

Appendix A: Post-1995: Non-Schedule A Changes to 20 C.F.R. § 656

After 1990, the Department of Labor stopped updating the Schedule A list of shortage occupations. However, it did continue to update provisions within its section of the Code of Federal Regulations into the mid-2000s, such as the determination of prevailing wages, backlog and bureaucracy reduction, and the permanent labor certification process. This appendix was added to provide a fuller history of 20 C.F.R. § 656 after the major changes were made to Schedule A.

I. The Late 1990s: A Debate over Prevailing Wages

In 1996, DOL issued a [proposed rule](#) to change the way prevailing wages are determined, specifically for researchers at universities and colleges and also for institutions of higher education filing H-1B visas on behalf of researchers. The prevailing wage regulations were last updated in 1976 and required foreign workers to be paid a wage that is within [five percent](#) of the average for similarly employed workers. The Immigration and Nationality Act also [required](#) H-1B workers to be paid the higher wage between “the actual wage paid to workers in the occupation or the prevailing wage for the occupational classification in the area of employment.” While not directly related to Schedule A regulations specifically, employers looking to hire workers through Schedule A are required to abide by prevailing wage laws.

In 1988, the Board of Alien Labor Certification determined that prevailing wages should be calculated by examining the nature of the employer’s business to fully compare the wages of those who are similarly employed. However, in a 1994 [case](#) in front of the Board, an employer argued that because of that 1988 decision, nonprofit organizations should be evaluated differently than for-profit businesses because the goal of their work is fundamentally different. The Board disagreed and said:

The underlying purpose of establishing a prevailing wage rate is to establish a minimum level of wages for workers employed in jobs requiring similar skills and knowledge levels in a particular locality. It follows that the term ‘similarly employed’ does not refer to the nature of the employer’s business as such; on the contrary, it must be determined on the basis of the similarity of the skills and knowledge required of the job offered.

After this decision, the prevailing wages for academic researchers were evaluated alongside those for industry researchers and the former

were calculated at a “considerably higher” level than before (between thirty-four and ninety-three percent in excess of actual wages for the position in question). Colleges and universities became concerned and told DOL these rates would make it too challenging to recruit foreign researchers with skills that are difficult to find in the United States. DOL also received [inquiries](#) about this policy from Congress and numerous research-focused agencies like the National Science Foundation, the Department of Defense, the National Institutes of Health, and the National Aeronautics and Space Administration, among others. Thus, DOL decided to issue a proposed rule to create an exception in which the prevailing wages for college and university researchers are based only on the wages paid at those institutions, instead of comparing them to similar jobs in industry.

In 1998, DOL came back with a [decision](#) about the proposed exception for academic researchers when calculating prevailing wages. The exception was accepted and expanded to include researchers at Federally Funded Research and Development Centers operated by academic institutions and federal research agencies. Out of seventy-five comments, seventy-two were supportive of the proposal. These comments came from several colleges and universities, the Association of American Universities, independent research institutes, and several federal research agencies.

II. The Turn of the Century: A Rapidly Increasing Backlog and the Struggle to Overhaul the Bureaucracy

In mid-2000, the agency was trying to reduce its backlog and ease the burden on its employees by issuing a [proposed rule](#) to improve efficiency. Since 1995, DOL’s backlogs have increased rapidly, growing from 40,000 in 1994 to 104,000 in 1998. It stated that for any applications submitted before July 26, 2000, employers could request that the applications be processed as reduction in recruitment requests (RIRs). This would allow employers to substitute recruiting that was done before filing the labor certification application for the recruiting required during the application process. According to the notice:

This measure to reduce backlogs would result in a variety of desirable benefits, a reduction in processing time for both new applications and those applications currently in the queue, would facilitate the development and implementation of a new, more efficient system for processing labor certification applications in the United States, and would reduce government resources necessary to process applications for alien employment certification.

Later that year, DOL compiled all of its proposed changes and posted them in the Federal Register as [guidelines](#) for the overhaul of its labor certification application process. In 2001, DOL issued a [final rule](#) approving its new expedited RIR system for older applications as mentioned above in an effort to reduce its growing backlog.

One year later, DOL issued an [NPRM](#) to update the applications process again and require employers to conduct recruitment prior to filing for a permanent labor certification, as well as implement a streamlined automated filing system for applications. The NPRM also proposed to eliminate Schedule B, the companion of Schedule A, that listed occupations in which there were adequate numbers of willing and employable U.S. workers who would be adversely affected by the employment of foreign workers. Employers who wished to hire foreign workers for a Schedule B occupation would have to obtain a waiver. DOL wanted to eliminate the list because “program experience indicate[d] that it has not contributed any measurable protection to U.S. workers.” Ultimately, Schedule B was folded into the permanent labor certification (PERM) program in [2005](#).

The 2002 NPRM also proposed to eliminate the rule that allowed employers to pay foreign workers within [five percent](#) of the prevailing wage. In the 1970s when this five percent rule was created, employers and DOL did not have the data needed to accurately calculate an occupation’s prevailing wage. However, with the advent of the internet, the Bureau of Labor Statistics was able to conduct much more reliable wage surveys for employers.

In mid-2004, an [interim final rule](#) was posted in the Federal Register to reduce the backlog of applications to the permanent labor certification process. This notice specifies that the backlog was exacerbated by a December 2000 amendment to the Immigration and Nationality Act that allowed immigrants who entered the country “without inspection or who fall within certain statutory categories” to change their status to lawful permanent resident if a labor certification was filed on their behalf by April 30, 2001. Almost 240,000 applications were filed before the cutoff date when the average annual level for the permanent labor certification program was less than 100,000. DOL performed a study to determine how to reduce the backlog and issued this interim final rule. This rule allowed the Chief of the Division of Foreign Labor Certification to send applications to centralized processing centers and consolidate some steps of the application process.

III. Finalizing Changes to Prevailing Wage Regulations and Further Proposed Changes to the Permanent Labor Certification Process

DOL issued another [final rule](#) to combat the application backlog in December 2004. This rule finalized the proposals made in the May 6, 2002 NPRM to streamline the filing process. It deleted all of the regulatory text for 20 C.F.R. § 656, or the language for the permanent labor certification program, and replaced it with updated language, effective March 28, 2005. Most of the notice dealt with the expanded use of electronic forms. Of note in this new language, foreign workers must be paid one hundred percent of the prevailing wage for their occupation and each prevailing wage survey that DOL conducts must provide at least four levels of wages that align with different levels of experience, education, and supervision. Additionally, it removes the requirement for businesses to use prevailing wages determined by the Davis-Bacon Act (DBA) and McNamara-O'Hara Service Contract Act (SCA). DOL determined that "the continued mandatory use of SCA and DBA determinations would continue to complicate the operation of the prevailing wage system because of the differing occupational taxonomies between OES [Bureau of Labor Statistics' Occupational Employment Statistics] and DBA/SCA."

This final rule outlined other proposals that were submitted through public comments, including changes to Schedule A. For example, a technology company suggested expanding Schedule A to include:

Employees who gained irreplaceable experience on the job, performed unusual combinations of duties or key duties; or who worked for the employer or its subsidiaries for a specified period of time, either within or outside the U.S.; and employees whose efforts had created jobs for U.S. workers.

The American Immigration Lawyers Association (AILA) proposed a similar policy, which would include:

Company founders and managers; key employees in managerial, executive, or essential positions in affiliated, predecessor, or successor-in-interest companies; employees who have been employed by a U.S. employer for a certain number of years and gained irreplaceable training and experience in distinct positions; and employees central to the existence of the employer.

These proposals were similar to Schedule A's Group IV which included intracompany transferees in managerial positions that was [eliminated](#) in 1991. DOL [responded](#), saying:

All of these comments fail to address the core premise for Schedule A; namely, pre-certification of occupations for which there are few qualified, willing, and available U.S. workers. Most of the categories suggested by commenters, such as key employees, employees with special or unique skills, and small business investors are not occupational categories; instead, as admitted by most of the commenters, they are categories of foreign workers.

AILA also proposed [expanding the list](#) "to include a special group for labor shortages by geographic area, to respond to acute labor shortages in a timely manner." The organization posited that enough data could be collected from permanent labor certification applications to determine what jobs were in demand in particular areas. DOL had already implemented this idea in 1980 by [admitting nurses](#) through Schedule A by geographic area but rejected it as an alternative to [eliminating physicians](#) from the list in 1987. DOL did not rule out changing Schedule A in the future though, [noting](#):

We believe it would be inappropriate to make changes to Schedule A in this final rule. However, it may be productive to consider whether we could create a more flexible Schedule A in the future . . . the just-in-time system proposed by AILA would require additional rule making. We are also unsure whether data would be available to successfully implement such a system. While we anticipate the automated system will capture data regarding occupations being sponsored for labor certification, it is not clear all occupations being sponsored for labor certification are experiencing a lack of available workers.

IV. Mid- to Late 2000s: Attempts to Reduce Fraud in the Permanent Labor Certification Program

In early 2006, DOL issued an [NPRM](#) to reduce opportunities for fraud in the permanent labor certification program. The agency [proposed](#) to eliminate the ability to substitute foreign workers on labor certification applications; institute a 45-day period for employers to file approved certifications with the Department of Homeland Security (DHS); explicitly prohibit the sale or purchase of applications or certifications;

and clarify existing fraud procedures and implement policies for debarment from the permanent labor certification program.

DOL originally allowed substitutions on labor certification applications because the approval process took a long time; however, according to the NPRM, that practice led to the commoditization of those applications. In one specific example listed in the notice, an attorney was prosecuted by the government for filing 2,700 fraudulent applications and selling them for at least \$20,000 each. DOL previously discussed prohibiting substitutions in its December 27, 2004 notice, but did not because they were not sufficiently related to the purpose of the NPRM of interest.

Fraud through the sale of permanent labor certifications also came from their indefinite validity. As time passes, the likelihood that the approved job still exists decreases and the prevailing wage determination becomes increasingly outdated. Thus, DOL proposed that certifications must be filed with DHS within [forty-five days](#) of approval or else they expire. In addition, though the sale of permanent labor certifications was against the spirit of the law, there was no language expressly prohibiting it. The 2006 NPRM proposed a policy to explicitly prevent employers or brokers from selling certifications or charging any kind of payment in exchange for filing the required labor certification forms with DOL.

The final provisions of interest in this NPRM are regarding employer debarment from the permanent labor certification program. With these provisions, employers or agents who are connected to possible [fraud or willful misrepresentation](#) would see their pending applications denied, and if they are convicted of fraud, future applications could also be denied. A system for appeals and fraud acquittals would be instituted alongside the debarment procedures.

One year later, the [final rule](#) was issued to reduce the levels of fraud and abuse in the permanent labor certification program. It approved all of the proposals put forth in the 2006 NPRM, except it extended the period in which employers must file labor certifications with DHS from 45 days to 180 days. This change came as a result of numerous [public comments](#) which explained that a 45-day period would put an outsized burden on businesses to get the applications sorted with DHS.