 1965).PDF).

<sup>2</sup> U.S. Department of Labor, Employment & Training Administration, Request for Information, *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*, 88 Fed. Reg. 88290 (Dec. 21, 2023), available at: <https://www.govinfo.gov/content/pkg/FR-2023-12-21/pdf/2023-27938.pdf>.

includes only physical therapists, professional nurses, and immigrants of exceptional ability in the arts, sciences, and performing arts.<sup>3</sup>

The Chamber views the Department's long-standing treatment of Schedule A as divorced from reality. Schedule A was crafted to identify the type of labor shortages in certain fields that were so significant as to warrant the employer being waived from the permanent labor certification requirement when seeking to hire/retain a foreign national worker on an employment-based immigrant visa. Updating Schedule A is long overdue.

The U.S. economy has changed significantly since Schedule A's last update. Upon its review of the comments submitted to it in this RFI, the Chamber urges the Department to expeditiously begin the process of publishing a notice of proposed rulemaking that will update Schedule A to reflect U.S. economic conditions today. In addition, we call upon the Department to establish an objective, data-driven methodology that will guide the periodical updating of the Schedule A occupation list. Establishing these procedures in concert with more opportunities for stakeholder engagement and input on this topic, which will ensure that this underutilized tool will not remain on autopilot for several decades when it could have been used to better serve the interests of American businesses, the economy, and of American workers.

A properly modernized Schedule A will better serve our national interests in several ways. American companies will have more certainty in meeting their workforce needs, particularly for workers in critical occupations where employers in certain industries have struggled for several years to fill their job openings. Similarly, the Labor Department will have the ability to better utilize its limited resources because the Department will no longer need to process a labor certification for foreign nationals seeking a job in an occupation that is certain to not adversely impact a similarly-situated American workers' wages or working conditions. To that end, the resources freed up by expanding Schedule A could be repurposed to focus on those labor certifications for foreign nationals where there is a greater potential for adverse impacts upon American workers.

The Department should also consider moving beyond its myopic focus on occupational classifications in isolation of all other considerations regarding Schedule A. U.S. companies are confronting significant workforce challenges today and will likely be dealing with them for the foreseeable future. In this regard, DOL should account for educational and skill achievements of specific foreign nationals to expand the reach of any potential Schedule A reforms. This would help the Department better identify those fields of endeavor where our nation would benefit from the occupation's inclusion on the Schedule A list.

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<sup>3</sup> See 20 CFR 656.5.

## *The Benefits of Establishing Data-Driven Methodologies for Updating Schedule A*

There are several benefits that would inure to the U.S. if the Labor Department not only updated Schedule A in the near future, but also committed to periodically updating it going forward. As stated earlier, using objective criteria and stakeholder engagement to inform these routine changes will ensure that certain occupations and categories are included when employers are having difficulties finding workers to fill their job openings. Conversely, in situations where a worker shortage no longer exists in a particular occupational classification, those occupations should be taken off the Schedule A list to ensure that American workers are adequately protected from potential adverse impacts upon their wages or working conditions.<sup>4</sup> Lastly, ensuring that the Labor Department periodically reviews its conclusions will help ensure that Schedule A adequately reflects the conditions in the American economy at any given point in time.

One important consideration that the Labor Department must confront is that the American economy is confronting significant workforce challenges across multiple industries. A revamped, modernized Schedule A will help American businesses address these problems, as our nation's economy has 8.8 million open jobs and only 6.4 million unemployed workers in the U.S. that could theoretically fill these jobs.<sup>5</sup> The raw data doesn't begin to scratch the surface of the skills mismatch between the educational and training requirements for many of these open jobs and the employment qualifications associated with Americans who are currently unemployed. This only further illustrates the need for the Department to seriously address the shortcomings of Schedule A.

Another key consideration for DOL is that the workforce challenges that U.S. employers are facing are not unique to our country. Many other countries are facing similar challenges. Recent findings from Randstad showed that following:

- European employers were struggling to fill roughly 1 million job openings as of late last year;
- Australian companies were working to fill over 400,000 job vacancies in their labor market, and;
- Singapore had 194 job vacancies for every 100 available candidates for those openings.<sup>6</sup>

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<sup>4</sup> See INA 212(a)(5); 8 U.S.C. § 1182(a)(5). See also 20 C.F.R. 656.5.

<sup>5</sup> USCC America Works Data Center, May 2, 2024, accessed on May 9, 2024 at <https://www.uschamber.com/workforce/america-works-data-center>.

<sup>6</sup> "Why is There a Global Labor Shortage," Feb. 20, 2024, last accessed on May 8, 2024, at <https://www.randstad.com/workforce-insights/talent-acquisition/why-there-a-global-labor-shortage/>.

These examples show that America's labor problems are not unique to us, nor is the federal government alone in its construction of a tool like Schedule A to help ensure that acute domestic labor needs can be met by employers.

The United Kingdom, Australia, Singapore, and many other countries have established shortage occupation lists that are similar to Schedule A. The UK's Migration Advisory Committee (MAC) manages its Shortage Occupation List (SOL) and updates it routinely. In recent years, the MAC updated this list in 2020 and 2023.<sup>7</sup> Australia maintains several Skilled Migration Occupation Lists, which were most recently reviewed in 2023.<sup>8</sup> Singapore, similarly, has a Shortage Occupation list, which is reviewed annually by its Ministry of Manpower and is subject to a more thorough review every three years.<sup>9</sup>

There are several other countries that maintain similar lists. Denmark maintains a Positive List for Skilled Work, which is updated on a biannual basis.<sup>10</sup> Spain's list is updated quarterly.<sup>11</sup> Belgium maintains regional lists, one for Flanders and the other for Wallonia; the former is updated biennially, the latter is updated annually.<sup>12</sup>

The critical issue here is that countries seeking to meet their critical labor needs use a tool that is similar to Schedule A. In addition, these countries have an established pattern of updating their respective lists to ensure that it is serving their national interests. Comparatively, the federal government has allowed Schedule A to languish for multiple decades to our detriment. Chamber research shows that the American workforce is aging and will continue to do so for the foreseeable future.<sup>13</sup> In addition, workforce participation rates in the U.S. are significantly lower than where they were the last time that Schedule A was updated by DOL.<sup>14</sup>

Another concerning economic trend that heavily weighs in favor of the Labor Department updating Schedule A is the significant gap between the educational and skills background of the U.S. population and the job skills that are in high demand today. The 2023 Salary.Com Skills Gap Survey showed that one quarter of all

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<sup>7</sup> See "Review of the Shortage Occupation List," Migration Advisory Committee (Sept. 19, 2020); "Review of the Shortage Occupation List," Migration Advisory Committee (Oct. 3, 2023).

<sup>8</sup> <https://dewr.gov.au/skilled-migration-occupation-lists>.

<sup>9</sup> [mom.gov.sg/passes-and-permits/employment-\[ass/eligibility/compass-c5-skills-bonus-shortage-occupation-list-sol](https://mom.gov.sg/passes-and-permits/employment-[ass/eligibility/compass-c5-skills-bonus-shortage-occupation-list-sol)

<sup>10</sup> [Nyidanmark.dk/en-GB/Applying/Work/The\\_Positive\\_Lists/Positive%20List%20List%20Skilled%20Work](https://nyidanmark.dk/en-GB/Applying/Work/The_Positive_Lists/Positive%20List%20List%20Skilled%20Work)

<sup>11</sup> <https://www.sepe.es/HomeSepe/en/empresas/informacion-para-empresas/profesiones-de-dificil-cobertura/profesiones-mas-demandadas.html>

<sup>12</sup> See <https://www.vlaanderen.be/en/work-permits-for-foreign-workers/work-permits-categories-and-procedures/work-permits-middle-skilled-shortage-occupations/work-permit-shortage-occupation-list> and also see <https://emploi.wallonie.be/home/travailleurs-etrangers/permis-de-travail/liste-des-metiers-en-penurie.html>

<sup>13</sup> Data Deep Dive: The Workforce of the Future, Oct. 4, 2023, accessed on May 9, 2024 at <https://www.uschamber.com/workforce/data-deep-dive-the-workforce-of-the-future>.

<sup>14</sup> Id.

employers surveyed are confronting this problem today and an additional 42% see this problem afflicting their companies within 2 years' time. That survey shows that 2 of every 3 U.S. companies are anxious over the likely negative impact this skills gap will have on their company's ability to grow and prosper. Relatedly, nearly three-quarters of the employers surveyed identified that it was more difficult for them to find qualified candidate for their job openings.<sup>15</sup> For these reasons, we urge DOL to update Schedule A along the lines set forth below.

### ***A Predictable Update Schedule Must Be Implemented for Schedule A***

The business community has been very adamant about their desire to see the Department institute a routine review cycle for updating the Schedule A list. While there is no solid consensus among the business community as to what would be the optimal time interval between reviews/updates of the list, there is strong agreement that in whatever model the Department chooses to move forward with, that model must a) adequately respond to the changes in the U.S. labor market and b) must establish a consistent schedule for these reviews and updates to occur.

One model upon which DOL can look to for updating Schedule A is the framework that the U.S. Department of Homeland Security uses to update the STEM Designated Degree Program list.<sup>16</sup> The operation of this degree list defines which types of undergraduate and graduate degrees that will allow that foreign national student to be able to work in the U.S. for an additional twenty-four months on post-graduate Optional Practical Training (OPT). The authority that the Homeland Security Secretary possesses to change this list is very similar to the authority that the Labor Secretary has with regard to amending Schedule A. The process that DHS designed for revisions to the degree list incorporated an annual cadence and it provides stakeholders with a workable means for providing input and suggestions to DHS.<sup>17</sup>

As it pertains to the Labor Department's next steps, we urge the Department to publish a notice of proposed rulemaking on Schedule A that establishes a transparent, predictable review process for what types of occupational classifications should be added or removed from the Schedule A list. Implementing a consistent review methodology for Schedule A would ensure that the occupations and categories

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<sup>15</sup> A Quarter of US Employers Surveyed by Salary.com are Battling a Skills Gap with Another 42% Saying It Will Hit Them Within 2 Years, July 25, 2023, accessed on May 9, 2024 at <https://www.prnewswire.com/news-releases/a-quarter-of-us-employers-surveyed-by-salarycom-are-battling-a-skills-gap-with-another-42-saying-it-will-hit-them-within-2-years-301884567.html>.

<sup>16</sup> U.S. Department of Homeland Security, Final Rule, *Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*, 18 Fed. Reg. 13040 (Mar. 11, 2016), available at <https://www.govinfo.gov/content/pkg/FR-2016-03-11/pdf/2016-04828.pdf>.

<sup>17</sup> U.S. Immigration & Customs Enforcement, *Schools & Programs* (last updated Jan. 17, 2024), available at: <https://www.ice.gov/sevis/schools#dhs-stem-designated-degree-program-list-and-cip-code-nomination-process>.

included in it reflect current and projected labor market shortages and better respond to changes in the global economy.

To that end, the Labor Department should provide itself with some flexibility in how it will conduct these types of reviews to amend the Schedule A list outside of an established schedule. Significant, unforeseen economic events can have all sorts of impacts, both beneficial and harmful, upon American businesses and workers, whether the development is a unique boom in a given economic sector or is a once-in-a-generation downturn. Should exogenous shocks to the U.S. economy occur, the Labor Department should not restrict its actions based upon a general schedule to update Schedule A. This is particularly true in light of the fact that the Labor Secretary retains broad authority to update Schedule A “upon his own initiative....”<sup>18</sup> Given all of the factors that the Labor Department needs to consider with regard to Schedule A, a reasonable cadence for DOL to update the Schedule A list would be every 2-3 years. This would establish a level of predictability at a rate that would provide the Department with access to a sufficient amount of recent data so as to make informed decisions that adequately account for the interest of all concerned stakeholders.

### ***Objective Labor-Market Data Must Help Inform Future Schedule A Updates***

The Chamber believes a revamped Schedule A requires the Labor Department to consider a number of objective measurements to help inform its decisions on Schedule A. The Institute for Progress (IFP) released a report late last year that provides a general outline to show how this can be done by DOL.<sup>19</sup> In doing so, it created a model that, in many ways, is similar in structure to what other countries consider with regard to their respective shortage occupation lists.

In crafting its model, the IFP relied upon the U.S. Census Bureau’s American Community Survey (ACS) data, the Current Population Survey data, and some other selected data to formulate a data-driven model for routinely updating Schedule A on a going forward basis. Specifically, the data considered by IFP included the following: percentage change in the median wage over one year and over three years; job vacancy postings per worker; percentage change in employment over one year; percentage change in median paid hours worked over three years; labor force non-participation; unemployment rate; three-year lagged unemployment rate; job-to-job transition rate over one year, and; an income premium that represents a weighted average for the additional income earned by individuals in the occupational classification.<sup>20</sup>

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<sup>18</sup> 30 Fed. Reg., at 14979-14980 (Dec. 2, 1965).

<sup>19</sup> Lindsay Milliken, Jeremy Neufeld & Greg Wright, The Institute for Progress, *Help Wanted: Modernizing the Schedule A Shortage Occupation List* (Dec. 14, 2023), available at: <https://ifp.org/schedule-a/>.

<sup>20</sup> Id.

The IFP Report certainly illustrates the possibilities for DOL in terms of putting together a data-driven approach to operating Schedule A in the future. However, this is not to say that the report provides the Labor Department with an exhaustive list of data that it should limit itself to when it considers potential changes to Schedule A. For example, DOL has significant amounts of performance data that could be examined for trends in applications for certain types of foreign national workers. DOL could compare this data with the types of aforementioned metrics and that analysis would help inform the Department's decisions to add or remove occupations from the list. Other types of quantitative data that could be examined include:

- Job growth projections for certain industries and occupations;
- Demographic and national origin statistics for the educational attainment of students at U.S. universities in certain fields of study, as well as projections for future trends based upon State Department student visa application data; and,
- State, local, and regional data that can better pinpoint distinct labor shortages that might not be evident from focusing solely or primarily on national data.

Including these types of metrics into the consideration of future changes to Schedule A along with the data above will undoubtedly help U.S. companies meet their workforce needs.

### ***Holistic Consideration of Qualifications and Skills Will Improve Program Functionality***

While the Chamber is adamant in its belief DOL must utilize the types of hard data mentioned above to properly implement any changes to Schedule A, optimal policy outcomes can only be achieved by the Department if this data is put into the proper context. As such, the Chamber recommends that DOL look beyond just the occupational classifications and account for the types of qualifications, skills, and education attainment associated with the specific job that an employer seeks to fill. Incorporating a foreign national's qualifications, skills, or education attainment that is required for the role he or she will perform for a company will allow DOL to more accurately identify the types of worker shortages that would warrant the waiver of a labor certification afforded under the Schedule A list.

For example, there are certain occupations where looking at the field as a whole, the data might not suggest the type of shortage warranting inclusion upon Schedule A. However, when that occupational classification is examined for those who have a graduate level degree in the field, there may be a woefully insufficient number of those types of workers in that occupational classification where the job is located such that a foreign national's employment will not adversely impact any U.S. workers in a similar job. This is a common problem cited by several companies and has been conveyed to us very strongly, particularly with regard to many roles involving

engineering and scientific disciplines, such as semiconductor design and process engineers, AI software development engineers, machine learning engineers, data scientists, and chemical and materials scientists. Our country needs more of these types of workers and a properly updated Schedule A would acknowledge this problem.

These significant labor challenges do not merely afflict industries struggling to find white-collar workers. The Chamber has also heard from several industries whose needs for non-college educated workers are similarly dire. This covers meat and seafood processors, construction firms, furniture manufacturers, agricultural commodity producers, hospitality, healthcare providers, among many others. Clearly, the issue of education attainment is not as important for these workers whose jobs do not require an undergraduate or graduate level degree. However, the level of skills that potential employees in these industries, such as a master craftsman for a construction company or a furniture manufacturer, or the caregivers and certified nursing assistants for a nursing home, are crucially needed in our country.

A common refrain from companies in these industries is that the lack of workers in those fields are a significant contributing factor to the burnout among their U.S. workers, as their businesses are stretched very thin in terms of the timely provision of the products and services their clients demanded. In these instances, companies are adamant in their belief that the status quo which requires their business to go through the labor certification process is a contributing factor to the adverse impacts that are being felt by their U.S. workers. In the view of companies confronting these issues, adding these types of occupations onto Schedule A will not only shorten the timeframe in which these workers can get employment-based immigrant visas, but it will have a positive impact upon their U.S. employees who would have additional support to perform their jobs.

### *Conclusion*

The Chamber very much appreciates the Labor Department seeking input from stakeholders on how best to update Schedule A. A modernized Schedule A that is routinely updated to reflect the conditions of American economy would not only benefit many companies seeking to meet their workforce needs, but it would also help the Labor Department make better use of its limited resources as it carries out its statutory obligations to ensure that the admission or continued presence of foreign national workers in the U.S. does not undermine the interests of similarly situated U.S. workers.

We hope the Department finds our feedback helpful and we urge the Department to move forward with the issuance of a notice of public rulemaking in this matter. To that end, we look forward to working with the Labor Department on this and



other matters that will help ensure that the American companies can meet their workforce needs and help our nation's economy reach its full potential.

Thank you for considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Baselice', is centered below the word 'Sincerely,'. The signature is fluid and cursive, with a large initial 'J'.

Jonathan Baselice  
Vice President, Immigration Policy  
U.S. Chamber of Commerce