DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

[CIS No. 2745-23; DHS Docket No. USCIS-2023-0005]

RIN 1615-AC70

Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Homeland Security (DHS) proposes to amend its regulations governing H-1B specialty occupation workers to modernize and improve the efficiency of the H-1B program, add benefits and flexibilities, and improve integrity measures. Some of the proposed provisions would narrowly impact other nonimmigrant classifications, including: H-2, H-3, F-1, L-1, O, P, Q-1, R-1, E-3, and TN. DHS intends to finalize the proposals contained in this rulemaking through one or more final rules, depending on agency resources.

DATES: Written comments must be submitted on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments on the entirety of this proposed rulemaking package, identified by DHS Docket No. USCIS-2023-0005 through the Federal eRulemaking Portal: *https://www.regulations.gov*. Follow the website instructions for submitting comments. The electronic Federal Docket Management System will accept comments before midnight Eastern time on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the

proposed rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, DHS and USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using *https://www.regulations.gov*, please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, by telephone at (240) 721-3000 for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone (240) 721-3000.

SUPPLEMENTARY INFORMATION:

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Table of Abbreviations

AAO – Administrative Appeals Office
AC21 – American Competitiveness in the Twenty-first Century Act
ACWIA – American Competitiveness and Workforce Improvement Act of 1998
BLS – Bureau of Labor Statistics
CEQ – Council on Environmental Quality
CFR – Code of Federal Regulations
CMSA – Consolidated Metropolitan Statistical Area
COS – Change of Status
CPI-U – Consumer Price Index for All Urban Consumers
D/S – Duration of status
DHS – U.S. Department of Homeland Security
DOL – U.S. Department of Labor
DOS – U.S. Department of State

FDNS – Fraud Detection and National Security
FR – *Federal Register*
FY – Fiscal Year
HR – Human Resources
HSA – Homeland Security Act of 2002
ICE – Immigration and Customs Enforcement
IMMACT 90 – Immigration Act of 1990
INA – Immigration and Nationality Act
INS – legacy Immigration and Naturalization Service
IRFA – Initial Regulatory Flexibility Analysis
IRS – Internal Revenue Service
LCA – Labor Condition Application
MSA – Metropolitan Statistical Area
NAICS – North American Industry Classification System
NEPA – National Environmental Policy Act
NOID – Notice of Intent to Deny
NPRM – Notice of proposed rulemaking
OIRA – Office of Information and Regulatory Affairs
OMB – Office of Management and Budget
OP&S – Office of Policy and Strategy
OPT – Optional Practical Training
PM – Policy Memorandum
PMSA – Primary Metropolitan Statistical Area
PRA – Paperwork Reduction Act
PRD – Policy Research Division
Pub. L. – Public Law
RFA – Regulatory Flexibility Act of 1980
RFE – Request for Evidence
RIA – Regulatory Impact Analysis
RIN – Regulation Identifier Number
SBA – Small Business Administration
SEVP – Student and Exchange Visitor Program
SOC – Standard Occupational Classification
Stat. – U.S. Statutes at Large
TLC – Temporary Labor Certification
UMRA – Unfunded Mandates Reform Act
U.S.C. – United States Code
USCIS – U.S. Citizenship and Immigration Services

I. Public Participation

DHS invites all interested parties to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to USCIS in implementing these changes will reference a specific portion of the proposed

rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS.

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS-2023-0005 for this rulemaking. Please note all submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at *https://www.regulations.gov*.

Docket: For access to the docket and to read background documents or comments received, go to *https://www.regulations.gov*, referencing DHS Docket No. USCIS-2023-0005. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Executive Summary

A. Purpose of the Regulatory Action

The purpose of this rulemaking is to modernize and improve the regulations relating to the H-1B program by: (1) streamlining the requirements of the H-1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures. Some of the proposed provisions would narrowly impact other nonimmigrant classifications.

B. Summary of the Major Provisions of the Regulatory Action

1. Modernization and Efficiencies

DHS proposes to streamline requirements for the H-1B program by: (1) revising the regulatory definition and criteria for a "specialty occupation"; (2) clarifying that "normally" does not mean "always" within the criteria for a specialty occupation; and (3) clarifying that a position may allow a range of degrees, although there must be a direct relationship between the required degree field(s) and the duties of the position. As 21st century employers strive to generate better hiring outcomes, improving the match between required skills and job duties, employers have increasingly become more aware of a skills-first culture, led by the Federal Government's commitment to attract and hire individuals well-suited to available jobs.[1] The flexibility inherent in H-1B adjudications to identify job duties and particular positions where a bachelor's or higher degree in a specific specialty, or its equivalent, is normally required, allows employers to explore where skills-based hiring is sensible.

DHS also proposes to clarify when an amended or new petition must be filed due to a change in an H-1B worker's place of employment to be consistent with current policy guidance.

Additionally, DHS proposes to codify and clarify its deference policy to state that, if there has been no material change in the underlying facts, adjudicators generally should defer to a prior determination involving the same parties and underlying facts. DHS also proposes to update the regulations to expressly require that evidence of maintenance of status must be included with the petition if a beneficiary is seeking an extension or amendment of stay. This policy would impact all employment-based nonimmigrant classifications that use Form I-129, Petition for Nonimmigrant Worker. DHS further

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[1] *See*, *e.g.*, U.S. Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies: "Guidance Release – E.O. 13932; Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates*"* (May 19, 2022), *https://chcoc.gov/content/guidance-release-eo-13932-modernizing-and-reforming-assessment-and-hiring-federal-job*.

proposes to eliminate the itinerary requirement, which would apply to all H classifications, and allow petitioners to amend requested validity periods where the validity expires before adjudication.

2. Benefits and Flexibilities

DHS proposes to modernize the definition of employers who are exempt from the annual statutory limit on H-1B visas to create more flexibility for nonprofit and governmental research organizations and beneficiaries who are not directly employed by a qualifying organization. Specifically, DHS proposes to change the definition of "nonprofit research organization" and "governmental research organization" by replacing "primarily engaged" and "primary mission" with "fundamental activity" to permit a nonprofit entity or governmental research organization that conducts research as a fundamental activity, but is not primarily engaged in research or where research is not a primary mission, to meet the definition of a nonprofit research entity. Additionally, DHS proposes to revise the requirements for beneficiaries to qualify for H-1B cap exemption when they are not directly employed by a qualifying organization, but still provide essential work, even if their duties do not necessarily directly further the organization's essential purpose.

DHS also proposes to provide flexibilities, such as automatically extending the duration of F-1 status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), until April 1 of the relevant fiscal year, rather than October 1 of the same fiscal year, to avoid disruptions in lawful status and employment authorization for F-1 students changing their status to H-1B. Additionally, DHS is proposing to clarify the requirements regarding the requested employment start date on H-1B cap-subject petitions to permit filing with requested start dates that are after October 1 of the relevant fiscal year, consistent with current USCIS policy.

3. Program Integrity

DHS proposes to address H-1B cap registration abuse by changing the way USCIS selects registrations. Instead of selecting by registration, USCIS would select registrations by unique beneficiary, thereby reducing the potential for gaming the process to increase chances for selection and helping ensure that each beneficiary would have the same chance of being selected, regardless of how many registrations are submitted on their behalf. DHS also proposes to clarify that related entities are prohibited from submitting multiple registrations for the same beneficiary, similar to the prohibition on related entities filing multiple cap-subject petitions for the same beneficiary for the same fiscal year's numerical allocations. Additionally, DHS proposes to codify USCIS's ability to deny H-1B petitions or revoke an approved H-1B petition where the underlying registration contained a false attestation or was otherwise invalid.

DHS further proposes to improve the integrity of the H-1B program by: (1) codifying its authority to request contracts; (2) requiring that the petitioner establish that it has an actual, non-speculative position in a specialty occupation available for the beneficiary as of the requested start date; (3) ensuring that the labor condition application (LCA) properly supports and corresponds with the petition; (4) revising the definition of "United States employer" by codifying the existing requirement that the petitioner has a bona fide job offer for the beneficiary to work within the United States as of the requested start date, consistent with current DHS policy; and (5) adding a requirement that the petitioner have a legal presence and be amenable to service of process in the United States.

DHS additionally proposes to clarify that beneficiary-owners may be eligible for H-1B status, while setting reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity.

DHS also proposes to codify USCIS's authority to conduct site visits and clarify that refusal to comply with site visits may result in denial or revocation of the petition. Additionally, DHS proposes to clarify that if an H-1B worker will be staffed to a third party, meaning they will be contracted to fill a position in the third party's organization, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. Through these provisions, DHS aims to prevent fraud and abuse and maintain H-1B program integrity.

C. Summary of Costs and Benefits

As discussed in the preamble, the purpose of this rulemaking is to modernize and improve the regulations relating to the H-1B program by: (1) streamlining H-1B program requirements and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures.

For the 10-year period of analysis of the proposed rule, DHS estimates the annualized net costs of this rulemaking would be $6,339,779 annualized at 3 percent and 7 percent. Table 12 provides a more detailed summary of the proposed rule provisions and their impacts.

D. Request for Preliminary Public Input

Finally, DHS is requesting preliminary public input on ideas that would curb or eliminate the possibility that petitioners may have speculative job opportunities as of the requested start date and delay admission of H-1B beneficiaries until the petitioner has secured work for the H-1B beneficiary, including two potential approaches DHS is considering for future action. DHS is also seeking preliminary public input on ways to provide H-1B and other Form I-129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf.

E. Future Rulemaking Actions

After carefully considering any public comments received on the proposals in this NPRM, DHS may move to finalize the proposed provisions through one or more final rules, and may possibly do so in time for the fiscal year (FY) 2025 cap season, depending on agency resources.

III. Background and Purpose

A. Legal Authority

The Secretary of Homeland Security's authority for these proposed regulatory amendments is found in various sections of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101 *et seq*., and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 *et seq*. General authority for issuing this proposed rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws and establish such regulations as the Secretary deems necessary for carrying out such authority, as well as section 112 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations.[2] Further authority for these regulatory amendments is found in:

- Section 101(a)(15) of the INA, 8 U.S.C. 1101(a)(15), which establishes classifications for noncitizens who are coming temporarily to the United States as nonimmigrants, including the H-1B classification, *see* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b);
- Section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe, by regulation, the time and conditions of the admission of nonimmigrants;

[2] Although several provisions of the INA discussed in this NPRM refer exclusively to the "Attorney General," such provisions are now to be read as referring to the Secretary of Homeland Security by operation of the HSA. *See* 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1), (g), 1551 note; *Nielsen v. Preap*, 139 S. Ct. 954, 959 n.2 (2019).

- Section 214(c) of the INA, 8 U.S.C. 1184(c), which, *inter alia*, authorizes the Secretary to prescribe how an importing employer may petition for nonimmigrant workers, including certain nonimmigrants described at sections 101(a)(a)(15)(H), (L), (O), and (P), 8 U.S.C. 1101(a)(15)(H), (L), (O), and (P); the information that an importing employer must provide in the petition; and certain fees that are required for certain nonimmigrant petitions;
- Section 214(e) of the INA, 8 U.S.C. 1184(e), which provides for the admission of citizens of Canada or Mexico as TN nonimmigrants;
- Section 214(g) of the INA, 8 U.S.C. 1184(g), which, *inter alia*, prescribes the H-1B numerical limitations, various exceptions to those limitations, and the period of authorized admission for H-1B nonimmigrants;
- Section 214(i) of the INA, 8 U.S.C. 1184(i), which sets forth the definition and requirements of a "specialty occupation";
- Section 235(d)(3) of the INA, 8 U.S.C. 1225(d)(3) ("any immigration officer shall have the power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.");
- Section 248 of the INA, 8 U.S.C. 1258, which authorizes a noncitizen to change from any nonimmigrant classification to any other nonimmigrant classification (subject to certain exceptions) if the noncitizen was lawfully admitted to the United States as a nonimmigrant and is continuing to maintain that status, and is not otherwise subject to the 3- or 10-year bar applicable to certain noncitizens who were unlawfully present in the United States;

- Section 274A of the INA, 8 U.S.C. 1324a, which recognizes the Secretary's authority to extend employment authorization to noncitizens in the United States;
- Section 287(b) of the INA, 8 U.S.C. 1357(b), which authorizes the taking and consideration of evidence concerning any matter that is material or relevant to the enforcement of the INA;
- Section 402 of the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 202, which charges the Secretary with "[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States" and "[e]stablishing national immigration enforcement policies and priorities," *id.*; *see also* HSA sec. 428, 6 U.S.C. 236; and
- Section 451(a)(3) and (b) of the HSA, 6 U.S.C. 271(a)(3) and (b), transferring to USCIS the authority to adjudicate petitions for nonimmigrant status, establish policies for performing that function, and set national immigration services policies and priorities.

B. Background

1. The H-1B Program

The H-1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations, defined by statute as occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor's or higher degree in the specific specialty, or its equivalent. *See* INA sections 101(a)(15)(H)(i)(b) and 214(i), 8 U.S.C 1101(a)(15)(H)(i)(b) and 1184(i).

The Immigration Act of 1990 (Pub. L. 101-649) (IMMACT 90) significantly reformed the H-1B program. To protect U.S. workers, IMMACT 90 required a certified LCA by the Secretary of Labor as a prerequisite for classification as an H-1B nonimmigrant. The LCA requirement, and the associated obligations the employer must

attest to and comply with, including the prevailing or actual wage requirement, were intended to safeguard the wages and working conditions of U.S. workers.[3] Through IMMACT 90, Congress set the current annual cap for the H-1B visa category at 65,000,[4] which limited the number of beneficiaries who may be issued an initial H-1B visa or otherwise provided initial H-1B status each fiscal year.[5] Prior to IMMACT 90, no limit existed on the number of initial H-1B visas that could be granted each fiscal year. Congressional deliberations ahead of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) describe the H-1B program's purpose both as filling shortages and creating opportunities for innovation and expansion.[6]

Congress also set up several exemptions to the annual H-1B cap. For example, workers who will be employed at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965, as amended) or a related or affiliated nonprofit entity, and workers who will be employed at a nonprofit or governmental research organization, are exempt from the cap. These exemptions are not numerically capped. *See* INA section 214(g)(5)(A)-(B), 8 U.S.C. 1184(g)(5)(A)-(B). Congress further provided an exemption from the numerical limits in INA section 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A), for 20,000 new H-1B visas, or grants of initial H-1B status, each fiscal

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[3] *See* U.S. Gov't Accountability Off., GAO/PEMD-92-17, "Immigration and the Labor Market: Nonimmigrant Alien Workers in the United States," at 18 (1992).

[4] Up to 6,800 visas are set aside from the 65,000 each fiscal year for the H-1B1 visa program under terms of the legislation implementing the U.S.-Chile and U.S.-Singapore free trade agreements. *See* INA sections 101(a)(15)(H)(i)(b1), 214(g)(8), 8 U.S.C. 1101(a)(15)(H)(i)(b1), 1184(g)(8).

[5] The 65,000 annual H-1B numerical limitation was increased for FYs 1999–2003. *See* INA section 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A), as amended by section 411 of the ACWIA, Public Law 105-277, div. C, tit. IV, 112 Stat. 2681, and the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758 (2002). Subsequent to IMMACT 90, Congress also created several exemptions from the 65,000 numerical limitation. *See* INA section 214(g)(5), 8 U.S.C. 1184(g)(5).

[6] *See* 144 Cong. Rec. at S12749 (statement of Sen. Abraham) ("[T]his issue [of increasing H-1B visas] is not only about shortages, it is about opportunities for innovation and expansion.").

year for foreign nationals who have earned a U.S. master's or higher degree ("advanced degree exemption").[7] Cap exemptions are discussed in more detail below.

To manage the annual cap, USCIS used a random selection process in years of high demand to determine which petitions were selected toward the projected number of petitions needed to reach the annual H-1B numerical allocations.[8] In order to better manage the selection process, DHS created a registration requirement for H-1B cap-subject petitions, which was first implemented in 2020 for the FY 2021 cap season.[9] Under the registration requirement, prospective petitioners seeking to file H-1B cap-subject petitions (including petitions filed on behalf of beneficiaries eligible for the advanced degree exemption) must first electronically register and pay the associated H-1B registration fee for each prospective beneficiary. The random selection process is then conducted, selecting from the properly submitted registrations the number of registrations projected as needed to reach the numerical allocations.[10] Only those prospective petitioners with selected registrations are eligible to file H-1B cap-subject petitions for the beneficiary(ies) named in their selected registration(s). The electronic registration process has streamlined the H-1B cap selection process by reducing paperwork and simplifying data exchange, and has provided overall cost savings to employers seeking to file H-1B cap-subject petitions and to USCIS. Prior to the registration requirement, petitioners were required to prepare and file complete H-1B petitions in order to be considered for the random selection process.

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[7] *See* INA section 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C). This rule also may refer to the 20,000 exemptions under section 214(g)(5)(C) from the H-1B regular cap as the "advanced degree exemption allocation" or "advanced degree exemption numerical limitation."

[8] *See* "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens," 84 FR 888 (Jan. 31, 2019).

[9] *Id.*

[10] *See* 8 CFR 214.2(h)(8)(iii).

2. The F-1 Program

Section 101(a)(15)(F)(i) of the INA, 8 U.S.C. 1101(a)(15)(F)(i), permits bona fide students to be temporarily admitted to the United States for the purpose of pursuing a full course of study at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or accredited language training program. Principal applicants are categorized as F-1 nonimmigrants and their spouses and minor children may accompany or follow to join them as F-2 dependents.[11]

In 1992, legacy Immigration and Naturalization Services (INS) amended its longstanding regulations relating to an employment program for students called Optional Practical Training (OPT) such that students in F-1 nonimmigrant status who have been enrolled on a full-time basis for at least one full academic year in a college, university, conservatory, or seminary (which now must be certified by U.S. Immigration and Customs Enforcement's (ICE's) Student and Exchange Visitor Program (SEVP)) are allowed up to 12 months of OPT to work for a U.S. employer in a job directly related to the student's major area of study.[12] Employers of F-1 students already working for the employer under OPT, would often file petitions to change the students' status to H-1B so that these nonimmigrant students may continue working in their current or a similar job.[13] Many times, however, an F-1 student's OPT authorization would expire prior to the student being able to assume the employment specified in the approved H-1B petition, creating a gap in employment.[14] In order to remedy this, in 2008, DHS created the cap-

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[11] *See* INA section 101(a)(15)(F)(i)-(ii), 8 U.S.C. 1101(a)(15)(F)(i)-(ii); 8 CFR 214.2(f)(3).
[12] *See* 8 CFR 214.2(f)(10); "Pre-Completion Interval Training; F-1 Student Work Authorization," 57 FR 31954 (July 20, 1992).
[13] *See* "Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions," 73 FR 18944, 18947 (Apr. 8, 2008), *vacated*, *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123 (D.D.C. 2015), which amended the cap-gap extension. Through this interim final rule, DHS also made other amendments, such as eliminating the requirement that USCIS issue a Federal Register Notice in order to extend status for students with pending H-1B petitions. Although the 2008 rule was vacated, the cap-gap extension was reinstated through "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students," 81 FR 13039 (Mar. 11, 2016).
[14] *Id.*

gap extension to temporarily extend the period of authorized stay, as well as work authorization, of certain F-1 students caught in a gap between the end of their program and the start date on their later-in-time approved, cap-subject H-1B petition.[15] The cap-gap extension provides a temporary bridge between F-1 and H-1B status, allowing students to remain in the United States between the end of their academic program and the beginning of the fiscal year, when the student's H-1B status commences.[16] DHS subsequently amended cap-gap procedures by extending the authorized period of stay and work authorization of any F-1 student who is the beneficiary of a timely filed cap-subject H-1B petition that has been granted by, or remains pending with, USCIS, until October 1 of the fiscal year for which H-1B visa classification has been requested.[17]

IV. Discussion of the Proposed Rule

A. Modernization and Efficiencies

1. Amending the Definition of a "Specialty Occupation"

DHS proposes to revise the regulatory definition and standards for a "specialty occupation" to better align with the statutory definition of that term. Section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), describes nonimmigrants coming to the United States temporarily to perform services in a specialty occupation. Section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1) states that the term "specialty occupation" means: "an occupation that requires—(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's

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[15] *Id.*

[16] *See* "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students," 81 FR 13039 (Mar. 11, 2016).

[17] *See* "Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions," 74 FR 26514 (June 3, 2009) (correction); "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students," 81 FR 13039 (Mar. 11, 2016). Through this proposed rule, DHS amended the cap-gap procedures by no longer requiring USCIS to issue a Federal Register notice indicating that the H-1B cap must first be met (or would likely be met) for the current fiscal year.

or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."

Currently, 8 CFR 214.2(h)(4)(ii) defines "specialty occupation" as an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

This proposed rule would add language to this definition to codify existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position; there may be more than one acceptable degree field for a specialty occupation; and a general degree is insufficient.[18] Specifically, DHS proposes to add language to the definition of "specialty occupation" clarifying that the required specialized studies must be directly related to the position. DHS also proposes to add language stating that a position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position, and that a position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position.

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[18] *See, e.g., Madkudu Inc., et al., v. U.S. Citizenship and Immigration Services*, et al. 5:20-cv-2653-SVK (N.D. Ca. Aug. 20, 2021) Settlement Agreement at 4 ("if the record shows that the petitioner would consider someone as qualified for the position based on less than a bachelor's degree in a specialized field directly related to the position (e.g., an associate's degree, a bachelor's degree in a generalized field of study without a minor, major, concentration, or specialization in market research, marketing, or research methods (see Sections II.C.1.b and c), or a bachelor's degree in a field of study unrelated to the position), then the position would not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. § 1184(i)(1) and 8 CFR § 214.2(h)(4)(ii)."), https://www.uscis.gov/sites/default/files/document/legal-docs/Madkudu-settlement-agreement.pdf (last visited Sep. 5, 2023).

A position for which a bachelor's degree in any field is sufficient to qualify for the position, or for which a bachelor's degree in a wide variety of fields unrelated to the position is sufficient to qualify, would not be considered a specialty occupation as it would not require the application of a body of highly specialized knowledge.[19] Similarly, the amended definition clarifies that a position would not qualify as a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position.[20] The burden of proof is on the petitioner to demonstrate that each qualifying degree field is directly related to the position. This is consistent with the statutory requirement that a degree be "in the specific specialty" and is USCIS' long-standing practice.

Under this proposed addition to 8 CFR 214.2(h)(4)(ii), the petitioner would continue to have the burden of demonstrating that there is a direct relationship between the required degree in a specific specialty (in other words, the degree field(s) that would qualify someone for the position) and the duties of the position. In many cases, the relationship will be clear and relatively easy to establish. For example, it should not be difficult to establish that a required medical degree is directly related to the duties of a physician. Similarly, a direct relationship may readily be established between the duties of a lawyer and a required law degree and the duties of an architect and a required architecture degree. In other cases, the direct relationship may be less apparent, and the

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[19] *See Caremax Inc* v. *Holder,* 40 F. Supp. 3d 1182, 1187-88 (N.D. Cal. 2014).

[20] Although a general-purpose bachelor's degree, such as a degree in business or business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a conclusion that a particular position qualifies for classification as a specialty occupation. *See, e.g.*, *Royal Siam Corp.*, 484 F.3d 139, 147 (1st Cir. 2007) ("The courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa."); *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1162-1164 (D. Minn. 1999) (the former INS did not depart from established policy or precedent when concluding that a general degree, such as a business administration degree, without more, does not constitute a degree in a specialized field); *Raj & Co. v. USCIS*, 85 F. Supp. 3d 1241, 1246 (W.D. Wash. 2015) (it is "well-settled in the case law and USCIS's reasonable interpretations of the regulatory framework" that "a generalized bachelor['s] degree requirement is [in]sufficient to render a position sufficiently specialized to qualify for H-1B status."); *Vision Builders, LLC v. USCIS*, No. 19-CV-3159, 2020 WL 5891546, at *6 (D.D.C. Oct. 5, 2020) (citing *Raj*).

petitioner may have to explain and provide documentation to meet its burden of demonstrating the relationship. As in the past, to establish a direct relationship, the petitioner would need to provide information regarding the course(s) of study associated with the required degree, or its equivalent, and the duties of the proffered position, and demonstrate the connection between the course of study and the duties and responsibilities of the position.

The requirement of a direct relationship between a degree in a specific specialty, or its equivalent, and the position, however, should not be construed as requiring a singular field of study.[21] For example, for the position of electrical engineer, a degree in electrical engineering or electronics engineering may qualify a person for the position, and therefore a minimum of a bachelor's or higher degree, or its equivalent, in more than one field of study may be recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B). In such a case, the "body of highly specialized knowledge" required by section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), would be afforded by either degree, and each field of study accordingly would be in a "specific specialty" directly related to the position consistent with section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B).

In cases where the petitioner lists degrees in multiple disparate fields of study as the minimum entry requirement for a position, the petitioner has the burden of establishing how each field of study is in a specific specialty providing "a body of highly specialized knowledge" directly related to the duties and responsibilities of the particular position. The petitioner must show that its position meets the requirements of sections

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[21] *See, e.g., Relx, Inc.* v. *Baran,* 397 F. Supp. 3d 41, 54 (D.D.C. 2019) ("There is no requirement in the statute that only one type of degree be accepted for a position to be specialized."); *Residential Fin. Corp.* v. *U.S. Citizenship & Immigration Servs.,* 839 F. Supp. 2d 985, 997 (S.D. Ohio 2012) (stating that when determining whether a position is a specialty occupation, "knowledge and not the title of the degree is what is important").

214(i)(1)(A) and (B) of the INA, 8 U.S.C. 1184(i)(1)(A) and (B), and the regulatory definition.[22]

As such, under this proposed rule, a minimum entry requirement of a bachelor's or higher degree, or its equivalent, in multiple disparate fields of study would not automatically disqualify a position from being a specialty occupation. For example, a petitioner may be able to establish that a bachelor's degree in the specific specialties of either education or chemistry, each of which provide a body of highly specialized knowledge, is directly related to the duties and responsibilities of a chemistry teacher. In such a scenario, the "body of highly specialized knowledge" requirement of section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), and the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), would both be met by either degree and the chemistry teacher position listing multiple disparate fields of study would qualify as a specialty occupation.

In determining whether a position involves a specialty occupation, USCIS currently interprets the "specific specialty" requirement in section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), to relate back to the body of highly specialized knowledge requirement referenced in section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), required by the specialty occupation in question. The "specific specialty" requirement is only met if the degree in a specific specialty or specialties, or its equivalent, provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A).

If the minimum entry requirement for a position is a general degree without further specialization or an explanation of what type of degree is required, the "degree in

[22] The petitioner must also establish that its position meets one of the four criteria at proposed 8 CFR 214.2(h)(4)(iii)(A), which is explained in detail below.

the specific specialty (or its equivalent)" requirement of INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), would not be satisfied. For example, a requirement of a general business degree for a marketing position would not satisfy the specific specialty requirement. In this instance, the petitioner would not satisfactorily demonstrate how a required general business degree provides a body of highly specialized knowledge that is directly related to the duties and responsibilities of a marketing position.[23]

Similarly, a petition with a requirement of any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement, as it is unlikely the petitioner could establish how the fields of study within any engineering degree provide a body of highly specialized knowledge directly relating to the duties and responsibilities of the software developer position.[24] If an individual could qualify for a petitioner's software developer position based on having a seemingly unrelated engineering degree, then it cannot be concluded that the position requires the application of a body of highly specialized knowledge and a degree in a specific specialty, because someone with an entirely or largely unrelated degree may qualify to perform the job.[25] In such a scenario, the requirements of INA sections 214(i)(1)(A) and (B), 8 U.S.C. 1184(i)(1)(A) and (B), would not be satisfied.

Further, if a position requires a bachelor's degree in an unspecified "quantitative field" (which could include mathematics, statistics, economics, accounting, or physics) the petitioner must identify specific specialties, such as the majors or degree fields, within the wide variety of "quantitative fields" and establish how each identified degree

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[23] *See Royal Siam Corp.,* 484 F.3d at 147.

[24] The requirement of any engineering degree could include, for example, a chemical engineering degree, marine engineering degree, mining engineering degree, or any other engineering degree in a multitude of seemingly unrelated fields.

[25] These examples refer to the educational credentials by the title of the degree for expediency. However, USCIS separately evaluates whether the beneficiary's actual course of study is directly related to the duties of the position, rather than merely the title of the degree. When applicable, USCIS also will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*).

in a specific specialty provides a body of highly specialized knowledge, consistent with INA section 214(i)(1)(A), 8 U.S.C. 1184(i)(1)(A), that is directly related to the duties and responsibilities of the software developer position. While a position may allow a range of degrees, and apply multiple bodies of highly specialized knowledge, each of those qualifying degree fields or each body of highly specialized knowledge must be directly related to the proffered position.

2. Amending the Criteria for Specialty Occupation Positions

Under INA section 214(i)(1), 8 U.S.C. 1184(i)(1), a "specialty occupation" requires attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. The current regulatory criteria at 8 CFR 214.2(h)(4)(iii)(A)(*1*) states that a bachelor's degree is "normally" required. To provide additional guidance to adjudicators, attorneys, and the public, DHS is proposing to define the term "normally" at proposed 8 CFR 214.2(h)(4)(iii)(A)(*5*) to state that, for purposes of the criteria in this provision, "normally" means "conforming to a type, standard, or regular pattern" and is "characterized by that which is considered usual, typical, common, or routine."[26] The proposed regulation also clarifies that "[n]ormally does not mean always." For these purposes, there is no significant difference between the synonyms "normal," "usual," "typical," "common," or "routine."[27] These synonyms illustrate that a description of an occupation that uses a synonym for the word "normally" in describing whether a bachelor's or higher degree is required for the occupation can support a finding that a degree is "normally" required. By the same token, other synonyms for the word "normally" that are not listed in proposed 8 CFR 214.2(h)(4)(iii)(A)(*5*), such as "mostly"

[26] *See* Merriam-Webster Dictionary at https://www.merriam-webster.com/dictionary/normal (last visited Aug. 24, 2023).
[27] *See Innova,* 983 F.3d at 432 ("There is no daylight between typically needed, per the OOH, and normally required, per the regulatory criteria. 'Typically' and 'normally' are synonyms.").

or "frequently," also can support a finding that a degree is "normally" required. This proposed change clarifies that the petitioner does not have to establish that the bachelor's degree in a specific specialty or its equivalent is always a minimum requirement for entry into the occupation in the United States. This is consistent with both USCIS's current practice, as reflected by the statement on the USCIS website that "normally," "common," and "usually" are not interpreted to mean "always,"[28] and USCIS's rescission of a 2017 policy memorandum guiding officers on the interpretation of the *Occupational Outlook Handbook's* with respect to the computer programmer occupation.[29] USCIS rescinded the 2017 policy memorandum following the decision of the U.S. Court of Appeals for the Ninth Circuit in *Innova Solutions v. Baran,* 983 F.3d 428 (9th Cir. 2020).[30] As the court stated in *Innova*, "the fact that *some* computer programmers are hired without a bachelor's degree is entirely consistent with a bachelor's degree '*normally* [being] the minimum requirement for entry.'"[31] USCIS currently applies this same rationale to other occupations. By proposing to codify USCIS's current practice at proposed 8 CFR 214.2(h)(4)(iii)(A)(*5*), DHS seeks to provide H-1B petitioners with more certainty as to what adjudication standards apply to their petitions.

In addition, DHS proposes to codify its current practices by revising the criteria for a specialty occupation at current 8 CFR 214.2(h)(4)(iii)(A). First, DHS proposes to replace the phrase "To qualify as a specialty occupation, the position must meet one of

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[28] *See* USCIS, "H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models," *https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations* (last updated Feb. 8, 2023).
[29] *See* USCIS, "Rescission of 2017 Policy Memorandum PM-602-0142," PM-602-0142.1, *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0142.1_RescissionOfPM-602-0142.pdf* (Feb. 3, 2021).
[30] The 2017 memorandum instructed officers not to "generally consider the position of [computer] programmer to qualify as a specialty occupation," specifically where the proffered position did not have a minimum entry requirement of a U.S. bachelor's or higher and indicated that the petitioner must provide other evidence to establish that the particular position is one in a specialty occupation. *See* USCIS, Recission of the December 22, 2000 "Guidance memo on H1B computer related positions", PM-602-0142, https://www.uscis.gov/sites/default/files/document/memos/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf (Mar. 31, 2017).
[31] *See Innova*, 983 F.3d at 432 (emphasis in original).

the following criteria" with "A position does not meet the definition of specialty occupation in paragraph (h)(4)(ii) of this section unless it also satisfies at least one of the following criteria at paragraphs (h)(4)(iii)(A)(*1*) through (*4*) of this section." This proposed change would clarify that meeting one of the regulatory criteria is a necessary part of—but not always sufficient for—demonstrating that a position qualifies as a specialty occupation. This is not new; the criteria at current 8 CFR 214.2(h)(4)(iii)(A) must be construed in harmony with and in addition to other controlling regulatory provisions and with the statute as a whole.[32] In 2000, the U.S. Court of Appeals for the Fifth Circuit highlighted the ambiguity of the regulatory provision's current wording, and petitioners have misinterpreted the criteria in 8 CFR 214.2(h)(4)(iii)(A) as setting forth both the necessary and sufficient conditions to qualify as a specialty occupation, a reading that resulted in some positions meeting one condition of 8 CFR 214.2(h)(4)(iii)(A), but not the definition as a whole.[33] These proposed changes would eliminate this source of confusion.

DHS is also proposing to amend 8 CFR 214.2(h)(4)(iii)(A)(*1*) by adding "U.S." to "baccalaureate," and replacing the word "position" with "occupation," so that it sets forth "the minimum requirement for entry into the particular occupation in which the beneficiary will be employed." *See* proposed 8 CFR 214.2(h)(4)(iii)(A)(*1*). Adding

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[32] Numerous AAO non-precedent decisions spanning several decades have explained that the criteria at 8 CFR 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 CFR 214.2(h)(4)(ii), and that the regulatory criteria must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See, e.g., In Re.* ---, 2009 WL 4982420 (AAO Aug. 21, 2009); *In Re.* ---, 2009 WL 4982607 (AAO Sept. 3, 2009); *In Re. 15542*, 2016 WL 929725 (AAO Feb. 22, 2016); *In Re. 17442092*, 2021 WL 4708199 (AAO Aug. 11, 2021); *In Re. 21900502*, 2022 WL 3211254 (AAO July 7, 2022).

[33] *See Defensor* v. *Meissner,* 201 F.3d 384, 387 (5th Cir. 2000) (stating that current 8 CFR 214.2(h)(4)(iii)(A) "appears to implement the statutory and regulatory definition of specialty occupation through a set of four different standards. However, this section might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition. The ambiguity stems from the regulation's use of the phrase 'to qualify as.' In common usage, this phrase suggests that whatever conditions follow are both necessary and sufficient conditions. Strictly speaking, however, the language logically entails only that whatever conditions follow are necessary conditions. . . . If § 214.2(h)(4)(iii)(A) is read to create a necessary and sufficient condition for being a specialty occupation, the regulation appears somewhat at odds with the statutory and regulatory definitions of 'specialty occupation.'").

"U.S." clarifies that a baccalaureate degree must be a U.S. degree (or its foreign equivalent), and that a foreign baccalaureate is not necessarily an equivalent. DHS is proposing this change to codify longstanding practice and to reflect a consistent standard that will align the regulation discussing the position requirement at 8 CFR 214.2(h)(4)(iii)(A)(*1*) with the statutory requirement of "a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States" at INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), as well as the regulatory requirement that an H-1B beneficiary must have the equivalent of a U.S. baccalaureate degree at 8 CFR 214.2(h)(4)(iii)(C)(*1*). Replacing "position" with "occupation" would clarify that the first criterion can be satisfied if the petitioner can show that its position falls within an occupational category for which all positions within that category have a qualifying minimum degree requirement.[34] This revision would provide added clarity to the regulatory criteria as the criteria would flow from general to specific (i.e., occupation level to industry to employer to position). If the occupation requires at least a bachelor's degree in a specific specialty (e.g., architect or aeronautical engineer) then it necessarily follows that a position in one of those occupations would require a degree and qualify as a specialty occupation. If the occupation does not require at least a bachelor's degree in a specific specialty, then the petitioner could submit evidence to show that at least a bachelor's degree in a specific specialty (or its equivalent) is required based on U.S. industry norms, the employer's particular requirement, or because of the particulars of the specific position. *See* proposed 8 CFR 214.2(h)(4)(iii)(A)(*2*) through (*4*). USCIS will continue its practice of consulting the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* and other reliable and

[34] DHS generally determines a position's occupation or occupational category by looking at the standard occupational classification (SOC) code designated on the LCA.

informative sources submitted by the petitioner, to assist in its determination regarding the minimum entry requirements for positions located within a given occupation.

DHS further proposes to amend 8 CFR 214.2(h)(4)(iii)(A)(*2*) by consolidating this criterion's second prong into the fourth criterion. *See* proposed 8 CFR 214.2(h)(4)(iii)(A)(*2*). The second prong of current 8 CFR 214.2(h)(4)(iii)(A)(*2*), which focuses on a position's complexity or uniqueness, is similar to current 8 CFR 214.2(h)(4)(iii)(A)(*4*), which focuses on a position's complexity and specialization. In practice, they are frequently consolidated into the same analysis. This amendment would streamline both criteria, as well as the explanation and analysis in written decisions issued by USCIS pertaining to specialty occupation determinations, as such decisions discuss all four criteria and are necessarily repetitive because of the existing overlap between 8 CFR 214.2(h)(4)(iii)(A)(*2*) and (*4*). This amendment would also simplify the analysis because petitioners may demonstrate eligibility under this criterion if the position is "so specialized, complex, or unique", as opposed to "so complex or unique" under current 8 CFR 214.2(h)(4)(iii)(A)(*2*) and "so specialized and complex" under current 8 CFR 214.2(h)(4)(iii)(A)(*4*) (emphasis added). Notwithstanding these amendments, the analytical framework of the first prong of proposed 8 CFR 214.2(h)(4)(iii)(A)(*2*) generally would remain the same. Thus, a petitioner would satisfy proposed 8 CFR 214.2(h)(4)(iii)(A)(*2*) if it demonstrates that the specialty degree requirement is normally the minimum entry requirement for: (1) parallel positions; (2) at similar organizations; (3) within the employer's industry in the United States. This criterion is intended for the subset of positions with minimum entry requirements that are determined not necessarily by occupation, but by specific industry standards. For this criterion, DHS would continue its practice of consulting DOL's *Occupational Outlook Handbook* and other reliable and informative sources, such as information from the industry's professional association or licensing body, submitted by the petitioner.

USCIS proposes to change the third criterion at proposed 8 CFR 214.2(h)(4)(iii)(A)(*3*), in part, from stating that the employer normally requires a "degree or its equivalent for the position" to stating that the employer normally requires a "U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, for the position." The additional phrase about a "degree in a directly related specific specialty" would reinforce the existing requirements for a specialty occupation, in other words, that the position itself must require a directly related specialty degree, or its equivalent, to perform its duties. *See also* proposed 8 CFR 214.2(h)(4)(iii)(A)(*3*). Employers requiring degrees as a proxy for a generic set of skills would not meet this standard. Employers listing a specialized degree as a hiring preference would not meet this standard either. If USCIS were constrained to recognize a position as a specialty occupation merely because an employer has an established practice of demanding certain educational requirements for the offered position—without consideration of whether the position actually requires the application of a body of highly specialized knowledge consistent with the degree requirement—then any beneficiary with a bachelor's degree in a specific specialty could be brought into the United States to perform work in a non-specialty occupation if the employer arbitrarily imposed such a degree requirement for the non-specialty occupation position.[35] With respect to an employer's normal employment practices, a petitioner could submit evidence of an established recruiting and hiring practice to establish its requirements for the position. Keeping the word "normally" in this criterion is intended to preserve flexibility for petitioners, although

[35] *See Defensor,* 201 F.3d at 388 (noting "If only [the employer]'s requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H1-B [sic] visas to positions which require specialized experience and education to perform.").

petitioners seeking to fill a position for the first time generally would not be able to demonstrate an established practice.[36]

Furthermore, DHS proposes to add "or third party if the beneficiary will be staffed to that third party" to proposed 8 CFR 214.2(h)(4)(iii)(A)(*3*)[37] to clarify that it is the third party's requirements, not the petitioning employer's, that are most relevant if the beneficiary would be staffed to a third party. This change would be consistent with proposed 8 CFR 214.2(h)(4)(i)(B)(*3*), which clarifies that when a beneficiary is staffed to a third party, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. This proposed revision would define "staffed" in the same way to mean that the beneficiary would be contracted to fill a position in the third party's organization. The criterion at proposed 8 CFR 214.2(h)(4)(iii)(A)(*4*) incorporates the second prong of current 8 CFR 214.2(h)(4)(iii)(A)(*2*). *See* proposed 8 CFR 214.2(h)(4)(iii)(A)(*4*). DHS proposes no other substantive changes to this criterion. Thus, the fourth criterion could be satisfied if the petitioner demonstrates that the proffered position's job duties are so specialized, complex, or unique that they necessitate the attainment of a U.S. bachelor's degree in a directly related specific specialty, or its equivalent.

3. Amended Petitions

DHS proposes to clarify when an amended or new H-1B petition must be filed due to a change in an H-1B worker's place of employment. Specifically, this rule proposes to clarify that any change of work location that requires a new LCA is itself considered a material change and therefore requires the petitioning employer to file an amended or new petition with USCIS before the H-1B worker may perform work under

[36] First-time hirings are not precluded from qualifying under one of the other criteria.
[37] The full proposed regulation would read: "The employer, or third party if the beneficiary will be staffed to that third party, normally requires a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, for the position."

the changed conditions. Further, DHS proposes to consolidate and clarify guidance on when an amended or new petition is required for short-term placement of H-1B workers at a worksite not listed on the approved petition or corresponding LCA.[38] These proposed changes are not intended to depart from existing regulations and guidance, but rather, seek to consolidate existing requirements and make clear when a petitioner must submit an amended or new petition. DHS regulations already require that petitioning employers file an amended or new H-1B petition for all situations involving a material change to the conditions of H-1B employment. Specifically, 8 CFR 214.2(h)(2)(i)(E) states that a "petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition." That regulation goes on to add that if the amended or new petition is an H-1B petition, a new LCA must accompany the petition. Additionally, 8 CFR 214.2(h)(11)(i)(A) requires a petitioner to "immediately notify" USCIS of a change in the terms and conditions of employment of a beneficiary which may affect eligibility for H-1B status. However, USCIS seeks to clarify when an amended or new petition must be filed or when a petitioner need not file an amended petition. To find relevant requirements, H-1B petitioners and USCIS officers currently must look to various sources, including USCIS policy guidance, DOL regulations, and DOL guidance. DHS seeks to make its regulations relating to amended or new H-1B petitions more comprehensive and useful by incorporating relevant requirements into proposed 8 CFR 214.2(h)(2)(i)(E)(*2*).

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[38] *See* USCIS, "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," PM-602-0120 (July 21, 2015), *https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf*.

Under 8 CFR 214.2(h)(4)(i)(B), an H-1B petition for a specialty occupation worker must include a certified LCA from DOL. DOL regulation at 20 CFR 655.731 provides details on the LCA requirements, including that an employer seeking to employ an H-1B worker in a specialty occupation must attest on the LCA that it will pay the H-1B worker the required wage rate. The required wage rate is the higher of either the prevailing wage[39] for the occupational classification, or the actual wage paid by the employer to similarly situated employees, in the geographic area of intended employment.[40] The LCA seeks to protect U.S. workers and their wages by disincentivizing hiring foreign workers at lower wages. A key component to filing an LCA is determining the appropriate wage to list on the application. Generally, a petitioning employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from the Office of Foreign Labor Certification, an independent authoritative source, or other legitimate sources of wage data.[41] While there are many factors that may be considered when determining the prevailing wage, one of the most significant is the geographic area where the H-1B worker will perform their duties. Because prevailing wages differ, often significantly, from location to location, a change in geographic area of intended employment that goes

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[39] 20 CFR 655.731(a)(2)(ii) states that, if the job opportunity is not covered by a collective bargaining agreement, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(*2*), and (b)(3)(iii)(C)(*2*) of 20 CFR 655.731. An employer is not permitted to pay a wage that is lower than a wage required under any other applicable Federal, State or local law.

[40] Pursuant to 20 CFR 655.715, "Area of intended employment" means the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., normal commuting distances might be 20, 30, or 50 miles). If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling with regard to the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA or PMSA (or CMSA).

[41] *See* 20 CFR 655.731(a)(2).

beyond the current metropolitan statistical area (MSA) often will have an impact on the prevailing wage, requiring a new LCA.

In its precedent decision *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015), USCIS's Administrative Appeals Office (AAO) held that a change in geographic area of employment that would require a new LCA is considered a material change for purposes of 8 CFR 214.2(h)(2)(i)(E) and (h)(11)(i)(A) because the new LCA may impact eligibility under 8 CFR 214.2(h)(4)(i)(B)(*1*). For example, a change in location may impact eligibility if the new location is in an MSA with a higher wage. USCIS provided additional guidance implementing *Matter of Simeio Solutions* in July 2015 in its policy memorandum "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*."[42]

In proposed 8 CFR 214.2(h)(2)(i)(E)(*2*), DHS proposes to specify that "Any change in the place of employment to a geographical area that requires a corresponding labor condition application to be certified to USCIS is considered a material change and requires an amended or new petition to be filed with USCIS before the H-1B worker may begin work at the new place of employment." Further, DHS proposes to specify in proposed 8 CFR 214.2(h)(2)(i)(E)(*2*) that "[t]he amended or new petition must be properly filed before the material change(s) takes place". This would codify current USCIS practice as articulated in its policy memorandum "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," which discusses the "USCIS position that H-1B petitioners are required to file an amended or new petition before placing an H-1B employee at a new place of employment not covered by an existing, approved H-1B petition." As with current USCIS practice,

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[42] *See* USCIS, "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," PM-602-0120 (July 21, 2015), *https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf*.

proposed 8 CFR 214.2(h)(2)(i)(E)(*2*) would allow the worker to begin working under the materially changed terms and conditions of employment upon the filing of the amended or new petition, assuming all other requirements and terms of eligibility are met. They would not need to wait for a final decision on the amended or new petition in order to begin working if eligible in accordance with existing portability provisions at 8 CFR 214.2(h)(2)(i)(H). If while the amended or new petition is pending adjudication another material change occurs, an employer must file another amended or new petition to account for the new changes.[43] If that amended or new petition is denied, the H-1B worker generally may return to the position and worksite listed on the most recently approved petition as long as that petition and corresponding LCA are still valid.[44]

Proposed 8 CFR 214.2(h)(2)(i)(E)(*2*) would also set forth limited circumstances in which a change to the beneficiary's place of employment would not require the petitioner to file an amended petition. Proposed 8 CFR 214.2(h)(2)(i)(E)(*2*)(*i*) states that moving a beneficiary to a new job location within the same area of intended employment as listed on the LCA would not require an amended petition, assuming there are no other material changes. This would be consistent with INA section 212(n)(4), which provides that a change in the worksite location within the same MSA of the existing LCA would generally be deemed to be within the area of employment.[45] Note that proposed 8 CFR 214.2(h)(2)(i)(E)(*2*)(*i*) does not purport to set forth all relevant DOL requirements, such as the requirement that the petitioning employer post notice of the LCA, either electronically or in hard-copy, in the new work location on or before the date that the H-1B worker performs any work at the new location.[46]

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[43] *See id.* at 7.
[44] *See id.*
[45] *See also* 20 CFR 655.734; DOL, Wage and Hour Division, "Fact Sheet #62J: What does 'place of employment' mean?" (July 2008), *https://www.dol.gov/agencies/whd/fact-sheets/62j-h1b-worksite* ("The employer need not obtain a new LCA for another worksite within the geographic area of intended employment where the employer already has an existing LCA for that area.").
[46] *See* 20 CFR 655.734(a)(2).

Additionally, proposed 8 CFR 214.2(h)(2)(i)(E)(*2*)(*ii*) would set forth the specific durations for short-term placements that would not require an amended or new petition, assuming there are no other material changes. This would be consistent with DOL regulations at 20 CFR 655.735 in which short-term placements of less than 30 days, or in some cases 60 days, do not require a new LCA or an amended or new petition, provided there are no material changes.

Proposed 8 CFR 214.2(h)(2)(i)(E)(*2*)(*iii*) would clarify that an amended or new petition would not be required when a beneficiary is going to a non-worksite location to participate in employee development, will be spending little time at any one location, or will perform a peripatetic job. Proposed 8 CFR 214.2(h)(2)(i)(E)(*2*)(*iii*) provides examples of "peripatetic jobs" including situations where the job is primarily at one location, but the beneficiary occasionally travels for short periods to other locations on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding 5 consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations). Proposed 8 CFR 214.2(h)(2)(i)(E)(*2*)(*iii*) would be consistent with DOL regulations at 20 CFR 655.715, which sets forth several criteria for what would not constitute a "place of employment" or "worksite," as well as what would constitute an "employee developmental activity," for purposes of requiring a new LCA.

Note that proposed 8 CFR 214.2(h)(2)(i)(E)(*2*) would not codify all relevant considerations related to when to file an amended petition. Stakeholders should still consult DOL regulations and policy guidance when considering if an amended petition is necessary. Nevertheless, DHS believes its proposed changes to 8 CFR 214.2(h)(2)(i)(E)(*2*) would still be beneficial by providing additional clarity about when a

change in an H-1B worker's place of employment constitutes a material change requiring an amended or new petition.

DHS proposes to revise and redesignate current 8 CFR 214.2(h)(2)(i)(E) as proposed 8 CFR 214.2(h)(2)(i)(E)(*1*) so that this provision would be applicable to all H classifications, while proposed 8 CFR 214.2(h)(2)(i)(E)(*2*) would be specific to H-1B nonimmigrants. In proposed 8 CFR 214.2(h)(2)(i)(E)(*1*), DHS proposes minor changes to clarify that an amended or new H-1B petition requires a current or new certified labor condition application.

4. Deference

DHS seeks to codify and clarify its existing deference policy at proposed 8 CFR 214.1(c)(5). Deference helps promote consistency and efficiency for both USCIS and its stakeholders. The deference policy instructs officers to consider prior determinations involving the same parties and facts, when there is no material error with the prior determination, no material change in circumstances or in eligibility, and no new material information adversely impacting the petitioner's, applicant's, or beneficiary's eligibility. Through this proposed regulation, DHS seeks to clarify when petitioners may expect adjudicators to exercise deference in reviewing their petitions, so petitioners will be more likely to submit necessary, relevant supporting evidence. This creates predictability for petitioners and beneficiaries and leads to fairer and more reliable outcomes. Codifying and clarifying when USCIS gives deference would also better ensure consistent adjudications.

In 2004, USCIS issued a memorandum discussing the significance of prior USCIS adjudications.[47] The memorandum acknowledged that USCIS is not bound to approve subsequent petitions or applications where eligibility has not been demonstrated merely

[47] *See* USCIS, "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity," HQPRD 72/11.3 (Apr. 23, 2004).

because of a prior approval, which may have been erroneous. Nevertheless, where there has been no material change in the underlying facts, the memorandum specified that adjudicators should defer to a prior determination involving the same parties and underlying facts unless there was a material error, a substantial change in circumstances, or new material information that adversely impacts eligibility. On October 23, 2017, USCIS rescinded that guidance, expressing concern that the 2004 memorandum shifted the burden from a petitioner to USCIS.[48] Rather than attempt to address any perceived concerns, the 2017 memorandum rescinded the 2004 policy entirely. On April 27, 2021, USCIS incorporated its deference policy into the USCIS Policy Manual, acknowledging that adjudicators are not required to approve subsequent petitions or applications where eligibility has not been demonstrated strictly because of a prior approval (which may have been erroneous), but stressing that they should defer to prior determinations involving the same parties and underlying facts.[49] As stated in the USCIS Policy Manual, deviation from a previous approval carries important consequences and implicates predictability and consistency concerns.[50]

Consistent with current guidance in the USCIS Policy Manual, proposed 8 CFR 214.1(c)(5) would provide that when adjudicating a request filed on Form I-129 involving the same parties and the same underlying facts, USCIS gives deference to its prior determination of the petitioner's, applicant's, or beneficiary's eligibility. However, USCIS need not give deference to a prior approval if: there was a material error involved with a prior approval; there has been a material change in circumstances or eligibility

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[48] *See* USCIS, "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status," PM-602-0151 (Oct. 23, 2017).
[49] *See* USCIS, "Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity, Policy Alert," PA-2021-05 (April 27, 2021), *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf* (last visited on Mar. 23, 2023).
[50] *See* USCIS Policy Manual, Volume 2, "Nonimmigrants," Part A, "Nonimmigrant Policies and Procedures", Chapter 4, "Extension of Stay, Change of Status, and Extension of Petition Validity," Section B, "Extension of Petition Validity," *https://www.uscis.gov/policy-manual/volume-2-part-a-chapter-4*.

requirements; or there is new, material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility.

Proposed 8 CFR 214.1(c)(5) would apply to all nonimmigrants using Form I-129, Petition for a Nonimmigrant Worker, and would include a request on Form I-129 involving the same parties and same material facts. Currently, the USCIS Policy Manual frames its deference policy as applying to requests for an "extension of petition validity."[51] The phrase "extension of petition validity" may be misread as limiting USCIS's deference policy to petition extensions and excluding other types of requests that could involve the same parties and same material facts. Thus, DHS proposes to more broadly frame proposed 8 CFR 214.1(c)(5) as applying to "a request filed on Form I-129" and would not use the term "extension of petition validity" as found in the current USCIS Policy Manual.

5. Evidence of Maintenance of Status

DHS seeks to clarify current requirements and codify current practices concerning evidence of maintenance of status at proposed 8 CFR 214.1(c)(1) through (7). Maintenance of status in this context generally refers to the applicant or beneficiary abiding by the terms and conditions of admission or extension of stay, as applicable (for example, if admitted as an H-1B nonimmigrant, the individual worked according to the terms and conditions of the H-1B petition approval on which their status was granted and did not engage in activities that would constitute a violation of status, such as by working without authorization). Primarily, DHS seeks to clarify that evidence of maintenance of status is required for petitions where there is a request to extend or amend the beneficiary's stay. These changes would impact the population of nonimmigrants named in 8 CFR 214.1(c)(1): E-1, E-2, E-3, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q-1, R-1, and TN nonimmigrants.

[51] *See id.*

First, DHS would add a new provision at proposed 8 CFR 214.1(c)(6), which would provide, in part, that an applicant or petitioner seeking an extension of stay must submit supporting evidence to establish that the applicant or beneficiary maintained the previously accorded nonimmigrant status before the extension request was filed.[52] Proposed 8 CFR 214.1(c)(6) would further provide that evidence of such maintenance of status may include, but is not limited to: copies of paystubs, W-2 forms, quarterly wage reports, tax returns, contracts, and work orders. This is consistent with the nonimmigrant petition form instructions, which state that for all classifications, if a beneficiary is seeking a change of status (COS) or extension of stay, evidence of maintenance of status must be included with the new petition.[53] The form instructions further state that if the beneficiary is employed in the United States, the petitioner may submit copies of the beneficiary's last two pay stubs, Form W-2, and other relevant evidence, as well as a copy of the beneficiary's Form I-94, passport, travel document, or Form I-797.[54] By proposing to codify these instructions, DHS hopes to clarify that petitioners should demonstrate such eligibility by submitting supporting documentation upfront with the extension of stay request, rather than waiting for USCIS to issue a request for additional information such as a request for evidence (RFE) or notice of intent to deny (NOID). Under proposed 8 CFR 214.1(c)(6) DHS further proposes to include additional examples of evidence to demonstrate maintenance of status, which include, but are not limited to: quarterly wage reports, tax returns, contracts, and work orders. By clearly stating what types of supporting documentation will help USCIS in adjudicating extension petitions, DHS hopes to further reduce the need for RFEs and NOIDs, which can be burdensome to both USCIS and petitioners.

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[52] This is subject to the exception in 8 CFR 214.1(c)(4).
[53] *See* USCIS, Form I-129 Instructions, "Instructions for Petition for Nonimmigrant Worker," at 6, *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf* (last visited Aug. 23, 2023).
[54] *See id.*

Requiring petitioners (or applicants, in the case of E nonimmigrants) to submit supporting evidence to establish that the beneficiary (or applicant) maintained the previously accorded nonimmigrant status before the extension of stay request was filed would not conflict with USCIS's current and proposed deference policy. Although USCIS defers to prior USCIS determinations of eligibility in extension requests, USCIS would not be able to defer to a prior determination of maintenance of status during the preceding stay because it would not have made such a determination until adjudicating the extension of stay request. Even if there was a prior determination, USCIS need not give deference when there was a material error involved with a prior approval; a material change in circumstances or eligibility requirements; or new, material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility. Without supporting evidence to demonstrate maintenance of status, it is unclear how USCIS would determine if there was a material error, material change, or other new material information. For example, evidence pertaining to the beneficiary's continued employment (e.g., paystubs) may help USCIS to determine whether the beneficiary was being employed consistent with the prior petition approval or whether there might have been material changes in the beneficiary's employment (e.g., a material change in the place of employment).

Thus, proposed 8 CFR 214.1(c)(6) would make clear that it is the filers' burden to demonstrate that status was maintained before the extension of stay request was filed. This would be consistent with current 8 CFR 214.1(c)(4), which states that, "An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status . . . ," as well as proposed 8 CFR 214.1(c)(4)(i), which would state that, "An extension or amendment of stay may not be approved for an applicant or beneficiary who failed to maintain the previously accorded status . . . ."

In line with proposed 8 CFR 214.1(c)(6), DHS is proposing to amend 8 CFR 214.2(h)(14) by removing the sentence "Supporting evidence is not required unless requested by the director." This sentence causes confusion because it implies that supporting evidence is not required, contrary to current 8 CFR 214.1(c)(1) (a request for an extension of stay must be filed "on the form designated by USCIS, . . . with the initial evidence specified in § 214.2, and in accordance with the form instructions") and the form instructions ("[f]or all classifications, if a beneficiary is seeking a [COS] or extension of stay, evidence of maintenance of status must be included with the new petition").[55] Removing this sentence from proposed 8 CFR 214.2(h)(14) should further reduce the need for RFEs or NOIDs.

For the same reasons, DHS is also proposing to remove the same or similar sentence found in the regulations for the L, O, and P nonimmigrant classifications. Specifically, DHS proposes to amend 8 CFR 214.2(l)(14)(i) by removing the sentence "Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director." DHS proposes to amend 8 CFR 214.2(o)(11) and (p)(13) by removing the sentence "Supporting documents are not required unless requested by the Director." DHS is proposing technical changes to add the word "generally" to 8 CFR 214.2(l)(14)(i), (o)(11), and (p)(13), to account for untimely filed extensions that are excused consistent with 8 CFR 214.1(c)(4). As stated above, removing this sentence should reduce the need for RFEs or NOIDs. Further, it would not add an additional burden on the petitioner or applicant.

In addition, DHS proposes to codify its longstanding practice of requiring evidence of maintenance of status for petitions requesting to amend a beneficiary's stay in the United States. The proposed rule would add language to clarify that the petitioner

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[55] *See* USCIS, Form I-129 Instructions, "Instructions for Petition for Nonimmigrant Worker," at 6, *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf* (last visited Aug. 23, 2023).

must submit initial evidence that the beneficiary maintained the previously accorded status before the amendment of stay petition was filed. Failure to establish maintenance of status would result in a denial of the request to amend the beneficiary's stay in the United States, unless USCIS determines that the failure to timely file the amendment of stay was due to extraordinary circumstances. *See* proposed 8 CFR 214.1(c)(1), (4), (6), and (7). DHS would also update the Form I-129, Petition for a Nonimmigrant Worker, as well as the form filing instructions to coincide with and support these changes, as well as provide clarity about when an amended petition is appropriate, including the requirement of establishing maintenance of status for amendment of stay requests.

Current 8 CFR 214.1(c)(1) generally requires evidence of maintenance of status with an extension of stay request, and 8 CFR 214.1(c)(4) generally states that an extension of stay may not be approved where a beneficiary failed to maintain the previously accorded status. DHS proposes to add specific references to requests to "amend the terms and conditions of the nonimmigrant's stay without a request for additional time" or for an "amendment of stay" to proposed 8 CFR 214.1(c)(1), (4), (6), and (7), so that these regulations clearly convey that evidence of maintenance of status is also required for petitions requesting to amend a beneficiary's stay in the United States, even when the petition is not requesting additional time beyond the period previously granted. For example, a petitioner may request to amend the stay of the beneficiary when filing an amended petition but not seek additional time for the beneficiary's stay because the beneficiary may have an unexpired I-94 that has been granted until the end of the 6-year period of admission and is not yet eligible for an exemption from the 6-year period of admission limitation. In that example, the petitioner may seek authorization for the beneficiary to remain in the United States, but under different terms and conditions than previously granted, without requesting additional time. A petitioner filing an amended petition with a request to amend the terms and conditions of the beneficiary's stay, but

without a request for additional time, would not specifically request an "extension of stay" on the Form I-129 petition. Nevertheless, DHS considers a petition requesting to amend the terms and conditions of the beneficiary's stay to be substantively equivalent to an extension of stay request for purposes of establishing maintenance of status and will exercise discretion when granting such requests. In other words, DHS considers an amendment of stay request as a request to continue to allow the beneficiary to remain in the United States based upon the amended conditions for a period of stay that has already been granted. Therefore, DHS believes that it is reasonable to require evidence that maintenance of status has been satisfied, before USCIS may favorably exercise its discretion to grant an amendment of stay request. Further, including amendments of stay under 8 CFR 214.1(c) would close a potential loophole of using an amended petition for a beneficiary who has not maintained status, yet wishes to remain in the United States, without having to depart and be readmitted in that status.

Currently, most petitioners filing to amend a beneficiary's stay already submit evidence of maintenance of status; however, if an amended petition does not contain evidence of maintenance of status, USCIS typically issues a request for such evidence. By proposing to codify current practice in 8 CFR 214.1(c), DHS hopes to clarify that petitioners should demonstrate eligibility by submitting evidence of maintenance of status with the amendment of stay request (just like with an extension of stay request), rather than waiting for USCIS to request this information. By clearly stating what types of supporting documentation will help USCIS in adjudicating requests to amend a beneficiary's stay, DHS hopes to further reduce the need for RFEs and NOIDs, which can be burdensome for petitioners and USCIS, and generally extends the time needed to complete the adjudication of the petition.

Specifically, DHS proposes to revise 8 CFR 214.1(c)(4), to add a reference to an "amendment" of stay. Aside from clarifying that evidence of maintenance of status would

be required in an amendment of stay request, this change would also clarify that USCIS can excuse the late filing of an amendment of stay request under the circumstances described at proposed 8 CFR 214.1(c)(4)(i)(A) through (D). "Late filing" in this context would include certain extension of stay requests filed after the expiration date on the Form I-94. A "late filing" would also encompass, for example, a request for an amendment of stay that was filed after the beneficiary temporarily stopped working due to extraordinary circumstances beyond their control. DHS would clarify in proposed 8 CFR 214.1(c)(4)(ii) that, if USCIS excuses the late filing of an amendment of stay request, it would do so without requiring the filing of a separate application or petition and would grant the amendment of stay, if otherwise eligible, from the date the petition was filed.[56]

DHS proposes nonsubstantive edits to improve readability to 8 CFR 214.1(c)(4). DHS also proposes nonsubstantive edits in proposed 8 CFR 214.1(c)(1) and (4) to add references to a "beneficiary," "petition," or "Form I-129," to account for the extension or amendment of stay being requested on the Form I-129 petition, and to replace "alien" with "beneficiary" and "Service" with "USCIS." With respect to proposed 8 CFR 214.1(c)(7), this provision would contain the same language as current 8 CFR 214.1(c)(5), except that DHS would add references to an "amendment" of stay and make other nonsubstantive edits similar to the ones described above.

6. Eliminating the Itinerary Requirement for H Programs

DHS is proposing to eliminate the H programs' itinerary requirement. *See* proposed 8 CFR 214.2(h)(2)(i)(B) and (F). Current 8 CFR 214.2(h)(2)(i)(B) states that "A petition that requires services to be performed or training to be received in more than

[56] Proposed 8 CFR 214.1(c)(4)(ii) would continue to state, with minor revisions, that if USCIS excuses the late filing of an extension of stay request, it will do so without requiring the filing of a separate application or petition and will grant the extension of stay from the date the previously authorized stay expired or the amendment of stay from the date the petition was filed.

one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions." In addition, current 8 CFR 214.2(h)(2)(i)(F), for agents as petitioners, contains itinerary requirement language.

The information provided in an itinerary is largely duplicative of information already provided in the LCA for H-1B petitions and the temporary labor certification (TLC) for H-2 petitions. The LCA and TLC require the petitioner to the list the name and address where work will be performed, as well as the name and address of any secondary entity where work will be performed. It is also largely duplicative of information already provided on the Form I-129, which requires the petitioner to provide the address where the beneficiary will work if different from the petitioner's address listed on the form.[57] Therefore, eliminating the itinerary requirement would reduce duplication that increases petitioner burden and promote more efficient adjudications, without compromising program integrity. Furthermore, USCIS no longer applies the itinerary requirement to H-1B petitions governed by 8 CFR 214.2(h)(2)(i)(B), as memorialized in USCIS Policy Memorandum PM-602-0114, "Rescission of Policy Memoranda" (June 17, 2020) (rescinding USCIS Policy Memorandum PM-602-0157, "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites" (Feb. 22, 2018)).[58]

To eliminate the unnecessary duplication of work, DHS also proposes to eliminate the itinerary requirement for agents acting as petitioners at current 8 CFR 214.2(h)(2)(i)(F). In proposing to eliminate the itinerary requirement for agents at paragraph (h)(2)(i)(F), DHS also proposes to incorporate technical changes to this

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[57] *See* USCIS, Form I-129, "Petition for a Nonimmigrant Worker," *https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf* (last visited Mar. 14, 2023).

[58] USCIS issued policy memorandum PM-602-0114 following the decision of the U.S. District Court for the District of Columbia in *ITServe Alliance, Inc. v. Cissna*, 443 F. Supp. 3d 14, 42 (D.D.C. 2020) ("the itinerary requirement in the INS 1991 Regulation [codified at 8 CFR 214.2(h)(2)(i)(B)] . . . has been superseded by statute and may not be applied to H-1B visa applicants"). *See also Serenity Info Tech, Inc. v. Cuccinelli*, 461 F. Supp. 3d 1271, 1285 (N.D. Ga. 2020) (citing *ITServe*).

provision by moving language currently found in paragraph (h)(2)(i)(F)(*2*) to paragraph (h)(2)(i)(F)(*1*); removing paragraph (h)(2)(i)(F)(*2*); and redesignating current paragraph (h)(2)(i)(F)(3) as proposed paragraph (h)(2)(i)(F)(*2*). Proposed 8 CFR 214.2(h)(2)(i)(F)(*1*) would incorporate the following language currently found in paragraph (h)(2)(i)(F)(*2*): "The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required." This proposed restructuring at 8 CFR 214.2(h)(2)(i)(F) is intended to simplify and consolidate the guidance for agents as petitioners following the removal of the itinerary requirement language.

7. Validity Expires Before Adjudication

DHS proposes to allow H-1B petitions to be approved or have their requested validity period dates extended if USCIS adjudicates and deems the petition approvable after the initially requested validity period end-date, or the period for which eligibility has been established, has passed. This typically would happen if USCIS deemed the petition approvable upon a favorable motion to reopen, motion to reconsider, or appeal. Specifically, under proposed 8 CFR 214.2(h)(9)(ii)(D)(*1*), if USCIS adjudicates an H-1B petition and deems it otherwise approvable after the initially requested validity period end-date, or the last day for which eligibility has been established, USCIS may issue an RFE asking whether the petitioner wants to update the dates of intended employment.

If in response to the RFE the petitioner confirms that it wants to update the dates of intended employment and submits a different LCA that corresponds to the new requested validity dates, even if that LCA was certified after the date the H-1B petition was filed, and assuming all other eligibility criteria are met, USCIS would approve the H-1B petition for the new requested period or the period for which eligibility has been established, as appropriate, rather than require the petitioner to file a new or amended

petition. The petitioner's request for new dates of employment and submission of an LCA with a new validity period that properly corresponds to the revised requested validity period on the petition and an updated prevailing or proffered wage, if applicable, would not be considered a material change, except that the petitioner may not reduce the proffered wage from that originally indicated in their petition. *See* proposed 8 CFR 214.2(h)(9)(ii)(D)(*1*). However, the total petition validity period would still not be able to exceed 3 years.

Currently, if USCIS adjudicates and deems these types of petitions approvable after the initially requested validity period, or the last day for which eligibility has been established, has elapsed, the petition must be denied. The petitioner is also not able to change the requested validity period using the same petition. Instead, the petitioner must file an amended or new petition requesting a new validity period if they seek to employ or continue to employ the beneficiary. *See* 8 CFR 214.2(h)(2)(i)(E) and (h)(11)(i)(A). The requirement to file an amended or new petition in this circumstance results in additional filing costs and burden for the petitioner. It also results in unnecessary expenditures of USCIS resources to intake and adjudicate another petition, even though the only change generally is a new requested validity period due to the passage of time. This is not an efficient use of USCIS or the petitioner's resources. In certain circumstances this requirement may also result in the H-1B beneficiary losing their cap number, which generally would be an unequitable result for a petition that was otherwise approvable.

Aside from changing the requested validity period, the petitioner would also be able to increase the proffered wage to conform with a new prevailing wage if the prevailing wage has increased due to the passage of time. The petitioner would also be able to increase the proffered wage for other reasons, such as to account for other market wage adjustments. An increase to the proffered wage would not be considered a material

change, so long as there are no other material changes to the position. However, a petitioner would not be allowed to reduce the proffered wage, even if the prevailing wage decreased due to the passage of time. If the petitioner intends to reduce the proffered wage or make any other material change to the proposed employment, it would have to file an amended or new petition in accordance with existing provisions at 8 CFR 214.2(h)(2)(i)(E) and (h)(11)(i)(A).

Under proposed 8 CFR 214.2(h)(9)(ii)(D), USCIS would not be required to issue an RFE, as it could instead proceed to approve the petition for the originally requested period or until the last day for which eligibility has been established, as appropriate. For example, USCIS would not be required to issue an RFE when the beneficiary has already been granted H-1B status through another employer, changed nonimmigrant status, adjusted status, or has reached their 6-year limitation on stay, such that an RFE asking the petitioner if they want to update the requested dates of H-1B employment would serve little or no purpose. Consistent with these examples, DHS would consider potential factors that could inform whether USCIS issues an RFE as including, but not limited to, additional petitions filed or approved on the beneficiary's behalf, or the beneficiary's eligibility for additional time in H-1B status. *See* proposed 8 CFR 214.2(h)(9)(ii)(D)(*1*) and (*2*).

Proposed 8 CFR 214.2(h)(9)(ii)(D)(*2*) provides that if no RFE is issued concerning the requested dates of employment, or if the petitioner does not respond, or the response to the RFE does not support new dates of employment, the petition would be approved, if otherwise approvable, for the originally requested period or until the last day for which eligibility has been established, as appropriate. The last day for which eligibility has been established could, for example, be the date the beneficiary reached their six-year maximum limitation on stay, or the end date of the supporting LCA, or one year from approval in case of temporary licensure. If the petition is approved for the

originally requested period or the last day for which eligibility has been established, the petition would not be forwarded to the U.S. Department of State (DOS) nor would any accompanying request for a COS, extension of stay, or amendment of stay, be granted because the validity period would have already expired and would therefore not support issuance of a visa or a grant of status.

B. Benefits and Flexibilities

1. H-1B Cap Exemptions

DHS proposes to revise the requirements to qualify for H-1B cap exemption under 8 CFR 214.2(h)(8)(iii)(F)(*4*) when a beneficiary is not directly employed by a qualifying institution, organization, or entity. DHS also proposes to revise the definition of "nonprofit research organization" and "governmental research organization" under 8 CFR 214.2(h)(19)(iii)(C). These proposed changes are intended to clarify, simplify, and modernize eligibility for cap-exempt H-1B employment, so that they are less restrictive and better reflect modern employment relationships. The proposed changes are also intended to provide additional flexibility to petitioners to better implement Congress's intent to exempt from the annual H-1B cap certain H-1B beneficiaries who are employed at a qualifying institution, organization, or entity.

Congress set the current annual regular cap for the H-1B visa category at 65,000. *See* INA section 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A). Not all H-1B nonimmigrant visas (or grants of H-1B status) are subject to this annual cap. INA section 214(g)(5) allows certain employers to employ H-1B nonimmigrant workers without being subject to the annual numerical cap. *See* INA section 214(g)(5), 8 U.S.C. 1184(g)(5). For example, INA section 214(g)(5)(A) and (B) exempts those workers who are employed at an institution of higher education or a related or affiliated nonprofit entity, a nonprofit research organization or a governmental research organization. *See* INA section 214(g)(5)(A)-(B), 8 U.S.C. 1184(g)(5)(A)-(B).

Currently, DHS regulations state that an H-1B nonimmigrant worker is exempt from the cap if employed by: (1) an institution of higher education; (2) a nonprofit entity related to or affiliated with such an institution; (3) a nonprofit research organization; or (4) a governmental research organization. *See* 8 CFR 214.2(h)(8)(iii)(F)(*1*) through (*3*). DHS regulations also state that an H-1B nonimmigrant worker may be exempt from the cap when they are not "directly employed" by a qualifying institution, organization, or entity, if they are employed at a qualifying institution, organization, or entity so long as: (1) the majority of the worker's work time will be spent performing job duties at a qualifying institution, organization, or entity; and (2) the worker's job duties will directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity. *See* 8 CFR 214.2(h)(8)(iii)(F)(*4*). When relying on this exemption, the H-1B petitioner must also establish that there is a nexus between the work to be performed and the essential purpose, mission, objectives, or functions of the qualifying institution, organization, or entity. *Id*.

The H-1B cap exemption regulations define "nonprofit entity," "nonprofit research organization," and "governmental research organization" at 8 CFR 214.2(h)(8)(iii)(F)(*3*). For the definition of "nonprofit entity," the regulation adopts the definition at 8 CFR 214.2(h)(19)(iv).[59] For the definition of "nonprofit research organization" and "governmental research organization," the regulation adopts the definition at 8 CFR 214.2(h)(19)(iii)(C). The regulation at 8 CFR 214.2(h)(19)(iii)(C) states that a nonprofit research organization is "primarily engaged in basic research and/or applied research," while a governmental research organization is a Federal, State, or local entity "whose primary mission is the performance or promotion of basic research and/or applied research." *Id*.

[59] 8 CFR 214.2(h)(19)(iii) and (iv) pertains to organizations that are exempt from the ACWIA fee for H-1B petitions.

Specifically, DHS proposes to change the phrase "the majority of" at 8 CFR 214.2(h)(8)(iii)(F)(*4*) to "at least half" to clarify that H-1B beneficiaries who are not directly employed by a qualifying institution, organization, or entity identified in section 214(g)(5)(A) or (B) of the Act, who equally split their work time between a cap-exempt entity and a non-cap-exempt entity, may be eligible for cap exemption. *See* proposed 8 CFR 214.2(h)(8)(iii)(F)(*4*). The purpose and intended effect of the proposed change is to update the standard to qualify for this cap exemption, as USCIS has historically interpreted "the majority of" as meaning more than half.[60] For example, under proposed 8 CFR 214.2(h)(8)(iii)(F)(*4*), a beneficiary who works at a for-profit hospital and research center that would not otherwise be a qualifying institution would qualify for this cap exemption if the beneficiary will spend exactly 50 percent of their time performing job duties at a qualifying research organization (and those job duties would further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying research organization). Under the current regulations, the same beneficiary would not qualify because 50 percent would not meet the "majority of" standard. The application of 8 CFR 214.2(h)(8)(iii)(F)(*4*) to a beneficiary who is not directly employed by a qualifying institution, organization, or entity identified in section 214(g)(5)(A) or (B) of the Act would remain unchanged.

DHS also proposes to revise 8 CFR 214.2(h)(8)(iii)(F)(*4*) to remove the requirement that a beneficiary's duties "directly and predominately further the essential purpose, mission, objectives or functions" of the qualifying institution, organization, or

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[60] *See* USCIS, Adjudicator's Field Manual (AFM), Chapter 31.3(g)(13), "Cap Exemptions Pursuant to 214(g)(5) of the Act," *https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm31-external.pdf*, at 36 (providing an example of a qualifying H-1B cap-exempt petition where the beneficiary "will spend more than half of her time" working at the qualifying entity). While USCIS retired the AFM in May 2020, this example nevertheless illustrates the agency's historical interpretation since at least June 2006, when chapter 31.3(g)(13) was added. *See also* USCIS, Interoffice Memorandum HQPRD 70/23.12, "Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)" (Jun. 6, 2006), *https://www.uscis.gov/sites/default/files/document/memos/ac21c060606.pdf*.

entity and replace it with the requirement that the beneficiary's duties "directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions" of the qualifying institution, organization, or entity. *See* proposed 8 CFR 214.2(h)(8)(iii)(F)(*4*).[61] This proposed change is intended to update the availability of cap exemptions to include beneficiaries whose work directly contributes to, but does not necessarily predominantly further, the qualifying organization's fundamental purpose, mission, objectives, or functions. Further, this proposed change, by revising "the" to "an", acknowledges that a qualifying organization may have more than one fundamental purpose, mission, objective, or function, and this fact should not preclude an H-1B beneficiary from being exempt from the H-1B cap.

Proposed 8 CFR 214.2(h)(8)(iii)(F)(*4*) would also eliminate the sentence stating that the H-1B petitioner has the burden to establish that there is a nexus between the beneficiary's duties and the essential purpose, mission, objectives or functions of the qualifying institution, organization, or entity. Since the petitioner is already required to establish that the beneficiary's duties further an activity that supports one of the fundamental purposes, missions, objectives, or functions of the qualifying entity, it is inherently required to show a nexus between the duties and the entity's purpose, mission, objections, or functions, and therefore, the "nexus" requirement is redundant. These proposed changes to 8 CFR 214.2(h)(8)(iii)(F)(*4*) would provide more clarity and flexibility for H-1B beneficiaries who will not be directly employed by a qualifying institution, organization, or entity.

DHS also proposes to clarify that the requirement that the beneficiary spend at least half of their work time performing job duties "at" a qualifying institution should not

[61] Although DHS would replace the word "essential" with "fundamental" in proposed 8 CFR 214.2(h)(8)(iii)(F)(*4*), these two words are synonymous for purposes of cap exemptions. DHS proposes to use "fundamental" in proposed 8 CFR 214.2(h)(8)(iii)(F)(*4*) in order to be consistent with current and proposed 8 CFR 214.2(h)(19)(iii).

be taken to mean the duties need to be physically performed onsite at the qualifying institution. DHS is aware that many positions can be performed remotely. When considering whether such a position is cap-exempt, the proper focus is on the job duties, rather than where the duties are performed physically.

DHS also proposes to revise 8 CFR 214.2(h)(19)(iii)(C), which states that a nonprofit research organization is an entity that is "primarily engaged in basic research and/or applied research," and a governmental research organization is a Federal, State, or local entity "whose primary mission is the performance or promotion of basic research and/or applied research." DHS proposes to replace "primarily engaged" and "primary mission" with "a fundamental activity of" to permit a nonprofit entity or governmental research organization that conducts research as a fundamental activity, but is not *primarily* engaged in research, or where research is not the *primary* mission, to meet the definition of a nonprofit research entity or governmental research organization. *See* proposed 8 CFR 214.2(h)(19)(iii)(C). Reorienting the cap exemptions for nonprofit research organizations and governmental research organizations to the "fundamental activity" construct would align these standards with the current "fundamental activity" standard found for formal written affiliation agreements under 8 CFR 214.2(h)(8)(iii)(F)(*2*)(iv) and (h)(19)(iii)(B)(*4*), and would bring more clarity and predictability to decision-making, for both adjudicators and the regulated community.

DHS acknowledges that the "primarily" and "primary" requirements at current 8 CFR 214.2(h)(19)(iii)(C) have been in effect for over a decade for purposes of cap exemptions, and that DHS declined to make the same changes it is currently proposing in response to commenters' suggestions when codifying this regulation in 2016.[62] At that

[62] As DHS explained in the final rule, the "primarily" and "primary" requirements "have been in place since 1998 with regard to fee exemptions and have been in effect for more than a decade for purposes of the cap exemptions." *See* "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," 81 FR 82398, 82446 (Nov. 18, 2016).

time, DHS stated "that maintaining these longstanding interpretations, which include the 'primarily' and 'primary' requirements, will serve to protect the integrity of the cap and fee exemptions as well as clarify for stakeholders and adjudicators what must be proven to successfully receive such exemptions."[63] However, rather than providing clarity, the "primarily" and "primary" requirements have resulted in inconsistency and confusion surrounding eligibility for such cap exemptions.[64]

In 2015, DHS proposed using the phrase "primary purpose" at 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*) and (h)(19)(iii)(B)(*4*) (addressing cap exemption and ACWIA fee exemption, respectively, for a nonprofit entity that is related to or affiliated with an institution of higher education based on a formal written affiliation agreement).[65] In the 2016 final rule, however, DHS explained that it was not pursuing the proposed phrase "primary purpose" and instead chose to replace it with "fundamental activity" at 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*) and (h)(19)(iii)(B)(*4*) "to avoid potential confusion" and to make it "clearer that nonprofit entities may qualify for the cap and fee exemptions even if they are engaged in more than one fundamental activity, any one of which may directly contribute to the research or education mission of a qualifying college or university."[66] Even though DHS declined to concurrently change the "primarily" and "primary" language at current 8 CFR 214.2(h)(19)(iii)(C), DHS acknowledges that the "fundamental activity" text in current 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*) and (h)(19)(iii)(B)(*4*) did enhance clarity in the intended manner and believes that current 8 CFR 214.2(h)(19)(iii)(C) would similarly benefit from this proposed change.

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[63] *Id.*
[64] *See, e.g., Open Society Inst. v. USCIS,* 2021 WL 4243403, at *1 (D.D.C. 2021) ("Open Society maintains that on over a dozen prior occasions USCIS found that Open Society satisfied this standard but that in 2020 the agency reversed course without sufficient explanation or sound reason.").
[65] *See* "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," 80 FR 81900 (Dec. 31, 2015) (proposed rule).
[66] *See* "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," 81 FR 82398, 82444 (Nov. 18, 2016).

In addition, DHS believes that the proposed "fundamental activity" standard would still protect the integrity of the cap. While changing this terminology may somewhat expand who is eligible for the cap exemption, it would still require that an employer demonstrate that research is a "fundamental activity," which is a meaningful limiting standard. Not every activity an organization engages in would be considered a "fundamental activity." A fundamental activity would still have to be an important and substantial activity, although it need not be the organization's principal or foremost activity as required under the current "primary" construct.[67] Further, the organization would still need to meet all the other requirements to qualify as a nonprofit research organization or governmental research organization, including engaging in qualifying research as defined in proposed 8 CFR 214.2(h)(19)(iii)(C), and documenting its tax exempt status pursuant to proposed 8 CFR 214.2(h)(19)(iv).

DHS believes that the "primarily" and "primary" requirements at current 8 CFR 214.2(h)(19)(iii)(C) are too restrictive.[68] As explained above, the current "primarily" and "primary" construct requires a petitioner to demonstrate that research is its principal activity, i.e., that research is the main or primary activity.[69] One key difference between the current and proposed standard is that an employer could have more than one "fundamental activity," whereas the "primary" or "primarily" standard requires that

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[67] *See Open Society Inst. v. USCIS,* 2021 WL 4243403, at *5 (D.D.C. 2021) ("the ordinary meaning of 'primarily' as it is used in 8 CFR § 214.2(h)(19)(iii)(C) is 'principally and as distinguished from incidentally or secondarily.'").

[68] Multiple comments leading to the 2016 final rule also expressed concern that the "primary purpose" requirement was too restrictive, although in the context of 8 CFR 214.2(h)(8)(ii)(F)(*2*)(*iv*) and (h)(19)(iii)(B)(*4*). 81 FR at 82403.

[69] *See Open Society Institute v. USCIS,* 2021 WL 4243403, at *4-5 (D.D.C. 2021) (The court examined AAO's analysis of the term "primarily engaged" and the AAO's conclusion that "a nonprofit organization is "primarily engaged" in research if, and only if, it is "'directly and principally' engaged in research": ". . . [While] [Open Society] is 'focused on research—researching problems in the world, researching possible solutions for those problems, and researching how to implement those solutions,' the regulation at 8 C.F.R. § 214.2(h)(19)(iii)(C) defines a nonprofit research organization as one that is 'primarily engaged' in research, which we interpret to mean directly and principally engaged in research. Based on the totality of evidence in the record, and considering its research activities in proportion to its other activities, we conclude that the record does not demonstrate that [Open Society] is directly and principally engaged in research. The research conducted by [Open Society] is incidental, or, at best, secondary to its principal activities: making grants to promote social, legal and economic reforms.'") (changes in original).

research is the employer's foremost and main activity. This proposed change acknowledges the reality that nonprofit organizations may engage in several important activities. The proposed change modernizes the definition of "nonprofit research organization" and "governmental research organization" to include entities that may assist with aspects of research throughout the research cycle despite not being primarily engaged in performing the research. For example, a nonprofit organization with a mission to eradicate malaria that engages in lobbying, public awareness, funding medical research, and performing its own research on the efficacy of various preventative measures, may qualify for H-1B cap exemption even if it was not primarily engaged in research. In this example, the organization would still qualify for the cap exemption if research were one of several "fundamental activities" of the organization, as opposed to its primary mission. Similarly, a governmental research organization that engages in semiconductor manufacturing research and development could qualify for H-1B cap exemption if research is a fundamental activity of the organization. Under the proposed rule, the organization may be eligible for cap exemptions if research is one of its fundamental activities as opposed to its primary activity.

DHS also proposes to revise 8 CFR 214.2(h)(19)(iii)(C) to state that a "nonprofit research organization or governmental research organization may perform or promote more than one fundamental activity." *See* proposed 8 CFR 214.2(h)(19)(iii)(C). This proposed change would align with DHS's position that a nonprofit entity may engage in more than one fundamental activity under current 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*),[70] which DHS seeks to codify at proposed 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*) and (h)(19)(iii)(B)(*4*) as well. DHS believes it should apply the same standard that an entity may engage in more than one fundamental activity, regardless of whether that entity is

[70] *Id.* at 82445 ("DHS emphasizes that a nonprofit entity may meet this definition even if it is engaged in more than one fundamental activity, so long as at least one of those fundamental activities is to directly contribute to the research or education mission of a qualifying college or university.").

requesting cap exemption as an "affiliated or related nonprofit entity" or a "nonprofit research organization or governmental research organization."

Finally, DHS proposes to add language that both basic and applied research may also include "designing, analyzing, and directing the research of others if on an ongoing basis and throughout the research cycle." *See* proposed 8 CFR 214.2(h)(19)(iii)(C).

Taken together, these proposed changes clarify, simplify, and modernize eligibility for cap-exempt H-1B employment.[71] DHS's proposed changes to 8 CFR 214.2(h)(8)(iii)(F)(*4*) and (h)(19)(iii)(C) provide additional flexibility to exempt from the H-1B cap certain H-1B beneficiaries who are employed at a qualifying institution, organization, or entity. These changes are consistent with the language of the statute at INA section 214(g)(5)(A) through (B) and would further the INA's goals of improving economic growth and job creation by facilitating U.S. employers' access to high-skilled workers, particularly at these institutions, organizations, and entities.[72]

DHS further proposes to amend the definition of "nonprofit or tax exempt organizations" by eliminating 8 CFR 214.2(h)(19)(iv)(B), which currently requires that the petitioner provide evidence that it "[h]as been approved as a tax exempt organization for research or educational purposes by the Internal Revenue Service." In its experience, USCIS has found that Internal Revenue Service (IRS) letters generally do not identify the reasons why an entity received approval as a tax exempt organization, so current 8 CFR

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[71] These proposed changes would also impact eligibility for exemption from the ACWIA fees applicable to initial cap-subject petitions. The definitions of "nonprofit research organization" and "governmental research organization" at 8 CFR 214.2(h)(19)(iii)(C), and "nonprofit entity" at 8 CFR 214.2(h)(19)(iv), would continue to apply to which entities are exempt from the H-1B- cap as well as which entities are exempt from the additional ACWIA fee.

[72] *See* S. Rep. No. 260, 106th Cong., 2nd Sess. (Apr. 11, 2000), at 10 (AC21 sought to help the American economy by, in part, exempting from the H-1B cap "visas obtained by universities, research facilities, and those obtained on behalf of graduate degree recipients to help keep top graduates and educators in the country." *See also* "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," 81 FR 82398, 82447 (Nov. 18, 2016) ("DHS believes that its policy extending the cap exemption to individuals employed 'at' and not simply employed 'by' a qualifying institution, organization or entity is consistent with the language of the statute and furthers the goals of AC21 to improve economic growth and job creation by immediately increasing U.S. access to high-skilled workers, and particularly at these institutions, organizations, and entities.").

214.2(h)(19)(iv)(B) imposes an evidentiary requirement that is unduly difficult to meet. Proposed 8 CFR 214.2(h)(19)(iv) would more simply state that a nonprofit organization or entity "must be determined by the Internal Revenue Service as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3) (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6)." While this change would remove the requirement that the IRS letter itself state that the petitioner's approval as a tax exempt organization was "for research or educational purposes," DHS is not proposing to eliminate or otherwise change the overarching requirement that a qualifying nonprofit or tax exempt petitioner be an institution of higher education or a related or affiliated nonprofit entity, or a nonprofit research organization or a governmental research organization institution, as required by the regulations and INA section 214(g)(5). The petitioner would still need to submit documentation to demonstrate that it meets such a requirement, except that the submitted documentation would not need to be in the form of an IRS letter.

2. Automatic Extension of Authorized Employment Under 8 CFR 214.2(f)(5)(vi) (Cap-Gap)

DHS proposes to revise 8 CFR 214.2(f)(5)(vi) to provide an automatic extension of duration of status and post-completion OPT or 24-month extension of post-completion OPT, as applicable, until April 1 of the relevant fiscal year for which the H–1B petition is requested. *See* proposed 8 CFR 214.2(f)(5)(vi). Currently, the automatic extension is valid only until October 1 of the fiscal year for which H-1B status is being requested. This change would result in more flexibility for both students and USCIS and would help to avoid disruption to U.S. employers that are lawfully employing F-1 students while a qualifying H-1B cap-subject petition is pending. As an added integrity measure, DHS proposes to specify that the H-1B petition must be "nonfrivolous" in order for the student to benefit from the cap-gap extension. *See* proposed 8 CFR 214.2(f)(5)(vi)(A)(*3*).

Each year, a number of U.S. employers seek to employ F-1 students via the H-1B program by requesting a COS and filing an H-1B cap petition with USCIS. Because petitioners may not file H-1B petitions more than six months before the date of actual need for the employee,[73] the earliest date an H-1B cap-subject petition may be filed for a given fiscal year is April 1, six months prior to the start of the applicable fiscal year for which initial H-1B classification is sought. Many F-1 students complete a program of study or post-completion OPT in mid-spring or early summer. Per current regulations, after completing their program or post-completion OPT, F-1 students have 60 days to depart the United States or take other appropriate steps to maintain a lawful status. *See* 8 CFR 214.2(f)(5)(iv). However, because the change to H-1B status cannot occur earlier than October 1, an F-1 student whose program or post-completion OPT expires in mid-spring has two or more months following the 60-day period before the authorized period of H-1B status can begin. To address this situation, commonly known as the "cap-gap," DHS established regulations that automatically extended F-1 Duration of Status (D/S) and, if applicable, post-completion OPT employment authorization to October 1 for eligible F-1 students. *See* 8 CFR 214.2(f)(5)(vi). The extension of F-1 D/S and OPT employment authorization is commonly known as the "cap-gap extension."

DHS proposes to further extend F-1 status and post-completion OPT, including STEM OPT, in this context.[74] Under current regulations, the automatic cap-gap extension is valid only until October 1 of the fiscal year for which H-1B status is being requested. *See* 8 CFR 214.2(f)(5)(vi). When the October 1 extension was initially promulgated through an interim final rule in 2008, DHS considered it an administrative solution to bridge the gap between the end of the academic year and the beginning of the fiscal year,

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[73] *See* 8 CFR 214.2(h)(2)(i)(I).

[74] DHS previously proposed extending the cap-gap period, but the proposed rule was never finalized and was subsequently withdrawn. *See* "Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media," 85 FR 60526 (Sept. 25, 2020) (withdrawn by 86 FR 35410 (July 6, 2021)).

when the student's H-1B status typically would begin.[75] When this provision was finalized in 2016, DHS responded to commenters requesting that DHS revise the cap-gap provision so as to automatically extend status and employment authorization "until adjudication of such H-1B petition is complete."[76] Commenters stated that an extension until October 1 might have been appropriate in the past, when H-1B petitions were adjudicated well before that date, but USCIS workload issues at the time the rule was promulgated and the need to respond to RFEs delayed such adjudications beyond October 1.[77] DHS responded that it recognized that some cap-subject H-1B petitions remain pending on or after October 1 of the relevant fiscal year, but that USCIS prioritizes petitions seeking a COS from F-1 to H-1B, which normally results in the timely adjudication of these requests, so the vast majority of F-1 students changing status to H-1B do not experience any gap in status.[78] DHS also explained that it was concerned that extending cap-gap employment authorization beyond October 1 would reward potentially frivolous filings that would enable students who may ultimately be found not to qualify for H-1B status to continue to benefit from the cap-gap extension and that the October 1 cut-off serves to prevent possible abuse of the cap-gap extension.[79]

DHS has reconsidered its position in light of recent adjudication delays and to avoid potential disruptions in employment authorization. With the consistently high volume of cap-subject H-1B petitions filed within a short period of time each year and the long timeframes afforded to respond to RFEs, USCIS has, in some years, been unable to complete the adjudication of all H-1B cap-subject petitions by October 1. This has resulted in situations where some individuals must stop working on October 1 because

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[75] *See* "Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions," 73 FR 18944 (Apr. 8, 2008).
[76] *See* "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students," 81 FR 13039, 13100 (Mar. 11, 2016).
[77] *See* 81 FR 13040, 13101 (Mar. 11, 2016).
[78] *Id*.
[79] *Id*.

the employment authorization provided under 8 CFR 214.2(f)(5)(vi) ends on that date, although these individuals generally have been allowed to remain in the United States in an authorized period of stay while the H-1B petition and COS application is pending.

To account for this operational issue, DHS is proposing to revise 8 CFR 214.2(f)(5)(vi) to provide an automatic extension of F-1 status and post-completion OPT, or 24-month extension of post-completion OPT, as applicable, until April 1 of the fiscal year for which the H-1B petition is filed, or until the validity start date of the approved H-1B petition, whichever is earlier. This provision would extend the student's F-1 status and employment authorization, as applicable, automatically if a nonfrivolous H-1B petition requesting a COS is timely filed on behalf of the F-1 student. *See* proposed 8 CFR 214.2(f)(5)(vi)(A). However, if the F-1 student's COS request is still pending at the end of the cap-gap period, then their employment authorization would terminate on March 31, and the F-1 student would no longer be authorized for employment on this basis as of April 1 of the fiscal year for which H-1B classification is sought. If the H-1B petition underlying the cap-gap extension is denied before April 1, then, consistent with existing USCIS practice, the F-1 beneficiary of the petition, as well as any F-2 dependents, would generally receive the standard F-1 grace period of 60 days to depart the United States or take other appropriate steps to maintain a lawful status.[80] If the H-1B petition is still pending on April 1, then the beneficiary of the petition is no longer authorized for OPT and the 60-day grace period begins on April 1. The F-1 beneficiary may not work during the 60-day grace period.

Changing the automatic extension end date from October 1 to April 1 of the relevant fiscal year would prevent the disruptions in employment authorization that some F-1 nonimmigrants seeking cap-gap extensions have experienced over the past several years. DHS recognizes the hardships that a disruption in employment authorization could

[80] *See* 8 CFR 214.2(f)(5)(iv).

cause to both the affected individual and their employer and seeks to prevent potential future disruptions by extending cap-gap relief. According to USCIS data for FY 2016–22, USCIS has adjudicated approximately 99 percent of H-1B cap-subject petitions requesting a COS from F-1 to H-1B by April 1 of the relevant fiscal year.[81] As a result of this proposed cap-gap extension, DHS expects USCIS would be able to adjudicate nearly all H-1B cap-subject petitions requesting a COS from F-1 to H-1B by the April 1 deadline.

In addition to avoiding employment disruptions, the lengthier extension of F-1 status and post-completion OPT or 24-month extension of post-completion OPT employment authorization for students with pending H-1B petitions until April 1, which is one year from the typical initial cap filing start date, accounts for USCIS' competing operational considerations and would enable the agency to balance workloads more appropriately for different types of petitions.

Although DHS previously expressed the concern that extending cap-gap employment authorization could potentially enable students who ultimately may be found not to qualify for H-1B status to continue to benefit from the cap-gap extension,[82] and thus encourage frivolous filings, DHS has reconsidered its position. It is now DHS's position that extending the cap-gap period would not significantly increase the risk of frivolous filings. Because there is no way of knowing whether USCIS would complete adjudication of a petition before October 1 or April 1 of the fiscal year, there should be little incentive to submit a frivolous filing solely to obtain the longer cap-gap extension period. The H-1B petition would still have to be filed with all appropriate fees, which can be substantial for an initial cap filing. Moreover, if the petition is denied, the beneficiary's cap-gap eligibility ends immediately. Accordingly, frivolous petitions or

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[81] USCIS, OP&S Policy Research Division (PRD), Computer-Linked Application Information Management System 3 (C3) database, Oct. 27, 2022. PRD187.
[82] *See* 81 FR 13039, 13101 (Mar. 11, 2016).

petitions filed solely to obtain cap-gap protections would run the risk of simply being denied prior to October 1. This would result in no additional benefit from the expanded timeframe. Any risk of fraud is already inherent in providing cap-gap relief itself, and DHS is unaware of any additional risk presented by extending the cap-gap period. DHS proposes to explicitly state that the H-1B petition must be nonfrivolous at proposed 8 CFR 214.2(f)(5)(vi)(A)(*3*) to further deter frivolous filings. This would bolster integrity because if USCIS determines the filing to be frivolous, then the beneficiary would not have qualified for the cap-gap protection and may be deemed to have failed to maintain status and, if applicable, worked without authorization. Given the importance of ensuring that the United States attracts and retains top talent from around the globe, DHS believes that the benefits of this proposed cap-gap extension far outweigh the risk of abuse.

3. Start Date Flexibility for Certain H-1B Cap-Subject Petitions

DHS proposes to eliminate all the text currently at 8 CFR 214.2(h)(8)(iii)(A)(*4*), which relates to a limitation on the requested start date, because the current regulatory language is ambiguous.[83] DHS's proposal to eliminate the current language at 8 CFR 214.2(h)(8)(iii)(A)(*4*) would provide clarity and flexibility to employers with regard to the start date listed on H-1B cap-subject petitions. This proposal also would align the regulations related to H-1B cap-subject petitions with current USCIS practice, which is to permit a requested petition start date of October 1 or later, as long as the requested petition start date does not exceed six months beyond the filing date of the petition, even during the initial registration period.[84] Other restrictions on the petition start date would remain in place, such as the requirement that a petition may not be filed earlier than six

[83] DHS is proposing new language at 8 CFR 214.2(h)(8)(iii)(A)(*4*) about selecting registrations based on unique beneficiaries. DHS discusses this proposal in detail in the preamble section describing the proposed changes to the H-1B registration system.

[84] *See* USCIS, "H-1B Electronic Registration Process," *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process* (petitioners with a selected registration "must indicate a start date of Oct. 1…. or later") (last visited Nov. 10, 2022).

months before the date of actual need. *See* 8 CFR 214.2(h)(2)(i)(I). Additionally, a petitioner may file an H-1B cap-subject petition on behalf of a registered beneficiary for a particular fiscal year only after the petitioner's registration for that beneficiary has been selected for that fiscal year. *See* 8 CFR 214.2(h)(8)(iii)(A)(*1*).

The current regulation at 8 CFR 214.2(h)(8)(iii)(A)(*4*) states, "A petitioner may submit a registration during the initial registration period only if the requested start date for the beneficiary is the first day for the applicable fiscal year." This language is ambiguous as to whether the "requested start date" is the start date of the registration or the petition. This has led to confusion as the H-1B cap registration system currently does not ask for the requested start date for the beneficiary. The start date would only be relevant upon the filing of the petition, but the regulation refers to submitting "a registration with a requested start date." Further, current 8 CFR 214.2(h)(8)(iii)(A)(*4*) states that, "If USCIS keeps the registration period open beyond the initial registration period, or determines that it is necessary to re-open the registration period, a petitioner may submit a registration with a requested start date after the first business day for the applicable fiscal year." Given the potential for multiple registration periods, however, the current regulation is potentially confusing regarding the intended start date and what start date a petitioner is permitted to request on a cap-subject petition.

As stated above, DHS's proposal to eliminate the current language at 8 CFR 214.2(h)(8)(iii)(A)(*4*) would provide clarity and flexibility to employers. The need to eliminate potential confusion regarding permissible requested start dates on cap-subject petitions emerged during the FY 2021 registration and filing season, the first year of the electronic registration process. The electronic registration period for FY 2021 ran from March 1, 2020, to March 20, 2020. First, USCIS selected registrations submitted on behalf of all beneficiaries, including those eligible for the advanced degree exemption. USCIS then selected from the remaining registrations a sufficient number projected to

reach the advanced degree exemption. The selection process was completed on March 27, 2020, and USCIS began to notify employers of selection results. The initial petition filing period began on April 1, 2020, and lasted 90 days. Due to multiple factors occurring during the FY 2021 registration and initial filing period (most notably that it was the first year that the electronic registration system was in place as well as it being the early months of the COVID-19 pandemic with its unforeseen consequences), USCIS received fewer petitions than projected as needed to reach the numerical allocations under the statutory cap and advanced degree exemption. In August 2020, USCIS selected additional registrations and permitted those prospective petitioners with a selected registration or registrations to file petitions before November 16, 2020. Due to the additional selection period, the filing window went beyond October 1, leading some petitioners to indicate a start date after October 1, 2020.

Although USCIS permitted employers to file petitions after October 1, 2020, USCIS rejected or administratively closed many petitions that did not list a start date of October 1, 2020, pursuant to current 8 CFR 214.2(h)(8)(iii)(A)(*4*). As a result, many petitioners had to backdate the requested start date on the petition, even though the start date listed on the petition consequently may have been before the start date identified on the accompanying LCA. On June 23, 2021, USCIS announced its reconsideration of those rejected or administratively closed petitions.[85] The agency announced that it would permit petitioners to resubmit any FY 2021 H-1B cap-subject petitions that were rejected or administratively closed solely because the petition requested a start date after October 1, 2020.

The proposed changes would eliminate the language at current 8 CFR 214.2(h)(8)(iii)(A)(*4*), which would clarify for petitioners that they may file H-1B cap-

[85] *See* USCIS, "USCIS Will Allow Resubmission of Certain FY 2021 H-1B Petitions Rejected or Closed Due to Start Date," *https://www.uscis.gov/news/alerts/uscis-will-allow-resubmission-of-certain-fy-2021-h-1b-petitions-rejected-or-closed-due-to-start-date* (last visited Jan. 26, 2023).

subject petitions with requested start dates that are after October 1 of the relevant fiscal year. This is consistent with current USCIS policy and would eliminate the potential confusion resulting from the current regulation with regard to permissible start dates for employers submitting H-1B cap-subject petitions.[86] While the requested start date may be later than October 1, it must be six months or less from the date the petition is filed.[87] If the requested start date is more than six months after the petition is filed, the petition will be denied or rejected.[88]

DHS's proposal to eliminate the current language at 8 CFR 214.2(h)(8)(iii)(A)(*4*) would not affect the requirement that an H--1B cap-subject petition must be based on a valid registration for the same beneficiary and the same fiscal year. This requirement is reflected in existing USCIS guidance[89] and the current regulation at 8 CFR 214.2(h)(8)(iii)(A)(*1*), which states that "A petitioner may file an H-1B cap-subject petition on behalf of a registered beneficiary only after the petitioner's registration for that beneficiary has been selected for that fiscal year." While DHS intends to remove this particular sentence at proposed 8 CFR 214.2(h)(8)(iii)(A)(*1*) to reflect changes resulting from the beneficiary-centric selection process, DHS proposes to add the same requirement that the registration and petition be for the same fiscal year by adding "for the same fiscal year" to the immediately preceding sentence discussing the eligibility requirements to file an H--1B cap-subject petition based on the registration. Thus, proposed 8 CFR 214.2(h)(8)(iii)(A)(*1*) would state, "To be eligible to file a petition for a beneficiary who may be counted against the H-1B regular cap or the H-1B advanced

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[86] *See* USCIS, "H-1B Electronic Registration Process" (last reviewed/updated Apr. 25, 2022), *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process* (Q4: "If we selected your registration, you must indicate a start date of Oct. 1 . . . or later.").

[87] *See* 8 CFR 214.2(h)(2)(i)(I).

[88] S*ee id.*

[89] *See* USCIS, "H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models," *https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations* ("A cap-subject H-1B petition will not be considered to be properly filed unless it is based on a valid, selected registration for the same beneficiary and the appropriate fiscal year".).

degree exemption for a particular fiscal year, a registration must be properly submitted in accordance with 8 CFR 103.2(a)(1), paragraph (h)(8)(iii) of this section, and the form instructions, for the same fiscal year."

C. Program Integrity

1. The H-1B Registration System

Through issuance of a final rule in 2019, *Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens*, DHS developed a new way to administer the H-1B cap selection process to streamline processing and provide overall cost savings to employers seeking to file H-1B cap-subject petitions.[90] In 2020, USCIS implemented the first electronic registration process for the FY 2021 H-1B cap. In that year, prospective petitioners seeking to file H-1B cap-subject petitions (including for beneficiaries eligible for the advanced degree exemption) were required to first electronically register and pay the associated H-1B registration fee for each prospective beneficiary.

Under this process, prospective petitioners (also known as registrants) that seek to employ H-1B cap-subject workers must complete a registration process that requires only basic information about the prospective petitioner and each requested worker. The H-1B selection process is then run on properly submitted electronic registrations. Only those with valid selected registrations are eligible to file H-1B cap-subject petitions.

Per regulation, USCIS takes into account historical data related to approvals, denials, revocations, and other relevant factors to calculate the number of petitions needed to meet the H-1B cap for a given fiscal year.[91] In making this calculation, USCIS considers the number of registrations that need to be selected to receive the projected number of petitions required to meet the numerical limitations.

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[90] *See* "Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens," 84 FR 888 (Jan. 31, 2019).
[91] *See* 8 CFR 214.2(h)(8)(iii)(E).

As stated in the proposed rule for the registration requirement, DHS proposed this new process, "to reduce costs for petitioners who currently spend significant time and resources preparing petitions and supporting documentation for each intended beneficiary without knowing whether such petitions will be accepted for processing by USCIS due to the statutory allocations."[92] DHS also explained that the registration process, "would help to alleviate administrative burdens on USCIS service centers that process H-1B petitions since USCIS would no longer need to physically receive and handle hundreds of thousands of H-1B petitions (and the accompanying supporting documentation) before conducting the random selection process."[93] Several stakeholders commented favorably on this proposal, noting that the registration requirement would "reduce waste and increase efficiency," as well as "relieve uncertainty for employers and employees, and mitigate burdens on USCIS."[94] The H-1B electronic registration process continues to be well-received by users, who provided a high satisfaction score with the system for FY 2023 (4.84 out of 5)[95] and FY 2022 (4.87 out of 5).[96]

As DHS noted in the final rule implementing the registration system, USCIS has authority to collect sufficient information for each registration to mitigate the risk that the registration system will be flooded with frivolous registrations.[97] For example, USCIS requires each registrant to complete an attestation and noted in the final rule that "individuals or entities who falsely attest to the bona fides of the registration and submitted frivolous registrations may be referred to appropriate Federal law enforcement

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[92] *See* "Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens," 83 FR 62406, 62407 (Dec. 3, 2018).
[93] *Id.* at 62407-08.
[94] *See* "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens," 84 FR 888, 897 (Jan. 31, 2019).
[95] *See* USCIS, "H-1B Electronic Registration Process" (last updated Apr. 25, 2022), *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process*.
[96] *See* American Immigration Lawyers Association, "USCIS Provides FY2022 H-1B Cap Registration Process Update," *https://www.aila.org/infonet/fy2022-h-1b-cap-registration-process-update*.
[97] *See* "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens," 84 FR 888, 900, 904 (Jan. 31, 2019).

agencies for investigation and further action as appropriate."[98] DHS revised this attestation prior to the FY 2023 cap season, by adding a certification (to which the registrant must attest before submission) that the registration reflects a legitimate job offer, and that the registrant has "not worked with, or agreed to work with, another registrant, petitioner, agent, or other individual or entity to submit a registration to unfairly increase chances of selection for the beneficiary or beneficiaries in this submission."[99] DHS continues to take steps against potential abuse and is in the process of investigating potential malfeasance and possible referrals to law enforcement agencies. However, the time needed to pursue potential bad actors supports an alternative solution. As a result, DHS has determined that a more effective way to ensure that the registration system continues to serve its purpose of fair and orderly administration of the annual H-1B numerical allocations would be to structurally limit the potential for bad actors to game the system by changing the selection process so that it selects by unique beneficiary rather than by registration.

As detailed in the table below, DHS has seen an increase in the number of beneficiaries with multiple registrations submitted on their behalf, an increase in the number and percentage of registrations submitted for beneficiaries with multiple registrations, an increase in the number of beneficiaries having five or more registrations submitted on their behalf, and a substantial increase in the total number of registrations submitted for a unique individual.

Registration Data for FY21–FY23

Table 1 – Registration Data			
	FY21 Cap Year	**FY22 Cap Year**	**FY23 Cap Year**
Total Registrations	274,237	308,613	483,927

[98] *See id.* at 900.

[99] *See* Office of Management and Budget (OMB) Control Number 1615-0144, Information Collection Request Reference Number 202202-1615-005, supplementary document "H-1B Registration Tool Copy Deck," *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202202-1615-005* (received by OMB's Office of Information and Regulatory Affairs (OIRA) Feb. 28, 2022, and approved without change Aug. 8, 2022).

Total number of unique beneficiaries*	253,331	235,720	357,222
Number of unique beneficiaries with 2 or more registrations	13,443	25,654	49,739
Total number of registrations submitted for beneficiaries with multiple registrations	34,349	98,547	176,444
% of total registrations for beneficiaries with multiple registrations	12.5%	31.9%	36.5%
Number of beneficiaries with 5 or more registrations	700	6,369	9,155
Largest number of registrations submitted for 1 beneficiary	18	41	83
Source: USCIS Office of Performance and Quality * Unique beneficiaries were identified using country of citizenship and passport number; if passport number was not available, name, date of birth, and country of birth were used to identify beneficiaries.			

While DHS recognizes that simply being the beneficiary of multiple registrations is not necessarily indicative of fraud or misuse, as beneficiaries may legitimately have multiple job offers by different employers that are not working together to game the system, it is still worth noting the significant increase in individuals with multiple registrations for FY22 and FY23. For instance, while DHS is aware that multiple petitioners may submit registrations for a highly qualified beneficiary, it raises red flags if one beneficiary has 41 or 83 registrations submitted on their behalf, which occurred in FY22 and FY23, respectively.

Under current regulations, there is no limit on the number of registrations that may be submitted on behalf of one unique individual by different registrants. DHS is not proposing to limit the number of registrations that may be submitted on behalf of a unique individual by different registrants, provided that the registrants are not working with (or have not agreed to work with) another registrant, petitioner, agent, or other individual or entity to submit a registration to unfairly increase the chances of selection for a beneficiary. However, the data show that multiple registrations on behalf of the

same individual are increasing. DHS is concerned that this increase in multiple registrations may indicate strategic behavior by registrants (and beneficiaries working with registrants) to submit increasing numbers of registrations, which may be frivolous, to greatly increase a beneficiary's chance of selection. This negatively affects the integrity of the registration system and selection process.

DHS is concerned that individuals with large numbers of registrations submitted on their behalf are potentially misusing the registration system to increase their chances of selection and that the registrations submitted may not represent legitimate job offers. The possible effect of this increase in multiple registrations, which potentially do not represent legitimate job offers, is to skew the selection process. Beneficiaries who have multiple registrations submitted on their behalf have a significantly higher chance of selection. At the same time, an individual's chance of selection with a single registration is greatly reduced, as the number of beneficiaries with multiple registrations increases.

Table 2 – Detailed Data on FY21 Registration and Selection

Number of Registrations per Beneficiary*	Count of Beneficiaries	Percent of Beneficiaries	Count of Beneficiaries Selected in First Random Selection Process	Percent Selected
75 or more	-	0.00%	-	N/A
50 or more	-	0.00%	-	N/A
25 or more	-	0.00%	-	N/A
20 or more	-	0.00%	-	N/A
15 or more	7	0.00%	7	100.00%
10 or more	289	0.11%	289	100.00%
5 or more	700	0.28%	681	97.29%
4 or more	1,259	0.50%	1,173	93.17%
3 or more	3,205	1.27%	2,805	87.52%

2 or more	13,443	5.31%	9,651	71.79%
1 only	239,888	94.69%	108,389	45.18%
Total beneficiaries	**253,331**	**100.00%**	**118,040**	**46.60%**

Source: USCIS Office of Performance and Quality

*Unique beneficiaries were identified using country of citizenship and passport number; if passport number was not available, name, date of birth, and country of birth were used to identify beneficiaries.

Table 3 – Detailed Data on FY22 Registration and Selection

Number of Registrations per Beneficiary*	Count of Beneficiaries	Percent of Beneficiaries	Count of Beneficiaries Selected in First Random Selection Process	Percent Selected
75 or more	-	0.00%	-	N/A
50 or more	-	0.00%	-	N/A
25 or more	44	0.02%	44	100.00%
20 or more	122	0.05%	122	100.00%
15 or more	392	0.17%	392	100.00%
10 or more	1,421	0.60%	1,421	100.00%
5 or more	6,369	2.70%	6,187	97.14%
4 or more	8,743	3.71%	8,329	95.26%
3 or more	13,289	5.64%	11,967	90.05%
2 or more	25,654	10.88%	19,695	76.77%
1 only	210,066	89.12%	86,816	41.33%
Total beneficiaries	**235,720**	**100.00%**	**106,511**	**45.19%**

Source: USCIS Office of Performance and Quality

*Unique beneficiaries were identified using country of citizenship and passport number; if passport number was not available, name, date of birth, and country of birth were used to identify beneficiaries.

Table 4 – Detailed Data on FY23 Registration and Selection

Number of Registrations per Beneficiary*	Count of Beneficiaries	Percent of Beneficiaries	Count of Beneficiaries Selected in First Random Selection Process	Percent Selected
75 or more	2	0.00%	2	100.00%
50 or more	5	0.00%	5	100.00%
25 or more	108	0.03%	108	100.00%
20 or more	246	0.07%	245	99.59%
15 or more	670	0.19%	665	99.25%
10 or more	2,322	0.65%	2,261	97.37%
5 or more	9,155	2.56%	7,781	84.99%
4 or more	14,261	3.99%	11,169	78.32%
3 or more	24,321	6.81%	16,752	68.88%
2 or more	49,739	13.92%	27,143	54.57%
1 only	307,483	86.08%	81,323	26.45%
Total beneficiaries	**357,222**	**100.00%**	**108,466**	**30.36%**

Source: USCIS Office of Performance and Quality

*Unique beneficiaries were identified using country of citizenship and passport number; if passport number was not available, name, date of birth, and country of birth were used to identify beneficiaries.

Registration data also show patterns of groups of companies submitting registrations for the same groups of beneficiaries. When selected, these companies then go on to file a minimal number of petitions compared to the number of registrations they submitted for those beneficiaries. The following tables exemplify how one group of companies has submitted large numbers of registrations for a smaller number of common beneficiaries over three fiscal years, with the vast majority of their total registrations

made up of beneficiaries for whom other companies in the group also submitted registrations.

Table 5 – Common Beneficiary Data for Group 1 Companies – FY21

Company	Registration Count	Selection Count	Petition Count	Nonfiling Rate*	Number of Common Beneficiaries **	Common Beneficiary Rate of Registration	Average Registrations per Beneficiary***
A	301	165	5	96.97%	301	100.00%	10.30
B	288	161	5	96.89%	288	100.00%	10.21
C	290	180	1	99.44%	290	100.00%	10.21
D	302	153	8	94.77%	302	100.00%	10.21
E	292	155	5	96.77%	291	99.66%	9.51
F	327	179	4	97.77%	327	100.00%	6.15
G	292	155	2	98.71%	292	100.00%	10.25
H	302	161	6	96.27%	301	99.67%	9.52
I	346	180	3	98.33%	334	96.53%	6.02
J	298	172	3	98.26%	298	100.00%	10.31
K	294	158	1	99.37%	294	100.00%	10.28
L	285	145	7	95.17%	285	100.00%	10.21
M	288	164	8	95.12%	287	99.65%	10.15

Source: USCIS Office of Performance and Quality

*"Nonfiling Rate" is defined as the percentage of registration selections that do not result in a petition being filed.
**Unique beneficiaries were identified using country of citizenship and passport number; if passport number was not available, name, date of birth, and country of birth were used to identify beneficiaries. "Number of Common Beneficiaries" is defined as the number of beneficiaries who were registered for by the company and also at least one more company.
***"Average Registrations per Beneficiary" is defined as the average number of companies that the beneficiaries of the particular company were registered for in the registration.

Table 6 -- Common Beneficiary Data for Group 1 Companies – FY22

Company	Registration Count	Selection Count	Petition Count	Nonfiling Rate*	Number of Common Beneficiaries **	Common Beneficiary Rate of Registration	Average Registrations per Beneficiary***
A	321	173	10	94.22%	321	100.00%	10.24
B	322	165	13	92.12%	322	100.00%	10.09
C	320	158	10	93.67%	320	100.00%	10.30
D	326	153	11	92.81%	325	99.69%	9.70

E	325	166	7	95.78%	325	100.00%	9.77
F	323	160	8	95.00%	323	100.00%	9.84
G	316	178	19	89.33%	316	100.00%	10.69
H	315	162	10	93.83%	315	100.00%	10.44
I	327	183	14	92.35%	327	100.00%	9.69
J	322	180	15	91.67%	322	100.00%	10.02
K	325	166	9	94.58%	325	100.00%	9.71
L	327	170	10	94.12%	327	100.00%	9.97
M	331	184	8	95.65%	331	100.00%	9.50

Source: USCIS Office of Performance and Quality

*"Nonfiling Rate" is defined as the percentage of registration selections that do not result in a petition being filed.
**Unique beneficiaries were identified using country of citizenship and passport number; if passport number was not available, name, date of birth, and country of birth were used to identify beneficiaries. "Number of Common Beneficiaries" is defined as the number of beneficiaries who were registered for by the company and also at least one more company.
***"Average Registrations per Beneficiary" is defined as the average number of companies that the beneficiaries of the particular company were registered for in the registration.

Table 7 – Common Beneficiary Data for Group 1 Companies – FY23

Company	Registration Count	Selection Count	Petition Count	Nonfiling Rate*	Number of Common Beneficiaries **	Common Beneficiary Rate of Registration	Average Registrations per Beneficiary***
A	540	180	4	97.78%	540	100.00%	14.68
B	544	182	8	95.60%	544	100.00%	14.56
C	561	189	7	96.30%	560	99.82%	14.27
D	563	181	9	95.03%	563	100.00%	14.39
E	562	175	7	96.00%	562	100.00%	14.50
F	543	198	8	95.96%	542	99.82%	14.69
G	526	204	5	97.55%	526	100.00%	14.85
H	529	191	9	95.29%	528	99.81%	14.88
I	536	196	10	94.90%	536	100.00%	14.77
J	547	212	10	95.28%	545	99.63%	14.74
K	555	205	11	94.63%	555	100.00%	14.27
L	556	199	9	95.48%	556	100.00%	14.87
M	559	198	10	94.95%	558	99.82%	14.46

Source: USCIS Office of Performance and Quality

*"Nonfiling Rate" is defined as the percentage of registration selections that do not result in a petition being filed.
**Unique beneficiaries were identified using country of citizenship and passport number; if passport number was not available, name, date of birth, and country of birth were used to identify beneficiaries. "Number of Common Beneficiaries" is defined as the number of beneficiaries who were registered for by the company and also at least one more company.
***"Average Registrations per Beneficiary" is defined as the average number of companies that the beneficiaries of the particular company were registered for in the registration.

The degree of duplication between the companies raises concern that the companies are working with each other to increase their chances of selection. This coupled with the fact that the companies routinely have over 150 registrations selected each year, but only file between 1 and 19 petitions, suggests that the registrations submitted by the companies for the duplicate beneficiaries may not have represented legitimate, bona fide offers of employment. This practice creates a disadvantage for companies that are adhering to the requirements of the registration and selection process.

Although there may have been legitimate reasons why a company did not file a petition for a beneficiary whose registration was selected, the non-filing rates for beneficiaries with multiple registrations is significantly higher than that of beneficiaries with single registrations. The non-filing rates for beneficiaries with multiple registrations raises the question of whether these companies actually intended to file an H-1B petition on behalf of the beneficiary when they submitted their registrations and did not work with others to unfairly improve their chance of selection, as they attested to on the Registration Tool when each registration was submitted.

Table 8 – Selection and Petition Filing Data

	FY21	FY22	FY23
Number of registrations selected where the beneficiary only had one registration submitted and one registration selected (single registration)	108,389	86,816	81,323
Number of these single registrations that resulted in petition filing	91,925	74,048	72,306
Filing rate of single registrations	84.81%	85.29%	88.91%

Number of registrations selected where the beneficiary had multiple registrations submitted and multiple registrations selected (multiple registration)	10,504	36,461	29,213
Number of these multiple registrations that resulted in petition filing	3,835	9,757	8,831
Filing rate of multiple registrations	36.51%	26.76%	30.23%
Source: USCIS Office of Performance and Quality			

The registration data also show that the companies with the highest rates of non-filing submitted a high percentage of registrations for beneficiaries with multiple registrations. In FY23, 97 companies with 10 or more selections had a non-filing rate of 90 percent or greater. Of those 97, the average rate of common beneficiaries among them was 90.72 percent. Eighteen of the 97 companies had a common beneficiary rate of 100 percent. Amongst these 97 companies, the average number of registrations per beneficiary was 8.03. In contrast, the companies with 10 or more selections and a non-filing rate of 10 percent or less, of which there were 667, had an average rate of common beneficiaries of 8.01 percent and submitted registrations for beneficiaries who had an average of 1.40 registrations per beneficiary.

Stakeholders have also identified opportunities for improving the registration system in response to a DHS Request for Public Input.[100] For instance, several commenters suggested running the selection process based on unique beneficiaries instead of registrations to give all beneficiaries an equal playing field, which is what DHS is proposing with the beneficiary-centric option described below. Commenters also made general suggestions to strengthen the consequences of submitting frivolous registrations, which DHS agrees with and has expanded upon in its proposals.

DHS has a strong interest in ensuring that the annual numerical allocations are going to petitioners that truly intend to employ an H-1B worker, rather than prospective

[100] *See* "Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input," 86 FR 20398 (Apr. 19, 2021).

petitioners using the registration system as a relatively cheap placeholder for the possibility that they may want to employ an H-1B worker or as a way to game the selection process. The current registration and selection process would benefit from additional guardrails to better ensure the fair allocation of the limited H-1B cap numbers to employers and individuals that are complying with the regulations and have bona fide, legitimate employment in which they intend to employ qualified beneficiaries. Accordingly, this rule proposes to further limit the potential for abuse of the registration process in three ways.[101]

First, if USCIS determines that a random selection process should be conducted, DHS proposes to shift from selecting by registration, to selecting by unique beneficiary. Under the new proposal, each unique individual who has a registration submitted on their behalf would be entered into the selection process once, regardless of the number of registrations filed on their behalf. By selecting by a unique beneficiary, DHS would better ensure that each individual has the same chance of being selected, regardless of how many registrations were submitted on their behalf.

Second, DHS proposes to extend the existing prohibition on related entities filing multiple petitions[102] by also prohibiting related entities from submitting multiple registrations for the same individual. Prohibiting related employers from submitting multiple registrations, absent a legitimate business need, would prevent employers from submitting registrations when they would not in fact be eligible to file a petition based on that registration, if selected.

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[101] In *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 88 FR 402, 527 (Jan. 4, 2023) (proposed rule), DHS proposed to increase the H-1B registration fee from $10 to $215 per registration submitted. While the underlying purpose of the proposed fee increase is to ensure full cost recovery for USCIS adjudication and naturalization services, DHS recognizes the possibility that the increase in the H-1B registration fee may have an impact on the number of H-1B registrations submitted, including those submitted to improperly increase the chance of selection. However, any potential impact of that separate regulatory proposal is purely speculative.

[102] *See* 8 CFR 214.2(h)(2)(i)(G).

Third, DHS proposes to codify USCIS's ability to deny an H-1B petition or revoke an H-1B petition's approval when the petition is based on a registration where the statement of facts (including the attestations) was not true and correct, inaccurate, fraudulent, or misrepresented a material fact.

2. Beneficiary Centric Selection

Under the proposed update to the random selection process, registrants would continue to submit registrations on behalf of beneficiaries and beneficiaries would continue to be able to have more than one registration submitted on their behalf, as allowed by applicable regulations. If a random selection were necessary, then the selection would be based on each unique beneficiary identified in the registration pool, rather than each registration. Each unique beneficiary would be entered in the selection process once, regardless of how many registrations were submitted on their behalf. If a beneficiary were selected, each registrant that submitted a registration on that beneficiary's behalf would be notified of selection and would be eligible to file a petition on that beneficiary's behalf. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(*1*) and (*4*). Changing how USCIS conducts the selection process to select by unique beneficiaries instead of registrations would significantly reduce or eliminate the advantage of submitting multiple registrations for the same beneficiary solely to increase the chances of selection and should give all beneficiaries an equal chance at selection. It could also result in other benefits, such as giving beneficiaries greater autonomy regarding their H-1B employment and improving the chances of selection for legitimate registrations.

To ensure that USCIS can accurately identify each potential beneficiary, registrants will continue to be required to submit identifying information about the beneficiaries as part of the registration process. Currently, each registration includes, in addition to other basic information, fields for the registrant to provide the beneficiary's full name, date of birth, country of birth, country of citizenship, gender, and passport

number if the beneficiary has a passport. Although the Registration Final Rule said the passport number would be required and it is requested during registration, registrants have been able to effectively bypass the passport requirement by affirmatively indicating that the beneficiary does not have a passport.[103]

Because the integrity of the new selection process would rely on USCIS's ability to accurately identify each individual beneficiary, DHS proposes to require the submission of valid passport information, including the passport number, country of issuance, and expiration date, in addition to the currently required information. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(*4*)(*ii*). Registrants would no longer be allowed to select an option indicating that the beneficiary does not have a passport. Combined with the other collected biographical information, the passport number would allow USCIS to identify unique individuals more reliably, increasing the likelihood that each individual would have the same opportunity to be selected, if random selection were required. Beneficiaries would be required to supply the same identifying information and passport information to all registrants submitting registrations on their behalf. Each beneficiary would only be able to be registered under one passport, and the registrant would be required to submit the information from the valid passport that the beneficiary intends to use for travel to the United States if issued an H-1B visa. If the beneficiary were already in the United States and were seeking a COS, the registrant would be required to list a valid passport. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(*4*)(*ii*). Even if a beneficiary had more than one valid passport, such as a beneficiary with dual citizenship, a beneficiary would only be able to be registered under one of those passports. If USCIS determined that registrations were submitted by either the same or different prospective petitioners

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[103] In response to a comment in the final rule, DHS responded, "This final rule requires that each registration include, in addition to other basic information, the beneficiary's full name, date of birth, country of birth, country of citizenship, gender, and passport number." "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens," 84 FR 888, 900 (Jan. 31, 2019).

for the same beneficiary, but using different identifying information, USCIS could find all of those registrations invalid and could deny or revoke the approval of any petition filed based on those registrations. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(*2*). Petitioners would be given notice and the opportunity to respond before USCIS denied or revoked the approval of a petition. Petitioners would be asked to explain and document the identifying information used in the registration process. Petitioners would be encouraged to retain documentation provided by the beneficiary prior to registration, including a copy of the passport.

Any H-1B cap-subject petition must contain and be supported by the same identifying information about the beneficiary as provided in the selected registration for the beneficiary named in the petition, and DHS proposes to require that petitioners submit evidence of the passport used at the time of registration to identify the beneficiary. *See* proposed 8 CFR 214.2(h)(8)(iii)(D)(*1*). USCIS could deny or revoke the approval of an H-1B petition that does not meet this proposed requirement. USCIS would typically afford the petitioner the opportunity to respond when identifying information provided on the registration does not match the information provided on the petition, and petitioners would need to be prepared to explain and document the reason for any change in identifying information. In its discretion, USCIS could find that a change in identifying information is permissible. Such circumstances could include, but would not be limited to, a legal name change due to marriage, change in gender identity, or a change in passport number or expiration date due to passport renewal, or replacement of a stolen passport, in between the time of registration and filing the petition. *See* proposed 8 CFR 214.2(h)(8)(iii)(D)(*1*).

DHS recognizes that some individuals may not possess a valid passport, and therefore the proposed passport requirement would require these individuals to obtain a valid passport, at some cost, by the time of registration or even preclude individuals from

being registered if they were unable to obtain a valid passport by the time of registration. However, DHS has a strong interest in requiring passport information for each beneficiary, regardless of nationality, to better identify unique beneficiaries and enhance the integrity of the H-1B registration system. Further, DHS believes that requiring passport information is reasonable because each registration should represent a legitimate job offer. Except in limited situations where the Department of State issued a beneficiary a visa on Form DS-232, Unrecognized Passport or Waiver Cases, in the absence of a passport, it is not clear how most beneficiaries could enter the United States in H-1B status pursuant to that job offer. Therefore, the proposed rule, if finalized, would only accelerate the time by which the beneficiary needed to obtain a passport if the beneficiary did not already have a passport.

DHS recognizes that stateless individuals may be unable to obtain a valid passport and that this passport requirement could preclude some stateless individuals from being registered. DHS considered proposing an exception to the passport requirement limited solely to stateless individuals, but providing an exception would leave open the risk of registrants submitting a registration for an individual claiming to be stateless and having no passport number and submitting another registration for the same individual while listing a passport number. At the registration stage, USCIS would not be able to determine whether those two individuals are the same person or whether the individual is truly stateless. Such a determination would require an adjudication of the claim of statelessness, but USCIS does not adjudicate the registration. Submission of the registration is merely an antecedent procedural requirement to file the petition properly and is not intended to replace the petition adjudication process or assess the eligibility of the beneficiary for the offered position.[104] DHS also considered the possibility of

[104] *See* "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens," 84 FR 888, 900 (Jan. 31, 2019).

generating a unique identifier for stateless individuals, so that registrants could use this number in place of the valid passport number on the registration, but believed this option would run into the same problems of USCIS not being able to verify a claim of statelessness at the registration stage.

Furthermore, DHS considered available data for individuals issued H-1B visas or otherwise granted H-1B status from FYs 2010-23. While the data are imperfect, the data nevertheless suggest that the proposed passport requirement would likely impact a small population of stateless individuals. For instance, available data for FYs 2022 and 2023 show that USCIS received H-1B petitions for nine and four individuals, out of a total of 370,110 and 94,649 H-1B petitions, respectively, whose country of citizenship were listed as "stateless."[105] This represents just 0.0024 percent and 0.0042 percent, respectively, of all H-1B petitions received those fiscal years. These data do not show whether the stateless individuals had a valid passport upon their admission into the United States in H-1B status; these data also do not show whether any of the four individuals for FY 2023 were the same as some of the nine individuals reported for FY 2022. Further, the DOS data show that, between FYs 2010–22, a total of 89 H-1B visas out of a total of 1,988,856 H-1B visas were issued to individuals whose nationalities were listed as "no nationality."[106] This total represents just 0.0045 percent of all H-1B visas issued during those years. These data do not show how many of the 89 total H-1B visas were issued to unique individuals, as individuals could have been issued more than one visa during this twelve-year timeframe. Again, while acknowledging that the above data are imperfect, DHS recognizes that not providing an exception or alternative to the passport requirement would potentially impact stateless individuals who might be

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[105] *See* USCIS, OP&S Policy Research Division (PRD), I-129 – H-1B Petitions reported with Stateless Country of Citizenship, ELIS Petitions FYs 2020–23, PRD 252. The reported numbers do not include beneficiaries whose country of citizenship information was missing, blank, or unknown. The reported numbers for FY 2020 and FY 2021 were both zero, as USCIS was not using ELIS at that time.

[106] DOS, "Visa Statistics," *https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics.html* (last visited Mar. 16, 2023).

approved for H-1B visas but would be ineligible because they are unable to obtain a passport. DHS continues to consider options and alternatives to the passport requirement for stateless individuals and welcomes public comment on this issue as well as the costs and benefits for both petitioners and beneficiaries of requiring a passport number at registration.

As discussed above, conducting the registration selection process based on unique beneficiaries would significantly reduce or remove the advantage of submitting multiple registrations solely to increase the chances of selection and better allow for an equal playing field for both employers and beneficiaries, while continuing to allow beneficiaries to have multiple job offers and multiple registrations. This would significantly reduce or remove an incentive for employers and individuals to pursue registration without the existence of a bona fide job offer and an intent to employ the individual for each registration.

The proposed change would potentially benefit beneficiaries by giving them greater autonomy to choose the employer for whom they ultimately work. If multiple unrelated companies submitted registrations for a beneficiary and the beneficiary were selected, then the beneficiary could have greater bargaining power or flexibility to determine which company or companies could submit an H-1B petition for the beneficiary, because all of the companies that submitted a registration for that unique beneficiary would be notified that their registration was selected and they are eligible to file a petition on behalf of that beneficiary. Under the current selection process, however, the beneficiary could only be petitioned for by the specific company that submitted the selected registration. While another company could subsequently file a petition for concurrent employment, the beneficiary would still have to be initially employed in H-1B status by the same company that filed the initial cap-subject petition based on the selected registration.

The proposed change may also potentially benefit companies that submit legitimate registrations for unique beneficiaries by increasing their chances to employ a specific beneficiary in H-1B status. Again, under the current selection process, a company could file a petition for and employ a beneficiary in H-1B status only if their registration for that specific beneficiary was selected. Under the proposed beneficiary-centric selection process, any company that submitted a registration for a selected beneficiary could file a petition for and potentially employ a beneficiary in H-1B status because all of the prospective petitioners that submitted a registration for that selected beneficiary would receive a selection notice. As previously discussed, the data show that the current system may result in an unfair advantage of selection for registrations potentially involving prospective petitioners that worked together to submit multiple registrations for the same beneficiary to unfairly improve their chance of selection. The beneficiary-centric process is intended to correct this and level the playing field for companies submitting legitimate registrations for unique beneficiaries and not attempting to unfairly improve their chance of selection.

DHS is also proposing minor changes to 8 CFR 214.2(h)(8)(iii)(A)(*5*) through (*7*) and (h)(8)(iii)(E) to conform the regulatory text to the proposed new selection process and clarify that USCIS would select "beneficiaries" rather than "registrations."

DHS expects USCIS to have sufficient time to develop, thoroughly test, and implement the modifications to the registration system and selection process and give stakeholders sufficient time to adjust to these new procedures by the time the rule finalizing this proposed rule would publish and become effective. USCIS has already begun planning the development work of the new selection process in the electronic H-1B registration tool. As indicated before, DHS may move to finalize certain provisions through one or more final rules after carefully considering all public comments and may possibly do so in time for the FY 2025 cap season, depending on agency resources. In

particular, DHS may seek to finalize the provisions relating to the beneficiary centric registration selection process in proposed 8 CFR 214.2(h)(8)(iii)(A)(*4*) before moving to finalize the other proposed provisions in a separate rule.

However, DHS and USCIS cannot predict, with certainty, agency resources for the next few years or even when the final rule would publish. Therefore, there is also the possibility that DHS would need to delay the effective date of 8 CFR 214.2(h)(8)(iii)(A)(*4*). This delayed effective date might only apply to the proposed changes describing the beneficiary-centric selection process and, in that case, would not impact any other provisions in this proposed rule, if finalized.

DHS may need to delay the effective date if it determines that USCIS does not have sufficient time to ensure proper functionality of the beneficiary-centric selection process, including completing all requisite user testing. DHS may need to delay the effective date for other reasons as well, such as to avoid the confusion that could result if the final rule took effect too close to the start of the initial registration period for the upcoming cap season, or to avoid disparate treatment of registrations if the final rule took effect in the middle of the initial registration period, or during a subsequent registration and selection period, particularly if USCIS needed to open a subsequent registration period later that year. In the event DHS needed to further delay the effective date of these provisions beyond the effective date of the final rule, DHS would publish a Federal Register Notice advising the regulated public of the new delayed effective date. That Federal Register Notice would be published at least 30 calendar days in advance of the first date of the initial registration period.

3. Bar on Multiple Registrations Submitted by Related Entities

DHS regulations already preclude the filing of multiple H-1B cap-subject petitions by related entities for the same beneficiary, unless the related petitioners can establish a legitimate business need for filing multiple cap-subject petitions for the same

beneficiary. *See* 8 CFR 214.2(h)(2)(i)(G). DHS is not proposing to change that, but, rather, is proposing to extend a similar limitation to the submission of registrations. *See* proposed 8 CFR 214.2(h)(2)(i)(G). When an employer submits a registration, they attest on the H-1B Registration Tool that they intend to file a petition based on that registration. If two related employers submit registrations for a cap-subject petition for the same beneficiary, without a legitimate business need, both employers are attesting to their intent to file a petition for that beneficiary. If they are both selected, and they lack a legitimate business need, they are left with one of two choices: (1) both file petitions in violation of 8 CFR 214.2(h)(2)(i)(G); or (2) do not file and potentially violate the attestation made at the time of registration. Therefore, employers are left with two bad options. To allow related employers to submit registrations, but not allow them to file petitions, creates an inconsistency between the antecedent procedural step of registration and the petition filing. Extending the bar on multiple petition filings by related entities to multiple registration submissions by related entities for the same cap-subject beneficiary would harmonize the expectations for petition filing and registration submission.

While DHS anticipates that changing the way beneficiaries are selected would reduce frivolous registrations and their negative effects, DHS cannot guarantee with certainty that this change would completely eliminate entities from working with each other to submit registrations to unfairly increase chances of selection for a beneficiary by submitting slightly different identifying information or other means that DHS cannot anticipate. Therefore, adding this provision would serve as an additional tool available to DHS to militate against such abuse and bolster the integrity of the registration process. Furthermore, proposed 8 CFR 214.2(h)(2)(i)(G) is necessary because of the possibility that registration could be suspended, or that the implementation of the beneficiary-centric selection process could be delayed. If registration were suspended, the bar on multiple

petitions would still be relevant, and if implementation of the beneficiary-centric selection process were delayed, the bar on multiple registrations would still be relevant.

4. Registrations with False Information or That Are Otherwise Invalid

Although registration is an antecedent procedural step undertaken prior to filing an H-1B cap-subject petition, the validity of the registration information is key to the registrant's eligibility to file a petition. The information contained in the registration, including the required attestations, must be valid. Currently, the regulations state that it is grounds for denial or revocation if the statements of facts contained in the petition are not true and correct, inaccurate, fraudulent, or misrepresented a material fact.[107] In this rule, DHS proposes to codify that those requirements extend to the information provided in the registration and to make clear that this includes if attestations on the registration are determined to be false. *See* proposed 8 CFR 214.2(h)(10)(ii) and (iii) and (h)(11)(iii)(A)(*2*).

To allow companies to provide false information on the registration without consequence would allow them to potentially take a cap number for which they are ineligible. As such, DHS proposes codifying that providing untrue, incorrect, inaccurate, or fraudulent statements of fact, or misrepresenting material facts, including providing false attestations on the registration, would be grounds for denial or revocation of the petition that was based on that registration.

DHS is also proposing changes to the regulations governing registration that would provide USCIS with clearer authority to deny or revoke the approval of a petition based on a registration that was not properly submitted or was otherwise invalid. Specifically, DHS is proposing to add that if a petitioner submits more than one registration per beneficiary in the same fiscal year, all registrations submitted by that petitioner relating to that beneficiary for that fiscal year may be considered not only

[107] *See* 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(*2*).

invalid, but that "USCIS may deny or revoke the approval of any petition filed for the beneficiary based on those registrations." *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(*2*).

Additionally, DHS is proposing to add that USCIS may deny or revoke the approval of an H-1B petition if it determines that the fee associated with the registration is declined, not reconciled, disputed, or otherwise invalid after submission. *See* proposed 8 CFR 214.2(h)(8)(iii)(D)(*2*). DHS is also proposing a new provision that adds an invalid registration as a ground for revocation. *See* proposed 8 CFR 214.2(h)(11)(iii)(A)(*6*). Through these provisions, DHS aims to bolster the integrity of the registration system.

5. Alternatives Considered

DHS considered the alternative of eliminating the registration system and reverting to the paper-based filing system stakeholders used prior to implementing registration. However, when DHS considered the immense cost savings that registration provides to both USCIS and stakeholders and the significant resources the agency would incur to revert back to a paper-based filing system for all cap-subject cases, the benefits of having a registration system still outweigh the costs and any potential problems caused by frivolous filings. As a result, DHS is proposing to make changes to the registration system to improve it and militate against the potential for frivolous filings. DHS continues to consider options to improve the registration system and welcomes public comment on this issue.

6. Provisions to Ensure Bona Fide Job Offer for a Specialty Occupation Position

a. Contracts

Under proposed 8 CFR 214.2(h)(4)(iv)(C), DHS proposes to codify USCIS' authority to request contracts, work orders, or similar evidence, in accordance with 8 CFR 103.2(b) (USCIS may request additional evidence if the evidence submitted does not establish eligibility) and 8 CFR 214.2(h)(9) ("USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication.").

Such evidence may take the form of contracts or legal agreements, if available, or other evidence including technical documentation, milestone tables, or statements of work. Evidence submitted should show the contractual relationship between all parties, the terms and conditions of the beneficiary's work, and the minimum educational requirements to perform the duties. Uncorroborated statements about a claimed in-house project for a company with no history of developing projects in-house, standing alone, would generally be insufficient to establish that the claimed in-house work exists.

The submitted contracts should include both the master services agreement and accompanying statement(s) of work (or similar legally binding agreements under different titles) signed by an authorized official of any party in the contractual chain, including the petitioner, the end-client company for which the beneficiary will perform work, and any intermediary or vendor company. In general, the master services agreement (also commonly called a supplier agreement) sets out the essential contractual terms and provides the basic framework for the overall relationship between the parties.[108] The statement of work (also commonly called a work order) provides more specific information, such as the scope of services to be performed, details about the services, and the allocation of responsibilities among the parties.[109] The petitioner may also submit letters signed by an authorized official of the end-client company for which the beneficiary will work and any intermediary or vendor company.

Other types of documentation petitioners may provide include technical documentation, milestone tables, marketing analyses, cost-benefit analyses, brochures, and funding documents. Overall, these documents should be detailed enough to provide a sufficiently comprehensive view of the position being offered to the beneficiary and the terms and conditions under which the work would be performed. The documentation

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[108] *See* 3 David M. Adlerstein et at., *Successful Partnering Between Inside and Outside Counsel* sec. 49:35.
[109] *See* 3 David M. Adlerstein et at., *Successful Partnering Between Inside and Outside Counsel* sec. 49:37.

should also include the minimum educational requirements to perform the duties. Documentation that merely sets forth the general obligations of the parties to the agreement, or that does not provide specific information pertaining to the actual work to be performed, would generally be insufficient.[110]

Through proposed 8 CFR 214.2(h)(4)(iv)(C), DHS seeks to put stakeholders on notice of the kinds of evidence that could be requested to establish the terms and conditions of the beneficiary's work and the minimum educational requirements to perform the duties. This evidence, in turn, could establish that the petitioner has a bona fide job offer for a specialty occupation position for the beneficiary. DHS is proposing conforming changes to the introductory paragraph (h)(4)(iv) to distinguish the types of evidence that are required as initial evidence addressed in paragraphs (h)(4)(iv)(A) and (B), from the evidence USCIS may request under new paragraph (h)(4)(iv)(C).

b. Non-Speculative Employment

DHS proposes to codify its requirement that the petitioner must establish, at the time of filing, that it has a non-speculative position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. *See* proposed 8 CFR 214.2(h)(4)(iii)(F). This change is consistent with current DHS policy guidance that an H-1B petitioner must establish that employment exists at the time of filing the petition and that it will employ the beneficiary in a specialty occupation.[111]

The requirement of non-speculative employment derives from the statutory definition of an H-1B nonimmigrant worker as someone who is "coming temporarily to

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[110] When requested evidence may contain trade secrets, for example, the petitioner may redact or sanitize the relevant sections to provide a document that is still sufficiently detailed and comprehensive, yet does not reveal sensitive commercial information. However, it is critical that the unredacted information contain all information necessary for USCIS to adjudicate the petition. Although a petitioner may always refuse to submit confidential commercial information, if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of denial. *Cf. Matter of Marques*, 16 I&N Dec. 314, 316 (BIA 1977) (in refusing to disclose material and relevant information that is within his knowledge, the respondent runs the risk that he may fail to carry his burden of persuasion with respect to his application for relief).

[111] *See* USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020) (citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010)).

the United States to perform services . . . in a specialty occupation . . . ." *See* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b). To determine whether the H-1B worker will perform services in a specialty occupation as required, USCIS must examine the nature of the services the beneficiary will perform in the offered position. Where the proposed position is speculative, meaning that it is undetermined, then the petitioner will not be able to establish the nature of the offered position. Speculative employment precludes the agency from ascertaining whether those duties normally require the attainment of a U.S. bachelor's or higher degree in a directly related specific specialty to qualify the position as a specialty occupation, and whether the beneficiary has the appropriate qualifications to perform those duties. Speculative employment undermines the integrity and a key goal of the H-1B program, which is to help U.S. employers obtain the skilled workers they need to conduct their business, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers. DHS believes that expressly prohibiting speculative employment, consistent with current practice, would align with Congressional intent and would prevent possible misunderstanding of the specialty occupation eligibility requirement.

The agency has long held and communicated the view that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position, stating that, historically, USCIS (or the Service, as it was called at the time) has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment.[112] That proposed rule explained that the H-1B classification was not intended as a vehicle for a person to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of

[112] *See* "Petitioning Requirements for the H Nonimmigrant Classification," 63 FR 30419, 30419-30420 (June 4, 1998) (proposed rule to be codified at 8 CFR part 214).

potential new customers or contracts.[113] If the employment is speculative, USCIS is unable to properly analyze the intended employment and determine whether the position is a specialty occupation.[114]

Note, however, that establishing non-speculative employment does not mean demonstrating non-speculative daily work assignments through the duration of the requested validity period. DHS does not propose to require employers to establish non-speculative and specific assignments for every day of the intended period of employment.[115] Again, under proposed 8 CFR 214.2(h)(4)(iii)(F), a petitioner must demonstrate, at the time of filing, availability of non-speculative employment as of the requested start date. However, DHS does not require a petitioner to identify and document the beneficiary's specific day-to-day assignments.[116] DHS also does not intend to limit validity periods based on the end-date of contracts, work orders, itineraries, or similar documentation. Speculative employment should not be confused with employment that is contingent on petition approval, visa issuance (when applicable), or the grant of H-1B status. DHS recognizes that employment may be actual, but contingent on petition approval, visa issuance, or the beneficiary being granted H-1B status.

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[113] *See id.* at 30420.

[114] *See id. See also* Government Accountability Office, "H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers," GAO/HEHS-00-157 (Sept. 2000), *https://www.gao.gov/assets/hehs-00-157.pdf* ("The petition is required to contain the necessary information to show that a bona fide job exists . . . ."); *Serenity Info Tech, Inc. v. Cuccinelli*, 461 F. Supp. 3d 1271, 1286 (N.D. Ga. 2020) ("Demonstrating that the purported employment is actually likely to exist for the beneficiary is a basic application requirement . . . .").

[115] *See ITServe Alliance, Inc. v. Cissna*, 443 F. Supp. 3d 14, 39 (D.D.C. 2020) (the U.S. District Court for the District of Columbia, in considering a requirement that an H-1B petitioner establish non-speculative assignments for the entire time requested in a petition, explained that "very few, if any, U.S. employer would be able to identify and prove daily assignments for the future three years for professionals in specialty occupations" and that "[n]othing in [the statutory definition of 'specialty occupation'] requires specific and non-speculative qualifying day-to-day assignments for the entire time requested in the petition"); *Serenity Info Tech*, 461 F. Supp. 3d at 1286 (agreeing with the determination by the court in *ITServe Alliance* that the statute does not require specific and non-speculative qualifying day-to-day assignments).

[116] USCIS, "Rescission of Policy Memoranda," PM-602-0114 at 3 (June 17, 2020) (stating that "a petitioner is not required to identify and document the beneficiary's specific day-to-day assignments").

c. LCA Corresponds with the Petition

DHS is proposing to update the regulations to expressly include DHS's existing authority to ensure that the LCA properly supports and corresponds with the accompanying H-1B petition. The proposed text at 8 CFR 214.2(h)(4)(i)(B)(*1*)(*ii*) would align DHS regulations with existing DOL regulations, which state that DHS has the authority to determine whether the LCA supports and corresponds with the H-1B petition. *See* 20 CFR 655.705(b). It would also codify DHS's authority to determine whether all other eligibility requirements have been met, such as whether the beneficiary for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in INA section 214(i)(2), 8 U.S.C. 1184(i)(2). While DHS already has the authority under INA sections 101(a)(15)(H)(i)(b), 103(a), and 214(a)(1) and (c)(1), 8 U.S.C. 1101(a)(15)(H)(i)(b), 1103(a), and 1184(a)(1) and (c)(1), to determine whether the LCA supports and corresponds with the H-1B petition, this authority currently is only stated in DOL's regulations and not in DHS's regulations.[117] By adding it to DHS regulations, DHS would align its regulations with existing DOL regulations, which would add clarity and provide transparency to stakeholders.

The current statute and regulations require that a petitioner file an LCA certified by the Secretary of Labor with its H-1B petition, unless filing for certain Department of Defense workers.[118] Among other information, the employer must provide the prevailing wage rate, occupational classification ("Standard Occupational Classification (SOC) occupational title"),[119] and place of employment for the offered position on the LCA. The employer must attest on the LCA that it will pay the beneficiary the higher of the

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[117] *See* 20 CFR 655.705(b).
[118] *See* INA section 212(n)(1); 8 CFR 214.2(h)(1)(ii)(B)(*1*); (h)(4)(i)(B)(*1*) and (*2*); (h)(4)(iii)(B).
[119] SOC refers to the Standard Occupational Classification code system, a classification system used by the DOL and other Federal agencies to categorize occupations. *See* BLS, "Standard Occupational Classification," *https://www.bls.gov/soc/* (last visited Oct. 26, 2022); OMB, "Statistical Programs & Standards," *https://www.whitehouse.gov/omb/information-regulatory-affairs/statistical-programs-standards/* (last visited Oct. 26, 2022).

prevailing wage for the occupational classification in the area of employment or the employer's actual wage.[120] It must also attest to the truthfulness and accuracy of the information provided on the LCA.[121]

DHS proposes to amend existing regulations to state clearly that, although the Secretary of Labor certifies the LCA, DHS has the authority and obligation to determine whether the certified LCA properly supports and corresponds with the H-1B petition.[122] DHS also proposes to amend the regulations to clarify its existing authority and obligation to determine whether all eligibility requirements for H-1B classification have been met.[123]

This proposed regulation would more clearly summarize DHS's existing authority under INA section 101(a)(15)(H)(i)(b), 103(a), and 214(a)(1) and (c)(1), 8 U.S.C. 1101(a)(15)(H)(i)(b), 1103(a), and 1184(a)(1) and (c)(1). This authority is also referenced, in part, in DOL's regulation at 20 CFR 655.705(b), which states in pertinent part that DHS accepts an employer's H-1B petition with the DOL-certified LCA attached, and in doing so, "DHS determines whether the petition is supported by an LCA which corresponds with the petition" and otherwise meets the statutory requirements for the classification.[124] Thus, DHS's proposed regulation would mirror DOL regulations and

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[120] *See* 20 CFR 655.730–655.731.

[121] *See id*.

[122] There are four Federal agencies involved in the process relating to H-1B nonimmigrant classification and employment: DOL, DOS, U.S. Department of Justice, and DHS. In general, DOL administers the LCA process and LCA enforcement provisions. As noted, DHS determines, among other things, whether the petition is properly supported by an LCA that corresponds with the petition, whether the occupation named in the LCA is a specialty occupation, and whether the qualifications of the nonimmigrant meets the statutory and regulatory requirements for H-1B visa classification. Department of Justice administers the enforcement and disposition of complaints regarding an H-1B–dependent or willful violator employer's failure to offer an H-1B position to an equally or better qualified U.S. worker, or such employer's willful misrepresentation of material facts relating to this obligation. DOS, through U.S. Embassies and consulates, is responsible for issuing H-1B visas. *See* 20 CFR 655.705.

[123] *See, e.g.,* 8 U.S.C. 1184(c)(1) (stating "[t]he question of importing any alien as a nonimmigrant under subparagraph (H) . . . in any specific case or specific cases shall be determined by the [Secretary of Homeland Security]").

[124] *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 546 n.6 (AAO 2015) ("USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition").

expressly clarify DHS's existing authority with respect to reviewing the certified LCA within the context of adjudicating the H-1B petition.

When determining whether the submitted certified LCA properly corresponds with the petition, consistent with current practice, USCIS would consider all the information on the LCA, including, but not limited to, the standard occupational classification (SOC) code, wage level (or an independent authoritative source equivalent), and location(s) of employment. USCIS would evaluate whether that information sufficiently aligns with the offered position, as described in the rest of the record of proceeding. In other words, USCIS would compare the information contained in the LCA against the information contained in the petition and supporting evidence. USCIS would not, however, supplant DOL's responsibility with respect to wage determinations. The wage level is not solely determinative of whether the position is a specialty occupation.

DHS notes that the LCA, H-1B petition, and supporting documentation must be for the same position; however, the same position does not necessarily mean that all information describing the position must be identical. A petitioner may legitimately supplement or clarify the record with additional information about the offered position in response to an RFE, on motion, or on appeal. So long as the supplemental information does not materially change the position described in the original H-1B petition, DHS would consider the position to be the same. DHS would view a change to be material for these purposes if the change would have required the petitioner to file an amended or new petition with the corresponding LCA or if the change was made to make the position description comport with an originally submitted LCA.[125]

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[125] *See* 8 CFR 103.2(b)(1) (an applicant or petitioner must establish eligibility at the time of filing); 8 CFR 214.2(h)(2)(i)(E) (petitioner must file a new or amended petition with USCIS to reflect any material change in the terms and conditions of employment or the foreign citizen's eligibility for H-1B status); *Matter of Simeio Solutions, LLC,* 26 I&N Dec. 542, 547 (AAO 2015) ("When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H−1B petition with the corresponding LCA. 8 CFR § 214.2(h)(2)(i)(E)."). *See also Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998) (a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements).

Additionally, DHS proposes to improve 8 CFR 214.2(h)(4)(i)(B), by redesignating existing paragraphs (h)(4)(i)(B)(*1*) through (*6*) as proposed paragraphs (h)(4)(i)(B)(*1*)(*i*) through (*vi*) and adding a new heading to clarify that these provisions all relate to LCA requirements. DHS is also proposing technical changes throughout this section, such as replacing "shall" with "must," "application" with "certified labor condition application," and "the Service" with "USCIS," for additional clarity.

In separate provisions that are also related to the LCA, DHS proposes to revise the grounds for denial or revocation related to the statements of facts contained in the petition, TLC, or the LCA. *See* proposed 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(*2*). This would codify DHS's current practices, as the LCA is incorporated into and considered part of the H-1B petition, just like the TLC is incorporated into and considered part of the H-2A or H-2B petition.[126]

While current 8 CFR 214.2(h)(11)(iii)(A)(*2*) already refers to the "temporary labor certification," it does not expressly refer to the "labor condition application." DHS proposes to add an express reference to the LCA in proposed 8 CFR 214.2(h)(11)(iii)(A)(*2*) to resolve any doubts that a false statement on the LCA – just like a false statement on the TLC – could provide a basis for USCIS to revoke an H petition approval. The purpose of the proposed change to 8 CFR 214.2(h)(10)(ii) is to clarify and better align with the language in proposed 8 CFR 214.2(h)(11)(iii)(A)(*2*) to expressly reference inaccurate or false statements on the petition, TLC, or LCA, as applicable, as a basis for denial of an H petition.

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[126] *See* 8 CFR 103.2(b)(1) (any evidence submitted in connection with a benefit request is incorporated into and considered part of the request); USCIS, "Rescission of Policy Memoranda," PM-602-0114, at 2 (June 17, 2020) ("The petitioner is required to attest under penalty of perjury on the H-1B petition and LCA that all of the information contained in the petition and supporting documents is complete, true, and correct."), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf*; *Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015) ("USCIS must determine whether the attestations and content of an LCA correspond to and support the H−1B visa petition, including the specific place of employment. 20 CFR § 655.705(b) (2014); see also 8 CFR § 214.2(h)(4)(i)(B).").

d. Revising the Definition of U.S. Employer

DHS is proposing to revise the definition of "United States employer." Currently, 8 CFR 214.2(h)(4)(ii) defines the term "United States employer" as a person, firm, corporation, contractor, or other association, or organization in the United States that: (1) Engages a person to work within the United States; (2) has an employer-employee relationship with respect to employees under 8 CFR part 214, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and (3) has an Internal Revenue Service Tax identification number.

DHS proposes several changes to the "United States employer" definition at 8 CFR 214.2(h)(4)(ii) to bring it in line with our current practice. First, in place of the employer-employee relationship requirement, DHS proposes to codify the existing requirement that the petitioner has a bona fide job offer for the beneficiary to work within the United States. DHS also proposes to replace the requirement that the petitioner "[e]ngages a person to work within the United States" with the requirement that the petitioner have a legal presence and is amenable to service of process in the United States. DHS is not proposing to change the current requirement at 8 CFR 214.2(h)(4)(ii) that the petitioner must have an IRS Tax identification number.

e. Employer-employee Relationship

DHS proposes to remove from the definition of U.S. employer the reference to an employer-employee relationship, which, in the past, was interpreted using common law principles and was a significant barrier to the H-1B program for certain petitioners, including beneficiary-owned petitioners. This proposed change is consistent with current USCIS policy guidance, and removing the employer-employee relationship language from the regulations would promote clarity and transparency in the regulations. It would also support DHS's overall commitment to reducing administrative barriers, including

those that unnecessarily impede access to USCIS immigration benefits.[127] This proposed change reflects USCIS's current practices since June 2020, when, following a court order and settlement agreement,[128] USCIS formally rescinded its January 2010 policy guidance on the employer-employee relationship analysis under common law.[129] As explained in USCIS's June 2020 policy memorandum "Rescission of Policy Memoranda," when assessing whether an employer and a beneficiary have an employer-employee relationship under current 8 CFR 214.2(h)(4)(ii), the petitioner need only establish that it meets at least one of the "hire, pay, fire, supervise, or otherwise control the work of" factors with respect to the beneficiary.[130] H-1B petitioners are required to submit an LCA attesting that they will pay the beneficiary, *see, e.g.,* 8 CFR 214.2(h)(4)(i)(B), as well as a copy of any written contracts between the petitioner and the beneficiary (or a summary of the terms of the oral agreement under which the beneficiary will be employed, if a written contract does not exist), which typically demonstrates that they will hire and pay the beneficiary, *see* 8 CFR 214.2(h)(4)(iv). Therefore, H-1B petitioners generally will meet the employer-employee relationship under current 8 CFR 214.2(h)(4)(ii) simply by submitting the required LCA and employment agreement as part of the initial evidence for Form I-129. As a result, the current employer-employee relationship requirement has limited practical value and could be a potential source of confusion if maintained in the regulations. As an additional integrity measure, and as explained in more detail below,

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[127] *See, e.g.*, "Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input," 86 FR 20398 (Apr. 19, 2021).
[128] *See ITServe Alliance, Inc. v. Cissna*, 443 F.Supp.3d 14, 19 (D.D.C. 2020) (finding that the USCIS policy interpreting the existing regulation to require a common-law employer-employee relationship violated the Administrative Procedure Act as applied and that the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) is ultra vires as it pertains to H-1B petitions).
[129] *See* USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf*. This memorandum rescinded the USCIS policy memorandum "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements," HQ 70/6.2.8 (AD 10-24) (Jan. 8, 2010).
[130] *Id.* at 2.

DHS is proposing to codify the existing requirement that the petitioner have a bona fide job offer for the beneficiary to work within the United States.

As indicated above, the previous analysis created significant barriers to the H-1B program for certain petitioners, including beneficiary-owned petitioners. For example, a beneficiary-owner may have been unlikely to establish a common-law employer-employee relationship with the petitioning entity, even if working for the petitioning entity in a specialty occupation and as a W-2 employee, and thus denied classification as an H-1B specialty occupation worker. Furthermore, USCIS's previous policy was not entirely consistent with DOL's regulatory definition of an H-1B employer. DOL's definition of "employer" at 20 CFR 655.715 states, in pertinent part, "In the case of an H-1B nonimmigrant (not including E-3 and H-1B1 nonimmigrants), the person, firm, contractor, or other association or organization in the United States that files a petition with [USCIS] on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant." The definition further states, "In the case of an E-3 and H-1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with [DOL] on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant." As a result of USCIS's 2010 policy guidance, it was often the case that USCIS concluded a petitioner was not an employer for purposes of the H-1B petition even though DOL deemed that same petitioner to be an employer for purposes of the LCA. This disparity increased the potential for confusion among H-1B stakeholders. It is in DHS's interests to promote, to the extent possible, a more consistent framework among DHS and DOL regulations for H-1B, E-3, and H-1B1 petitions and to increase clarity for stakeholders. However, the proposed removal of the employer-employee requirement from 8 CFR 214.2(h)(4)(ii) is not intended to narrow in any way the scope of petitioners against whom DOL may enforce the H-1B labor requirements.

f. Bona fide Job Offer

Under the second prong of the definition of "U.S. employer" at 8 CFR 214.2(h)(4)(ii), DHS proposes to codify the existing requirement that the petitioner have a bona fide job offer for the beneficiary to work within the United States.[131] While this requirement is not currently expressly stated in the regulations, it is reflected in current USCIS policy guidance, which states that the petitioner must establish that "[a] bona fide job offer . . . exist[s] at the time of filing."[132]

This proposed change would also be consistent with the current H-1B Registration Tool, where the petitioner must attest at the time of registration that each registration for an H-1B cap-subject beneficiary reflects a legitimate job offer. DHS's proposal to codify the requirement for a bona fide job offer requirement would complement DHS's proposal to codify the requirement to demonstrate a non-speculative position in a specialty occupation for the beneficiary at proposed 8 CFR 214.2(h)(4)(iii)(F).

DHS proposes to codify the bona fide job offer requirement in place of the current requirement that the petitioner "[e]ngages a person to work within the United States" under the first prong of current 8 CFR 214.2(h)(4)(ii). As currently written, the requirement for a petitioner to "engage[] a person to work within the United States" has limited practical value because it does not specify that the petitioner should engage the beneficiary (rather than "a person") and it does not specify that the work to be performed must be within the United States.

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[131] Consistent with existing practice, the phrase "within the United States" does not and would not prohibit H-1B nonimmigrants from travelling internationally.

[132] *See* USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020); *see also* USCIS, Adjudicator's Field Manual (AFM) Chapter 31.3(g)(4) at 24, "H1-B Classification and Documentary Requirements has been partially superseded as of June 17, 2020," available at https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm31-external.pdf (last visited Sept. 5, 2023) ("The burden of proof falls on the petitioner to demonstrate the need for such an employee. Unless you are satisfied that a legitimate need exists, such a petition may be denied because the petitioner has failed to demonstrate that the beneficiary will be employed in a qualifying specialty occupation."). While USCIS retired the AFM in May 2020, this example nevertheless illustrates the agency's historical interpretation.

Furthermore, DHS proposes to add clarification that the bona fide job offer may include "telework, remote work, or other off-site work within the United States." *See* proposed 8 CFR 214.2(h)(4)(ii). While USCIS currently allows these types of work arrangements (provided they are consistent with the certified LCA and other regulatory requirements), the regulations do not state this expressly. DHS believes this clarification is helpful as more businesses allow and more workers choose telework, remote work, or other types of work arrangements.[133] DHS emphasizes that nothing in the proposed rule would change the Department of Labor's administration and enforcement of statutory and regulatory requirements related to labor condition applications. *See* 8 U.S.C. 1182(n); 20 CFR Part 655 Subparts H and I. These requirements would be unaffected by this proposed rule and would continue to apply to all H-1B employers.

g. Legal Presence and Amenable to Service of Process

In the second prong of the definition of U.S. employer at 8 CFR 214.2(h)(4)(iv)(D), DHS proposes to add a new requirement that the petitioner has a legal presence in the United States and is amenable to service of process in the United States. Legal presence, in this context, means that the petitioner is legally formed and authorized to conduct business in the United States. In order to employ an individual legitimately in a specialty occupation, an employer should be able to conduct business legally in the United States.[134] If USCIS discovers at any time while the petition is pending that the

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[133] *See, e.g.,* Kim Parker, Juliana Menasce Horowitz, and Rachel Minkin, "COVID-19 Pandemic Continues to Reshape Work in America" (Feb. 16, 2022), *https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/* (among those who have a workplace outside of their home, in January 2022, 61 percent said they choose not to go into their workplace, compared to only 31 percent of this population surveyed in October 2020); Greg Iacurci, "Why Labor Economists Say the Remote Work 'Revolution' is Here to Stay" (Dec. 1, 2022), *https://www.cnbc.com/2022/12/01/why-labor-economists-say-the-remote-work-revolution-is-here-to-stay.html* (the share of remote workers had been doubling every 15 years prior to 2020, but the subsequent increase during the pandemic amounted to 30 years of pre-pandemic growth).

[134] *See, e.g., In Re. 9019481*, 2020 WL 9668720 (AAO July 17, 2020) ("[T]he record of proceeding does not contain evidence demonstrating the Petitioner is active and in good standing with any State. If a petitioner is no longer in business, then no bona fide job offer exists to support the petition."); *In Re. 16130730*, 2021 WL 2806409 (AAO Apr. 27, 2021) ("[T]he petitioner has not demonstrated that it is an entity in active and good standing…. If the petitioner is not actually in business, it cannot qualify as an entity with standing to file an H-1B petition.").

petitioner does not have a legal presence in the United States, it may issue a request for additional evidence and provide the petitioner the opportunity to cure that deficiency.

"Amenable to service of process" means that the petitioner may be sued in a court in the United States. Since the petitioner undertakes legal obligations to employ the beneficiary according to the terms and conditions on the petition and LCA, the petitioner should not be able to avoid liability for not complying with these obligations by later claiming that it is not the employer or is not amenable to service of process. The requirement that the petitioner is amenable to service of process in the United States is also found in other classifications, such as H-2B, O-1, and P-1. Those regulations state that "a foreign employer is any employer who is not amenable to service of process in the United States." *See* 8 CFR 214.2(h)(6)(iii)(B); (o)(2)(i); and (p)(2)(i), respectively.

7. Beneficiary-Owners

In the fourth prong of the definition of U.S. employer at 8 CFR 214.2(h)(4)(ii), DHS proposes to codify a petitioner's ability to qualify as a U.S. employer even when the beneficiary possesses a controlling interest in that petitioner. As discussed above, historically, USCIS's common law analysis of the employer-employee relationship has been an impediment for certain beneficiary-owned businesses to use the H-1B program. While USCIS has not applied the common law analysis of the employer-employee relationship since June 2020, when it rescinded its 2010 policy memorandum,[135] DHS believes that prospective beneficiary-owned businesses may still be reluctant to participate in the H-1B program due to the legacy of its now-rescinded memorandum. Through this proposed change to 8 CFR 214.2(h)(4)(ii), DHS seeks to clarify its current

[135] *See* USCIS, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements," HQ 70-6.2.8, AD 10-24 (Jan. 8, 2010).

policy and encourage more beneficiary-owned businesses to participate in the H-1B program.[136]

The United States has long been a destination for top talent from all over the world, including for entrepreneurs and innovators. The United States continues to build and expand initiatives to support its evolving workforce with policies such as the passage of the CHIPS and Science Act of 2022, which will foster innovation in many ways, including by reducing the barriers of entry to startups.[137] While the United States prides itself on its ability to attract global talent, there are limited pathways for entrepreneurs to come to the United States under existing regulations. To promote access to H-1Bs for entrepreneurs, start-up entities, and other beneficiary-owned businesses, DHS is proposing to add provisions to specifically address situations where a potential H-1B beneficiary owns a controlling interest in the petitioning entity. If more entrepreneurs are able to obtain H-1B status to develop their business enterprises, the United States could benefit from the creation of jobs, new industries, and new opportunities.[138] At the same time, DHS seeks to set reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity to better ensure program integrity. These proposed conditions would apply when a beneficiary owns a controlling interest, meaning that the beneficiary owns more than 50 percent of the petitioner or when the beneficiary has majority voting rights in the petitioner. These proposed conditions would not apply when

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[136] Again, DHS emphasizes that nothing in the proposed rule would change the Department of Labor's administration and enforcement of statutory and regulatory requirements related to labor condition applications. *See* 8 U.S.C. 1182(n); 20 CFR part 655, subparts H and I. These requirements would be unaffected by this proposed rule and would continue to apply to all H-1B employers.

[137] *See* The CHIPS and Science Act of 2022, Public Law 117-167 (Aug. 22, 2022).

[138] *See, e.g.,* National Bureau of Economic Research*, "*Winning the H-1B Visa Lottery Boosts the Fortunes of Startups" (Jan. 2020), *https://www.nber.org/digest/jan20/winning-h-1b-visa-lottery-boosts-fortunes-startups* ("The opportunity to hire specialized foreign workers gives startups a leg up over their competitors who do not obtain visas for desired employees. High-skilled foreign labor boosts a firm's chance of obtaining venture capital funding, of successfully going public or being acquired, and of making innovative breakthroughs."); Pierre Azoulay, et al., "Immigration and Entrepreneurship in the United States" (National Bureau of Economic Research, Working Paper 27778 (Sept. 2020), *https://www.nber.org/system/files/working_papers/w27778/w27778.pdf* ("immigrants act more as 'job creators' than 'job takers' and . . . non-U.S. born founders play outsized roles in U.S. high-growth entrepreneurship").

a beneficiary does not own a controlling interest in the petitioning entity. DHS believes it is reasonable to limit the application of these conditions to H-1B petitioners where the beneficiary has a controlling interest to ensure that the beneficiary will be employed in a specialty occupation in a bona fide job opportunity.

One of the proposed conditions is that the beneficiary may perform duties that are directly related to owning and directing the petitioner's business as long as the beneficiary will perform specialty occupation duties authorized under the petition a majority of the time. *See* proposed 8 CFR 214.2(h)(4)(ii). "A majority of the time" in this context means that the beneficiary must perform specialty occupation duties more than 50 percent of the time.

By requiring that the beneficiary perform specialty occupation duties a majority of the time, the beneficiary-owner would have flexibility to perform non-specialty occupation duties that are directly related to owning and directing the petitioner's business. This proposed rule would not preclude the beneficiary from being authorized for concurrent employment with two or more entities (including another entity where the beneficiary is also an owner with a controlling interest) so long as each entity has been approved to employ the beneficiary in a specialty occupation and the individual otherwise satisfies all eligibility requirements. In this concurrent employment scenario, where a beneficiary seeks concurrent employment with more than one entity and the beneficiary owns a controlling interest in each of the petitioners filing to authorize concurrent employment, the "majority of the time" standard must be met with respect to each petition, and the beneficiary must comply with the terms and conditions of each petition.

The proposed language at 8 CFR 214.2(h)(4)(ii) would state that a beneficiary may perform non-specialty occupation duties as long as such non-specialty occupation duties are directly related to owning and directing the petitioner's business. Additionally and similar to other H-1B petitions, a beneficiary-owner may perform some incidental

duties, such as making copies or answering the telephone. DHS expects a beneficiary-owner would need to perform some non-specialty occupation duties when growing a new business or managing the business. Notwithstanding incidental duties, non-specialty occupation duties must be directly related to owning and directing the business. These duties may include, but are not limited to: signing leases, finding investors, and negotiating contracts. The goal is to ensure that a beneficiary who is the majority or sole owner and employee of a company would not be disqualified by virtue of having to perform duties directly related to owning and directing their own company, while also ensuring that the beneficiary would still be "coming temporarily to the United States to perform services . . . in a specialty occupation" as required by INA section 101(a)(15)(H)(i)(b).

The proposed "majority of the time" framework would allow a beneficiary-owner to perform some non-specialty occupation duties that are directly related to owning and directing the business, as long as a majority of their time performing the job would be spent performing the specialty occupation duties authorized in the approved petition. USCIS would analyze all of the job duties— specialty occupation duties and non-specialty occupation duties—which the petitioner must accurately describe in the petition along with the expected percentage of time to be spent performing each job duty, to determine whether the job would be in a specialty occupation and to determine whether the non-specialty occupation duties are directly related to owning and directing the business. If the beneficiary would spend a majority of their time performing specialty occupation duties, and if the non-specialty occupation duties are directly related to owning and directing the business, then the position may qualify as a specialty occupation.[139]

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[139] *See GCCG Inc v. Holder*, 999 F. Supp. 2d 1161, 1167 (N.D. Cal. 2013) (agreeing with Defendant that for USCIS to find the petitioner's proffered job to be a specialty occupation, the majority of the beneficiary's time must be spent performing the duties of the specialty occupation).

The "majority of the time" analysis would be similar to the approach generally taken for other H-1B petitions, although it would be more limiting in order to mitigate against potential abuse.[140] However, DHS acknowledges that past adjudicative practices have not been entirely consistent as to what level of non-specialty occupation duties is permissible and what level of such duties would result in a finding that the proffered position as a whole does not qualify as a specialty occupation.[141] Codifying the "majority of the time" framework would provide clarity in the regulations as to what is permissible in the specific context of beneficiary-owners. This, in turn, would better ensure consistency in adjudications of petitions involving beneficiary-owners. DHS again emphasizes that nothing in the proposed rule would change the Department of Labor's administration and enforcement of statutory and regulatory requirements related to labor condition applications, including requirements concerning the appropriate prevailing wage and wage level when the proffered position involves a combination of occupations.[142] For example, in some cases the petition might involve a combination of occupations that can affect the petitioner's wage obligation, as detailed in DOL's wage guidance.[143] Generally, when an H-1B employer requests a prevailing wage

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[140] *See, e.g.*, *GCCG Inc v. Holder*, 999 F. Supp. 2d 1161, 1165-68 (N.D. Cal. 2013) (finding the beneficiary to be mainly performing non-specialty occupation duties and explaining that USCIS requires the beneficiary's duties to entail mainly the performance of specialty occupation duties for the position to qualify as a specialty occupation); *Engaged in Life, LLC v. Johnson*, No. 14-06112-CV-DW, 2015 WL 11111211, at *4 (W.D. Mo. Oct. 13, 2015) (citing *GCCG Inc.*).

[141] *See, e.g., In Re. 8423340,* 2020 WL 9668851, at *12 (AAO July 27, 2020) ("[W]e will permit the performance of duties that are incidental to the primary duties of the proffered position as acceptable when they occur by chance, are intermittent, and are of a minor consequence. Anything beyond such incidental duties (e.g., predictable, recurring, and substantive job responsibilities), must be specialty occupation duties or the proffered position as a whole cannot be approved as a specialty occupation."); *In Re. M-C-*, 2016 WL 8316337, at *4 (AAO Dec. 23, 2016) ("[A]nything beyond incidental duties, that is predictable, recurring, and substantive job responsibilities, must be specialty occupation duties or the proffered position as a whole cannot be approved as a specialty occupation."); *In Re. 1280169*, 2018 WL 2112902 (AAO Apr. 20, 2018) (concluding that the beneficiary's position, on the whole, will include non-qualifying duties inconsistent with those of a specialty-occupation caliber position because the non-qualifying duties have not been shown to be incidental to the performance of the primary duties of the proffered position).

[142] *See* 8 U.S.C. 1182(n); 20 CFR part 655, subparts H and I.

[143] DOL, "Round 3: Implementation of the Revised Form ETA-9141 FAQs" at 1 (July 16, 2021), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWC%20Round%203%20Frequently%20Asked%20Questions%20-%20Implementation%20of%20Revised%20Form%20ETA-9141.pdf (When there is a combination of occupations, the SOC code with the highest wage is assigned.); DOL, "Prevailing Wage

determination from DOL, the National Prevailing Wage Center will assign to the position the occupational code that has the higher of the prevailing wages amongst the combination of occupations. Under this proposed rule, a petitioner may be authorized to employ a beneficiary-owner in a combination of occupations, provided that the petitioner pays the required wage, consistent with existing DOL wage guidance, even when the beneficiary-owner is performing non-specialty occupation duties as authorized by USCIS.

DHS is also proposing to limit the validity period for beneficiary-owned entities. DHS proposes to limit the validity period for the initial petition and first extension (including an amended petition with a request for an extension of stay) of such a petition to 18 months each. *See* proposed 8 CFR 214.2(h)(9)(iii)(E). Any subsequent extension would not be limited and may be approved for up to 3 years, assuming the petition satisfies all other H-1B requirements. DHS proposes limiting the first two validity periods to 18 months as a safeguard against possible fraudulent petitions. While DHS sees a significant advantage in promoting the H-1B program to entrepreneurs, DHS believes that guardrails for beneficiary-owner petitions would be helpful to mitigate the potential for abuse of the H-1B program. Limiting the first two validity periods to 18 months each would allow DHS adjudicators to review beneficiary-owned petitions more frequently, and limiting the nature of non-specialty occupation duties that may be performed, would deter potential abuse and help to maintain the integrity of the H-1B program. DHS seeks public comments on these proposed safeguards and additional safeguards and flexibilities for beneficiary-owned businesses.

Determination Policy Guidance Nonagricultural Immigration Programs Revised November 2009" at 4, https://www.flcdatacenter.com/download/npwhc_guidance_revised_11_2009.pdf (last visited Oct. 3, 2023) (If the employer's job opportunity involves a combination of occupations, the National Prevailing Wage Center should list the relevant occupational code for the highest paying occupation.).

8. Site Visits

Pursuant to its authority under INA sections 103(a), 214(a), 235(d)(3) and 287(b), 8 U.S.C. 1103(a), 1184(a), 1225(d)(3) and 1357(b), sections 402, 428 and 451(a)(3) of the HSA, 6 U.S.C. 202, 236 and 271(a)(3), and 8 CFR 2.1, USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a petitioner and beneficiary are eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. These inspections, verifications, and other compliance reviews may be conducted telephonically or electronically, as well as through physical on-site inspections (site visits). The existing authority to conduct inspections, verifications, and other compliance reviews is vital to the integrity of the immigration system as a whole and to the H-1B program specifically. In this rule, DHS is proposing to add regulations specific to the H-1B program to codify its existing authority and clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections. *See* proposed 8 CFR 214.2(h)(4)(i)(B)(*2*). The authority of USCIS to conduct on-site inspections, verifications, or other compliance reviews to verify information does not relieve the petitioner of its burden of proof or responsibility to provide information in the petition (and evidence submitted in support of the petition) that is complete, true, and correct.[144]

In July 2009, USCIS started a compliance review program as an additional way to verify information in certain visa petitions.[145] Under this program, USCIS Fraud Detection and National Security (FDNS) officers make unannounced site visits to collect information as part of a compliance review. A compliance review verifies whether petitioners and beneficiaries are following the immigration laws and regulations that are

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[144] *See* 8 CFR 103.2(b). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe*, 25 I&N Dec. 376 (quoting *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989).

[145] *See* USCIS, Administrative Site Visit and Verification Program, https://www.uscis.gov/about-us/organization/directorates-and-program-offices/fraud-detection-and-national-security-directorate/administrative-site-visit-and-verification-program (last updated March 6, 2023).

applicable in a particular case. This process includes researching information in government databases, reviewing public records and evidence accompanying the petition, and interviewing the petitioner and beneficiary.[146] It also includes conducting site visits.

The site visits conducted by USCIS through its compliance review program have uncovered a significant amount of noncompliance in the H-1B program. For instance, during FYs 2019–22, USCIS conducted a total of 27,062 H-1B compliance reviews and found 5,037 of them, equal to 18.6 percent, to be noncompliant or indicative of fraud.[147] These compliance reviews (during FYs 2019–22) consisted of reviews conducted under both the Administrative Site Visit and Verification Program, which began in 2009, and the Targeted Site Visit and Verification Program, which began in 2017. The targeted site visit program allows USCIS to focus resources where fraud and abuse of the H-1B program may be more likely to occur.[148]

The data from FYs 2013–19 include data only from the Administrative Site Visit and Verification Program.[149] During FYs 2013–16, USCIS conducted 30,786 H-1B compliance reviews. Of those, 3,811 (12 percent) were found to be noncompliant.[150] From FY 2016 through March 27, 2019, USCIS conducted 20,492 H-1B compliance

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[146] Outside of the administrative compliance review program, USCIS conducts forms of compliance review in every case, including, for example, by researching information in relevant government databases or by reviewing public records and evidence accompanying the petition.

[147] DHS, USCIS, PRD (2022). PRD196. USCIS conducted these site visits through its Administrative and Targeted Site Visit Program. A finding of noncompliance indicates that the petitioner and/or third-party company is not complying with the terms and conditions of the petition but does not indicate that the petitioner willfully misrepresented information provided to USCIS. An example of noncompliance may include a petitioner sending a worker to an end-client, who without the petitioner's knowledge, uses the worker to perform duties substantially different from those specified in the petition.

[148] *See* USCIS, "Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse," (Apr. 3, 2017), *https://www.uscis.gov/archive/putting-american-workers-first-uscis-announces-further-measures-to-detect-h-1b-visa-fraud-and-abuse*.

[149] *See* USCIS, "Administrative Site Visit and Verification Program," *https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program* (last updated Mar. 6, 2023).

[150] *See* USCIS, "Fiscal Year 2017 Report to Congress: H-1B and L-1A Compliance Review Site Visits, Fraud Detection and National Security Compliance Review Data (October 1, 2012, to September 30, 2016)," at 7 (Jan. 17, 2018), *https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf* (last visited Mar. 23, 2023). Note that USCIS conducted these site visits only through its Administrative Site Visit Program.

reviews and found 2,341 (11.4 percent) to be noncompliant.[151] Of the site visits conducted during FYs 2013–22, lack of cooperation may have contributed to a finding of noncompliance, although not all findings of noncompliance mean there was a lack of cooperation.

Site visits are important to maintaining the integrity of the H-1B program and in detecting and deterring fraud and noncompliance with H-1B program requirements.[152] Cooperation is crucial to USCIS's ability to verify information about employers and workers, and the overall conditions of employment. Therefore, as noted above, DHS is proposing additional regulations specific to the H-1B program to set forth the scope of on-site inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections. This proposed rule would provide a clear disincentive for petitioners that do not cooperate with compliance reviews and inspections while giving USCIS a greater ability to access and confirm information about employers and workers as well as identify fraud.

The proposed regulations would make clear that inspections may include, but are not limited to, an on-site visit of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that

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[151] DHS, USCIS, PRD (2019). Summary of H-1B Site Visits Data. Note that USCIS conducted these site visits only through its Administrative Site Visit Program.

[152] DHS acknowledges the 2017 Office of Inspector General report that addressed concerns with the H-1B site visit program and made recommendations for improvement. DHS, Office of Inspector General, "USCIS Needs a Better Approach to Verify H-1B Visa Participants," OIG-18-03 (Oct. 20, 2017), *https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-18-03-Oct17.pdf*. Since the issuance of this report, USCIS has greatly improved its site visit program pursuant to the report's recommendations, such that USCIS believes the concerns addressed in the 2017 report no longer pertain. Specifically, the report's assessment that "USCIS site visits provide minimal assurance that H-1B visa participants are compliant and not engaged in fraudulent activity" no longer pertains. As of March 31, 2019, the recommendations have been resolved. *See* DHS, Office of Inspector General, "DHS Open Unresolved Recommendations Over Six Months Old, as of March 31, 2019," *https://www.oig.dhs.gov/sites/default/files/DHS-Open-Recommendations-As-Of-033119_053019.pdf* (not listing OIG-18-03 as an "open unresolved" report). DHS maintains that site visits, generally, are an important and effective tool for the H-1B program. The site visit provisions at proposed 8 CFR 214.2(h)(4)(i)(B)(*2*)(*i*) would directly support USCIS's continued efforts to strengthen the effectiveness of the site visit program and the integrity of the H-1B program overall.

USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H-1B program. *See* proposed 8 CFR 214.2(h)(4)(i)(B)(*2*). The proposed regulation would also clarify that an inspection may take place at the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including the beneficiary's home, or third-party worksites, as applicable. The proposed provisions would make clear that an H-1B petitioner or any employer must allow access to all sites where the labor will be performed for the purpose of determining compliance with applicable H-1B requirements. The word "employer" used in this context would include petitioners and third-party contractors. DHS believes that the ability to inspect various locations is critical because the purpose of a site inspection is to confirm information related to the petition, and any one of these locations may have information relevant to a given petition. If the petitioner and any third-party contractor does not allow USCIS officials to interview H-1B workers, including in the absence of the employer or the employer's representatives, this may also result in denial or revocation of the associated H-1B petition(s). The interviews may take place on the employer's property, or as feasible, at a neutral location agreed to by the interviewee and USCIS away from the employer's property. The presence of employer representatives during such interviews can reasonably be expected to have a chilling effect on the ability of interviewed workers to speak freely and, in turn, impede the Government's ability to ensure compliance with the terms and conditions of the H-1B program.

The proposed regulation also states that if USCIS is unable to verify facts related to an H-1B petition, including due to the failure or refusal of the petitioner or third party to cooperate in an inspection or other compliance review, then the lack of verification of pertinent facts, including from failure or refusal to cooperate, may result in denial or

revocation of the approval of any petition for workers who are or will be performing services at the location or locations that are a subject of inspection or compliance review, including any third-party worksites. *See* proposed 8 CFR 214.2(h)(4)(i)(B)(*2*). A determination that a petitioner or third party failed or refused to cooperate would be case specific, but it could include situations where one or more USCIS officers arrived at a petitioner's worksite, made contact with the petitioner and properly identified themselves to a petitioner's representative, and the petitioner refused to speak to the officers or refused entry into the premises or refused permission to review human resources (HR) records pertaining to the beneficiary. Failure or refusal to cooperate could also include situations where a petitioner or employer agreed to speak but did not provide the information requested within the time period specified, or did not respond to a written request for information within the time period specified. Before denying or revoking the petition, USCIS would provide the petitioner an opportunity to rebut adverse information and present information on its own behalf in compliance with 8 CFR 103.2(b)(16).

This new provision would put petitioners on notice of the specific consequences for noncompliance or lack of cooperation, whether by them or by a third party. It has long been established that, in H-1B visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought.[153] If USCIS conducts a site visit to verify facts related to the H-1B petition or to verify that the beneficiary is or will be employed consistent with the terms of the petition approval, and is unable to verify relevant facts and otherwise confirm general compliance, then the petition could properly be denied or the approval revoked. This would be true whether the unverified facts related to a petitioner worksite or a third-party worksite at which a beneficiary had been

[153] *See* INA section 291, 8 U.S.C. 1361; *Matter of Simeio Solutions*, 26 I&N Dec. 542, 549 (AAO 2015) ("It is the petitioner's burden to establish eligibility for the immigration benefit sought."); *Matter of Skirball Cultural Center*, 25 I&N Dec. 799, 806 (AAO 2012) ("In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.").

or would be placed by the petitioner. It would also be true whether the failure or refusal to cooperate were by the petitioner or a third party. Petitioners could consider notifying third parties at whose worksites beneficiaries may be working about the possibility of DHS verification efforts regarding the immigration benefit.

9. Third-Party Placement (Codifying *Defensor*)

In certain circumstances where an H-1B worker provides services for a third party, USCIS would look to that third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation. As required by both INA section 214(i)(1) and 8 CFR 214.2(h)(4)(i)(A)(*1*), an H-1B petition for a specialty occupation worker must demonstrate that the worker will perform services in a specialty occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty (or its equivalent) as a minimum requirement for entry into the occupation in the United States. This proposal would ensure that petitioners are not circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party.

Specifically, under proposed 8 CFR 214.2(h)(4)(i)(B)(*3*), if the beneficiary will be staffed to a third party, meaning they will be contracted to fill a position in a third party's organization, the actual work to be performed by the beneficiary must be in a specialty occupation. Therefore, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. If the beneficiary will work for a third party and perform work that is part of the third party's regular operations, the actual work to be performed by the beneficiary must be in a specialty occupation based on the requirements for the position imposed by that third party. While a petitioning employer may be the entity that hires and pays the beneficiary,

the actual services the beneficiary provides may be for a third party. When interpreting the meaning of "perform services . . . in a specialty occupation," INA section 101(a)(15)(H)(i)(b), in the context of certain third-party placements, USCIS would look to the position requirements imposed by the third party if the beneficiary will be "staffed" to that third party. Under such an interpretation, a position would not qualify as a specialty occupation simply because the petitioning employer decides to require a baccalaureate or higher degree in a specific specialty.[154]

As stated in proposed 8 CFR 214.2(h)(4)(i)(B)(*3*), "staffed" means that the beneficiary "will be contracted to fill a position in a third party's organization and becomes part of that third party's organizational hierarchy by filling a position in that hierarchy (and not merely providing services to the third party." There is a difference between a beneficiary who is "staffed" to a third party and a beneficiary who provides services to a third party (whether or not at a third-party location). A beneficiary who is "staffed" to a third party becomes part of that third party's organizational hierarchy by filling a position in that hierarchy, even when the beneficiary technically remains an employee of the petitioner. In this circumstance where the beneficiary fills a position within the third party's organizational hierarchy, the third party would be better positioned than the petitioner to be knowledgeable of the actual degree requirements for the beneficiary's work. Thus, it is reasonable for USCIS to consider the requirements of the third party as determinative of whether the position is a specialty occupation. *See* proposed 8 CFR 214.2(h)(4)(i)(B)(*3*).

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[154] *See Defensor v. Meissner,* 201 F.3d 384, 388 (5th Cir. 2000) ("If only [the employer]'s requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit [H-1B] visas to positions which require specialized experience and education to perform.").

Compared to all cases where the H-1B beneficiary provides services to a third party, a third party would not always be in a better position than the petitioner to set the requirements of the proffered position. For example, a beneficiary may provide software development services to a third party as part of the petitioner's team of software developers on a discrete project, or a beneficiary employed by a large accounting firm may provide accounting services to various third-party clients. In these examples, proposed 8 CFR 214.2(h)(4)(i)(B)(*3*) would not apply, because it would not be reasonable to assume that the third party would be better positioned than the petitioner to know the actual degree requirements for the beneficiary's work. DHS narrowed down the applicability of proposed 8 CFR 214.2(h)(4)(i)(B)(*3*) to only the subset of beneficiaries who would be "staffed" to a third party because these examples illustrate how a third party's degree requirements would not always be as relevant as the petitioner's degree requirements.

Proposed 8 CFR 214.2(h)(4)(i)(B)(*3*) would be generally consistent with long-standing USCIS practice.[155] In *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), the court recognized that, if only the petitioner's requirements are considered, then any beneficiary with a bachelor's degree could be brought to the United States in H-1B status to perform non-specialty occupation work, as long as that person's employment was arranged through an employment agency that required all staffed workers to have bachelor's degrees. This result would be the opposite of the plain purpose of the statute and regulations, which is to limit H-1B visas to positions that require specialized

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[155] *See, e.g., In Re.* ---, 2010 WL 3010500 (AAO Jan. 12, 2010) ("In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation."); *In Re. 5037859*, 2019 WL 6827396 (AAO Nov. 7, 2019) ("The scenario in *Defensor* has repeatedly been recognized by Federal Courts as appropriate in determining which entity should provide the requirements of an H-1B position and the actual duties a beneficiary would perform.") (citing to *Altimetrik Corp. v. USCIS*, No. 2:18-cv-11754, at *7 (E.D. Mich. Aug. 21, 2019); *Valorem Consulting Grp. v. USCIS*, No. 13-1209-CV-W-ODS, at *6 (W.D. Mo. Jan. 15, 2015); *KPK Techs. v. Cuccinelli*, No. 19-10342, at *10 (E.D. Mich. Sep. 16, 2019); *Altimetrik Corp. v. Cissna*, No. 18-10116, at *11 (E.D. Mich. Dec. 17, 2018); *Sagarwala v. Cissna*, No. CV 18-2860 (RC), 2019 WL 3084309, at *9 (D.D.C. July 15, 2019)).

education to perform the duties. If the work that the beneficiary would actually perform does not require the theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in a specific specialty or its equivalent, then the position would not qualify as an H-1B specialty occupation. In such a case, the petitioning employer's stated education and experience requirements for the beneficiary's position would not be determinative to the specialty occupation assessment. USCIS would make the determination as to whether the beneficiary would be "staffed" to a third party on a case-by-case basis, taking into consideration the totality of the relevant circumstances.

D. Request for Preliminary Public Input Related to Future Actions/Proposals

1. Use or Lose

DHS wants to ensure that the limited number of H-1B cap-subject visas and new H-1B status grants available each fiscal year are used for non-speculative job opportunities. Demand for H-1B workers who would be subject to the annual numerical limitations, including those eligible under the advanced degree exemption, has routinely exceeded the annual H-1B numerical allocations. DHS believes there is a problem of petitioners filing H-1B cap-subject petitions even though there is no job opportunity available as of the requested start date. As illustrated by the data below, a significant percentage of H-1B beneficiaries do not enter the United States within six months of the requested employment start date or H-1B petition approval date, whichever was later, or within 90 days of the visa validity start date. The data also show a large percentage of new or amended petitions received before the beneficiary's arrival in the United States, suggesting that there may not have been a bona fide job opportunity available at the time of filing and the initial petition filed was simply to secure an H-1B cap number for the worker. Given the history of demand for H-1B visas that greatly exceeds supply, it is of great concern when a petitioner requests an H-1B cap number and receives approval, but

does not use that approved H-1B petition to employ an H-1B worker when the petitioner claimed to need that worker to start and significantly delays such employment by six months or more.

DHS has compiled internal data to help demonstrate the potential scale of the problem. The first two tables below focus on delayed entry into the United States by beneficiaries of H-1B cap-subject petitions that selected consular processing. The third table looks at the same population of cases and amended or new petitions received prior to the beneficiary's arrival in the United States. DHS believes that these may be indicators that the petitioners in these cases had speculative job opportunities at the time of filing their H-1B petitions.

Table 9 shows data on H-1B cap-subject petitions that selected consular processing into the United States and that DHS was able to match with the beneficiary's arrival data into the United States.

FY	**Table 9: Arrivals After 6 Months from Requested Employment Start Date or H-1B Petition Approval Date, Whichever Is Later (Percent)**
2017	48.4%
2018	41.9%
2019	38.4%
2020	38.7%
2022 YTD	41.1%
AVERAGE	42.8%

Source: C3, Sept. 15, 2022. ADIS, Aug. 13, 2022. Data in FY 2022 YTD only through source pull-date.

Note(s): ADIS matching completed using first name, last name, and date of birth.

Associated Receipts are receipts requesting selection A, B, C, or F in Part 2Q2 of I-129.

Average times are calculated only for records with a matching ADIS arrival.
ADIS matching completed on ADIS H-1B records only.

This table shows that, from FYs 2017 through 2022 (excepting FY 2021),[156] on average, approximately 43 percent of H-1B cap-subject beneficiaries of petitions that selected consular processing (and that DHS was able to match with the beneficiaries' arrival data) did not enter the United States in H-1B status within six months of the requested employment start date on the H-1B petition or the H-1B petition approval date, whichever was later.[157] While it is reasonable to conclude that some of these delays were due to legitimate reasons (e.g., long consular wait times), other delays may have been due to illegitimate reasons (e.g., the petitioner filing an H-1B petition despite not having work available on the requested start date). While DHS is aware that these data are imperfect, in part because DHS was not able to match some petitions with beneficiary arrival data, these data illustrate the scale of the issue – that nearly half of beneficiaries who consular processed appear to have not entered the United States in H-1B status within six months of the requested start date.

DHS is aware that there have been significant visa delays at some consulates, especially during the last few years. Table 10 takes this into account by showing data on H-1B beneficiaries who went through consular processing, who arrived more than 90 days after their DOS visa validity start date, and for whom DHS was able to match with arrival data into the United States with corresponding H-1B petitions.

FY	Table 10: Arrivals After 90 Days of DOS Visa Validity Start (Percent)
2017	38.8%
2018	27.0%
2019	16.1%
2020	22.4%
2022 YTD	21.2%
TOTAL	

[156] FY 2021 data was not included because of the variances in visa entries and closed borders due to the COVID-19 pandemic.

[157] These data only track whether a beneficiary entered the United States in H-1B status after 6 months of the employment start date or H-1B petition approval date, whichever was later; the data do not track a beneficiary's prior or subsequent travel history into or outside of the United States. By capturing data on entries made after the requested employment start date on the H-1B petition or the H-1B petition approval date, whichever was later, these data should exclude entries that were made after 6 months of the requested employment start date because of a delay in USCIS approving the H-1B petition.

AVERAGE	26.6%

Source: C3, Sept. 15, 2022. ADIS, Aug. 13, 2022. Data in FY 2022 YTD only through source pull-date.

Note(s): ADIS matching completed using first name, last name, and date of birth.

Associated Receipts are receipts requesting selection A, B, C, or F in Part 2Q2 of I-129.

Average times are calculated only for records with a matching ADIS arrival. ADIS matching completed on ADIS H-1B records only.

This table shows that, from FYs 2017 through 2022 (excepting FY 2021),[158] on average, more than 26 percent of H-1B cap-subject beneficiaries who selected consular processing arrived in the United States more than 90 days after the DOS visa validity start date. Again, while it is reasonable to conclude that some of these delays were due to legitimate reasons (e.g., a medical emergency pertaining to the beneficiary or the beneficiary's immediate family), other delays may have been due to illegitimate reasons (e.g., the petitioner filing an H-1B petition despite not having work available on the requested start date).

DHS has also compiled internal data on the number of amended or new petitions received prior to the beneficiary's arrival in the United States, which may also be an indicator that a petitioner had a speculative job opportunity at the time of filing. Table 11 shows data on the percentage of amended or new petitions received prior to the beneficiary's arrival in the United States that DHS was able to match with the beneficiary's arrival data into the United States.

Table 11: Associated Petitions Received Prior to Arrival

[158] FY 2021 data was not included because of the variances in visa entries and closed borders due to the COVID-19 pandemic.

FY	Percent of Associated Petitions Received Prior to Arrival (Consular Processing Only)	Percent of Associated Receipts are receipts requesting selection A in Part 2Q2 of I-129.[159]	Percent of Associated Receipts are receipts requesting selection B in Part 2Q2 of I-129.[160]	Percent of Associated Receipts are receipts requesting selection C in Part 2Q2 of I-129.[161]	Percent of Associated Receipts are receipts requesting selection F in Part 2Q2 of I-129.[162]
2017	24.2%	2.0%	0.6%	1.2%	20.4%
2018	14.5%	1.8%	0.6%	1.2%	11.0%
2019	9.6%	2.3%	0.9%	1.8%	4.6%
2020	15.3%	6.1%	1.4%	2.3%	5.4%
2022 YTD	2.3%	0.9%	0.0%	0.2%	1.2%
Total Average	**14.9%**	**2.6%**	**0.7%**	**1.4%**	**10.2%**

Source: C3, Sept. 15, 2022. ADIS, Aug. 13, 2022. Data in FY 2022 YTD only through source pull-date.
Note(s): ADIS matching completed using first name, last name, and date of birth.
Associated Receipts are receipts requesting selection A, B, C, or F in Part 2Q2 of I-129.
Average times are calculated only for records with a matching ADIS arrival.
ADIS matching completed on ADIS H-1B records only.

Table 11 shows that from FYs 2017 through 2022 (excepting FY 2021),[163] an average of approximately 15 percent of amended or new petitions where the beneficiary selected consular processing are received prior to the beneficiary's arrival in the United States. Again, while it is reasonable to conclude that some of these amended or new petitions were due to legitimate reasons (e.g., a legitimate shift in work location or end-client project), other petitions may have been filed due to illegitimate reasons (e.g., the petitioner filing an H-1B petition despite not having work available on the requested start date). DHS believes that these data illustrate that there may be a problem with petitioners filing H-1B petitions and taking up cap numbers without having non-speculative job opportunities as of the requested start date on the petition.

[159] Part 2, question 2, asks for the "Basis for Classification," and option "a" is for "New employment."
[160] Part 2, question 2, asks for the "Basis for Classification," and option "b" is for "Continuation of previously approved employment without change with the same employer."
[161] Part 2, question 2, asks for the "Basis for Classification," and option "c" is for "Change in previously approved employment."
[162] Part 2, question 2, asks for the "Basis for Classification," and option "f" is for "Amended petition."
[163] FY 2021 data was not included because of the variances in visa entries and closed borders due to the COVID-19 pandemic.

DHS is looking for the most effective ways to prevent petitioners from receiving approval for speculative H-1B employment, and to curtail the practice of delaying H-1B cap-subject beneficiary's employment in the United States until a bona fide job opportunity materializes. DHS has considered various approaches – two of which are discussed below but has determined that each of them has potentially significant downsides.

For example, although current 8 CFR 214.2(h)(8)(ii)(B) requires petitioners to notify USCIS if a petition goes unused because the beneficiary does not apply for admission to the United States, so that the agency may revoke approval of the petition, this regulatory provision does not include a deadline for admission or a reporting deadline. Thus, one approach DHS considered would be to amend 8 CFR 214.2(h)(8)(ii)(B) to require petitioners to notify USCIS if a beneficiary does not apply for admission after a certain amount of time, so that USCIS may revoke the approval of the petition. DHS could add a reporting requirement, so that a failure to report, or reporting that the beneficiary had not yet been admitted within the required timeframe, could be a basis for revocation. This proposal would also afford petitioners an opportunity to provide legitimate reasons for the delay in admission and avoid revocation. However, this approach would not prevent a petitioner without a legitimate reason for the delay from circumventing the intent of this provision, such as by filing an amended petition for the cap-subject beneficiary and further delaying their admission, or having the beneficiary enter the United States one day before the deadline and then leaving shortly thereafter. In addition, while the revocation of the H-1B petition may serve as a disincentive to the petitioner and discourage such conduct the next time around, it may not be the most efficient way to deter the filing of the H-1B petition itself given the time that would have elapsed between the time of filing and the final revocation.

Another approach DHS considered would be to create a rebuttable presumption that a petitioner had only a speculative position available for the beneficiary of an approved H-1B cap-subject petition, which would be triggered if certain circumstances occurred. These circumstances might include delayed entry or filing an amended petition before the beneficiary would have been admitted to the United States in H-1B status. If the petitioner were unable to rebut this presumption, USCIS could deny any extension request based on the previously approved cap-subject H-1B cap-subject petition and could revoke the initial petition approval. Regarding delayed entry, DHS considered proposing that the rebuttable presumption would be triggered if the beneficiary had not entered the United States in H-1B status either within a certain number of days of the requested start date or within a certain number of days of the validity date of their H-1B nonimmigrant visa based on the cap-subject petition. Ultimately, DHS concluded that this approach of a rebuttable presumption would create significant evidentiary burdens for legitimate petitioners. Further, while it would bolster program integrity, similar to the first approach, it would not be an efficient deterrent given the time that would have elapsed between the time of filing and the denial of the extension request or the final revocation.

As discussed, DHS is aware that either option could have a broad reach and potentially include petitions for beneficiaries whose admission into the United States was delayed for legitimate reasons beyond their control, such as lengthy consular processing times. Either option would place an additional burden on petitioners, which may be particularly difficult to overcome for a subsequent petitioner that is distinct from the original petitioner that filed the initial H-1B cap-subject petition. Further, the above options would focus on the beneficiary's timely admission into the United States but would not account for the beneficiary's or petitioner's subsequent actions.

Therefore, because DHS believes there is a problem of petitioners filing H-1B cap-subject petitions for speculative job opportunities that would not be fully resolved by the changes at proposed 8 CFR 214.2(h)(4)(iii)(F), DHS is seeking preliminary public comments on the approaches described above, as well as soliciting ideas that would further curb or eliminate the possibility that petitioners may have speculative job opportunities at the time of filing or approval of H-1B petitions and delay admission of H-1B beneficiaries until they have secured work for them. DHS is hoping to use the public input it receives to develop proposals that would further strengthen the programmatic framework and complement provisions already proposed in this NPRM, such as the proposed requirement that the petitioner establish a non-speculative position for the beneficiary as of the start date of the validity period under proposed 8 CFR 214.2(h)(4)(iii)(F) and the proposed requirement that a petitioner have a bona fide job offer under proposed 8 CFR 214.2(h)(4)(ii). Specifically, DHS is requesting ideas and, where possible, supporting data for future regulatory, subregulatory, and enforcement actions that USCIS could take, alone or in partnership with other agencies, to mitigate this behavior. With respect to the two approaches discussed above, DHS encourages commenters to provide input on how a time restriction on admission, or a rebuttable presumption as described above, could impact legitimate business practices. DHS also encourages commenters to provide ideas on other ways DHS could better ensure petitions are filed only for non-speculative job opportunities without imposing an unnecessary burden on H-1B cap-subject petitioners.

2. Beneficiary Notification

DHS is seeking preliminary public input on ways to provide H-1B and other Form I-129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf, including receipt notices for a petition to extend, amend, or change status filed on their behalf. USCIS does not currently provide notices directly to Form I-129 beneficiaries.

DHS is aware that the lack of petition information may leave Form I-129 beneficiaries unable to verify their own immigration status and susceptible to employer abuse.[164] DHS is also aware that having case status information would improve worker mobility and protections.

DHS is committed to addressing the issue of beneficiary notification but is not at this time proposing a specific beneficiary notification process or regulation. The agency continues to research and consider the feasibility, benefits, and costs of various options separate and apart from this proposed rule. At this time, DHS would like to solicit preliminary public comments on various options, and in particular, one option currently being considered for potential future action separate from this rulemaking. This option would require Form I-129 petitioners to provide a copy of the notice of USCIS action to beneficiaries in the United States seeking extension or change of status. DHS believes such notification may be especially beneficial in the context of extensions or changes of status. While beneficiaries who are outside of the United States will receive basic petition information on Form I-94, Arrival-Departure Record, and on their nonimmigrant visa, beneficiaries who are already in the United States must rely entirely on petitioners and employers to provide such information.[165]

DHS recognizes this option would leave open the possibility that petitioners would not comply with this requirement, something DHS intends to forestall, but believes it would still provide benefits and worker protections while USCIS continues to explore other options, including the feasibility of technological solutions that would allow USCIS

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[164] *See* DHS, Office of the Citizenship and Immigration Services Ombudsman, *Recommendation to Remove a Barrier Pursuant to Executive Order 14012: Improving U.S. Citizenship and Immigration Services' Form I-129 Notification Procedures Recommendation Number 62* (Mar. 31, 2022), https://www.dhs.gov/sites/default/files/2022-03/CIS%20OMBUDSMAN_I-129_BENEFICIARY_RECOMMENDATION_fnl_03-2022_508.pdf ("lack of direct notification may leave them without status documentation, rendering them noncompliant with the law, susceptible to abuse by employers, and unable to access benefits requiring proof of status"). This report formally recommended that USCIS directly notify beneficiaries of Form I-129 actions taken in the petition on their behalf.

[165] The Form I-797 approval notice instructs petitioners that the lower portion of the notice, including Form I-94, "should be given to the beneficiary(ies)."

to directly notify beneficiaries or allow beneficiaries to directly access case status.[166] DHS is particularly interested in comments that cite evidence of the expected costs and burdens on petitioners as a result of such a requirement, as well as comments and evidence about the extent that such a provision would benefit H-1B workers, which DHS will take into consideration when crafting potential future solutions or regulatory proposals.

E. Potential Publication of One or More Final Rules

As indicated earlier in this preamble, after carefully considering public comments it receives on this NPRM, DHS may publish one or more final rules to codify the provisions proposed in this NPRM.

F. Severability

DHS intends for the provisions of this proposed rule, if finalized through one or more final rules, to be severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule would remain in effect as to any other person or circumstance. While the various provisions of this proposed rule, taken together, would provide maximum benefit with respect to modernizing the H-1B program and strengthening program integrity, none of the provisions are interdependent and unable to operate separately, nor is any single provision essential to the rule's overall workability. DHS welcomes public input on the severability of provisions contained in this proposed rule.

V. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and Executive

[166] *See* USCIS Memorandum, *Response to Recommendations on Improving Form I-129 Notification Procedures* (Aug. 11, 2022), https://www.dhs.gov/sites/default/files/2022-08/SIGNED%20USCIS%20Response%20to%20Formal%20Recommendation%20-%20Form%20I-129.08122022_v2.pdf.

Order 13563 (Improving Regulation and Regulatory Review)

Executive Orders (E.O.) 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has designated this proposed rule a "significant regulatory action" as defined under section 3(f) of EO 12866, as amended by Executive Order 14094, but it is not significant under section 3(f)(1) because its annual effects on the economy do not exceed $200 million in any year of the analysis. Accordingly, OMB has reviewed this proposed rule.

1. Summary

As discussed in the preamble, the purpose of this rulemaking is to modernize and improve the regulations governing the H-1B program by: (1) modernizing and streamlining H-1B program requirements and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures.

For the 10-year period of analysis of the proposed rule DHS estimates the annualized net costs of this rulemaking will be $6,339,779 annualized at 3 percent and 7 percent. Table 12 provides a more detailed summary of the proposed rule provisions and their impacts.

Table 12. Summary of Provisions and Impacts of the Proposed Rule

Proposed Rule Provisions	Description of Proposed Change to Provisions	Estimated Costs/Transfers of Provisions	Estimated Benefits of Provisions
1. Amended Petitions	DHS proposes to clarify when an amended or new H-1B petition must be filed due to a change in an H-1B worker's place of employment.	Quantitative: Petitioners - None DHS/USCIS - None Qualitative: Petitioners – None DHS/USCIS – None	Quantitative: Petitioners - DHS estimates the total annual cost savings to petitioners would be $297,673. DHS/USCIS - None Qualitative: Petitioners – DHS/USCIS – None
2. Deference	DHS proposes to codify and clarify its existing deference policy.	Quantitative: Petitioners - None DHS/USCIS - None Qualitative: Petitioners – None DHS/USCIS – None	Quantitative: Petitioners - DHS estimates the total annual cost savings to petitioners would be $338,412 based on the pre policy baseline. DHS/USCIS - None Qualitative: Petitioners – DHS anticipates that codifying its existing deference policy would save petitioners time from having to answer RFEs, and provide more certainty when businesses are planning for their HR needs. DHS/USCIS – DHS may issue and review fewer RFEs, which may save adjudicators time.
3. Evidence of Maintenance of Status	DHS proposes to clarify that evidence of maintenance of status is required for petitions where there is a request	Quantitative: Petitioners - None DHS/USCIS -	Quantitative: Petitioners - None DHS/USCIS -

	to extend or amend the beneficiary's stay.	None Qualitative: Petitioners – None DHS/USCIS – None	None Qualitative: Petitioners – DHS anticipates that codifying and providing clarification of the requirements for maintenance of status applications would at least render some RFEs and NOIDs unnecessary; therefore, may save the petitioner's time. DHS/USCIS – This would in turn reduce the added burden on adjudicators associated with receiving, responding to, and adjudicating RFEs and NOIDs, and decrease the number of RFEs and NOIDs
4. Eliminating the Itinerary Requirement for H Programs	DHS proposes to eliminate the H programs' itinerary requirement.	Quantitative: Petitioners - None DHS/USCIS - None Qualitative: Petitioners – None DHS/USCIS – None	Quantitative: Petitioners - DHS estimates the total annual cost savings to petitioners would be $708,300. DHS/USCIS - None Qualitative: Petitioners – This may benefit petitioners who have beneficiaries at alternative worksites and agents. DHS/USCIS – None
5. Validity Expires Before Adjudication	DHS proposes to allow H-1B petitions to be approved or have their requested validity period dates extended if USCIS adjudicates and deems the petition approvable after the	Quantitative: Petitioners - None DHS/USCIS - None	Quantitative: Petitioners - None DHS/USCIS - None

	initially requested validity period end-date, or the period for which eligibility has been established, has passed. This typically would happen if USCIS deemed the petition approvable upon a favorable motion to reopen, motion to reconsider, or appeal.	Qualitative: Petitioners – - Increased cost of receiving an RFE and spending time to review it. USCIS may issue an RFE asking whether the petitioner wants to update the dates of intended employment. This change may increase the number of RFE's; however, it may save petitioners from having to file another H-1B petition and USCIS from having to intake and adjudicate another petition. - Reduced cost of filing new petition. DHS/USCIS – - None	Qualitative: Petitioners – - This proposed change may save the petitioners the opportunity cost of time and the fee to file an additional form. DHS/USCIS – - None
6. H-1B Cap Exemptions	- DHS proposes to revise the requirements to qualify for H-1B cap exemption when a beneficiary is not directly employed by a qualifying institution, organization, or entity. - DHS also proposes to revise the definition of "nonprofit research organization" and "governmental research organization."	Quantitative: Petitioners - - None DHS/USCIS - - None Qualitative: Petitioners – - Some petitioners may see a transfer of $10 from no longer registering. Additional cost savings on ACWIA fees associated with initial cap-subject petitions are possible. DHS/USCIS – - DHS will likely receive fewer registrations for H-1B cap-subject petitioners; therefore, will likely receive less fees for H-1B registrations.	Quantitative: Petitioners - - None DHS/USCIS - - None Qualitative: Petitioners – - These petitioners may benefit because they may no longer have to submit a registration for a cap-subject petition and potentially have greater access to high skilled talent. - Increase in population of petitioners eligible for cap exemption. DHS/USCIS – - None

7. Automatic Extension of Authorized Employment "Cap-Gap"	□ Under current regulations, the automatic cap-gap extension is valid only until October 1 of the fiscal year for which H-1B status is being requested.	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Students – □ None DHS/USCIS – □ None	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ This change may benefit petitioners and students, as the automatic extension end date from October 1 to April 1 of the relevant fiscal year would avoid disruptions in employment authorization that some F-1 nonimmigrants seeking cap-gap extensions have experienced over the past several years. DHS/USCIS – □ None
8. Start Date Flexibility for Certain Cap-Subject H-1B Petitions	□ DHS proposes to eliminate all the text currently at 8 CFR 214.2(h)(8)(iii)(A)(*4*), which relates to a limitation on the requested start date.	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ This proposed change is also a potential cost savings to petitioners who, in the event USCIS cap-subject petitions that were rejected solely due to start date, would no longer need to re-submit their petition(s). DHS/USCIS – □ None	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ Reduced confusion regarding which start date they must put on an H-1B petition. DHS/USCIS – □ None
9. Additional Time Burden for the H-1B Registration System	□ Due to changes in the instructions, adding clarifying language regarding the denial or revocation of approved H-1B petitions, adding	Quantitative: Petitioners - □ DHS estimates that the additional time to complete and submit	Quantitative: Petitioners - □ None DHS/USCIS -

	information collection elements related to the beneficiary-centric registration selection option, namely the collection of passport information and related instructional language, and adding verification before submitting instructions, this proposed rule would increase the burden per response by 5 minutes.	the H-1B registration would cost $3,001,285 annually. DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ None	□ None Qualitative: Petitioners – □ None DHS/USCIS – □ None
10. Beneficiary Centric Selection	□ Under the new proposal, each unique individual who has a registration submitted on their behalf would be entered into the selection process once, regardless of the number of registrations filed on their behalf. By selecting by a unique beneficiary, DHS would better ensure that each individual has the same chance of being selected, regardless of how many registrations were submitted on their behalf.	Quantitative: Petitioners - □ DHS estimates the total annual cost savings to petitioners would be $3,840,822 for the registrants cost of time. □ DHS estimates that there will be 73,501 fewer registrations due to this change, resulting in a $735,010 cost savings to petitioners based on those petitioners no longer needing to pay the $10 registration fee. DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ None	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners/Beneficiaries – □ DHS believes that changing how USCIS conducts the selection process to select by unique beneficiaries instead of registrations would give each unique beneficiary an equal chance at selection and would reduce the advantage that beneficiaries with multiple registrations submitted on their behalf have over beneficiaries with a single registration submitted on their behalf. DHS/USCIS – □ None
11. Bar on Multiple Registrations Submitted by Related Entities	□ DHS is proposing to preclude the submission of multiple H-1B cap-subject registrations by related entities for the same beneficiary unless the related registrants can	Quantitative: Petitioners - □ None DHS/USCIS - □ None	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative:

	establish a legitimate business need for submitting multiple cap-subject registrations for the same beneficiary.	Qualitative: Petitioners – • None DHS/USCIS – • None	Petitioners – • This would benefit the petitioners during the years that the registration process is suspended, and the beneficiary centric process would not be in place to support the petitioners. DHS/USCIS – • This would also lead to improved program integrity for USCIS.
12. Registrations with False Information or that are Otherwise Invalid	• DHS proposes to codify its authority to deny or revoke a petition on the basis that the statement of facts on the underlying registration was not true and correct, or was inaccurate, fraudulent, or misrepresented a material fact.	Quantitative: Petitioners - • None DHS/USCIS - • None Qualitative: Petitioners – • DHS anticipates that USCIS adjudicators may issue more RFEs and NOIDs related to registrations with false information under this proposed rule, which would increase the burden on petitioners and adjudicators. • USCIS may deny or revoke the approval of any petition filed for the beneficiary based on those registrations with false information. DHS/USCIS – • DHS would need to spend time issuing RFEs and NOIDs with false information.	Quantitative: Petitioners - • None DHS/USCIS - • None Qualitative: Petitioners – • None DHS/USCIS – • This would lead to improved program integrity for USCIS.
13. Provisions to Ensure Bona Fide Job Offer for a Specialty Occupation Position	• DHS proposes to codify USCIS' authority to request contracts, work orders, or similar evidence.	Quantitative: Petitioners - • None DHS/USCIS - • None Qualitative: Petitioners –	Quantitative: Petitioners - • None DHS/USCIS - • None Qualitative: Petitioners –

		□ **No Action Baseline:** None □ **Pre-Policy Baseline:** Petitioners may have taken time to find contracts or legal agreements, if available, or other evidence including technical documentation, milestone tables, or statements of work. DHS/USCIS – □ None	□ **No Action Baseline:** There may be transparency benefits due to this proposed change. □ **Pre-Policy Baseline:** None DHS/USCIS – □ None
14. Beneficiary-Owners	□ DHS proposes to codify a petitioner's ability to qualify as a U.S. employer even when the beneficiary possesses a controlling interest in that petitioner.	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ None	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ This proposed change may benefit H-1B petitions for entrepreneurs, start-up entities, and other beneficiary-owned businesses. DHS/USCIS – □ None
15. Site Visits	□ DHS is proposing to add regulations specific to the H-1B program to codify its existing authority to conduct site visits and clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections.	Quantitative: Petitioners - □ Failure to cooperate during site visits or other compliance reviews may result in denial or revocation of any petition for workers performing services at the location or locations that are a subject of inspection or compliance review. Such action, in turn, may result in opportunity costs of time to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.08 hours, which is a reasonable	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ A benefit is that USCIS would have clearer authority to deny or revoke a petition if unable to verify information related to the petition. □ Existing USCIS enforcement activities would be more

		estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit. - Employers that do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses. - DHS obtains the total annual cost of the H-1B worksite inspections to be $674,881 for the proposed rule. DHS/USCIS - - None Qualitative: Petitioners – - None DHS/USCIS – - None	effective by additional cooperation from employers.
16. Third-party placement (Codifying *Defensor*)	- In this proposed provision, when the beneficiary will be staffed to a third party, USCIS would look at the third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation.	Quantitative: Petitioners - - None DHS/USCIS - - None Qualitative: Petitioners – - **No Action Baseline:** None - **Pre-Policy Baseline:** Petitioners may have taken time to demonstrate that the worker will perform services in a specialty occupation, which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty. DHS/USCIS –	Quantitative: Petitioners - - None DHS/USCIS - - None Qualitative: Petitioners – - **No Action Baseline:** There may be transparency benefits due to this proposed change. This provision will improve program integrity. - **Pre-Policy Baseline:** None DHS/USCIS – - None

		□ None	
17. Additional Time Burden for Form I-129 H-1B	□ This proposed rule would increase the burden per response by 5 minutes Due to changes in the instructions, adding clarifying language regarding the denial or revocation of approved H-1B petitions, adding information collection elements related to the beneficiary-centric registration selection option, namely the collection of passport information and related instructional language, and adding verification before submitting instructions.	Quantitative: Petitioners - □ DHS estimates that the time to complete and submit Form I-129 H-1B would cost $4,578,144 annually. DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ None	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ None
18. Additional Time Burden for H Classification Supplement to Form I-129	□ This proposed rule would increase the burden per response 5 minutes. Due to changes in the instructions, adding clarifying language regarding the denial or revocation of approved H-1B petitions, adding information collection elements related to the beneficiary-centric registration selection option, namely the collection of passport information and related instructional language, and adding verification before submitting instructions.	Quantitative: Petitioners - □ DHS estimates that the time to complete and submit Form I-129 H-1B H Classification would cost $4,005,877 annually. DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ None	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ None

In addition to the impacts summarized above, and as required by OMB Circular A-4, Table 13 presents the prepared accounting statement showing the costs and benefits that would result if this proposed rule is finalized.[167]

Table 13. OMB A-4 Accounting Statement ($ millions, FY 2021) Time Period: FY 2022 through FY 2031				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source Citation**
BENEFITS				

[167] OMB, *Circular A-4* (Sept. 17, 2003), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf* (last viewed June 1, 2021).

Monetized Benefits	N/A			Regulatory Impact Analysis (RIA)
Annualized quantified, but unmonetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	The purpose of the changes in this proposed rule is to ensure that petitioners may have clarity and may reduce the amount of redundant work for each beneficiary. DHS anticipates that codifying and providing clarification of the requirements for maintenance of status applications would at least render some RFEs and NOIDs unnecessary; therefore, may save the petitioner's time. In addition, these changes would improve the integrity of the H-1B program by preventing certain abuses. DHS is also proposing to change the automatic extension end date from October 1 to April 1 of the relevant fiscal year to avoid disruptions in employment authorization that some F-1 nonimmigrants seeking cap-gap extensions have been experiencing over the past several years.			RIA
COSTS				
Annualized monetized costs (7%)	$6.3			RIA
Annualized monetized costs (3%)	$6.3			
Annualized quantified, but unmonetized, costs	N/A			
Qualitative (unquantified) costs	DHS anticipates that USCIS adjudicators may issue more RFEs and NOIDs related to registrations with false information under this proposed rule, which would increase the burden on petitioners and adjudicators. Changes to the site visit provision may affect employers who do not cooperate with site visits who would face denial or revocation of their petition(s), which could result in costs to those businesses. Petitioners may face financial losses because they may lose access to labor for extended periods, which could result in too few workers, loss of revenue, and some could go out of business. DHS expects program participants to comply with program requirements, however, and notes that those that do not could experience significant impacts due to this proposed rule. DHS expects that the proposed rule would hold certain petitioners more accountable for violations, including certain findings of labor law and other violations, and would prevent registrations with false information from taking a cap number for which they are ineligible.			RIA
TRANSFERS				
Annualized monetized transfers (7%)	N/A			
Annualized monetized transfers (3%)	N/A			
From whom to whom?				
From whom to whom?				
Miscellaneous Analyses/Category	***Effects***			***Source Citation***
Effects on State, local, or tribal governments	None			RIA

Effects on small businesses	None	RIA
Effects on wages	None	None
Effects on growth	None	None

2. Background

The purpose of this rulemaking is to propose changes that DHS believes would modernize and improve the regulations relating to the H-1B program by: (1) streamlining the requirements of the H-1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures. Some of the proposed provisions would narrowly impact other nonimmigrant classifications.

3. Costs, Transfers, and Benefits of the Proposed Rule

a. Amended Petitions

DHS proposes to clarify when an amended or new H-1B petition must be filed due to a change in an H-1B worker's place of employment. Specifically, this rule proposes to clarify that any change of work location that requires a new LCA is itself considered a material change and therefore requires the petitioning employer to file an amended or new petition with USCIS before the H-1B worker may perform work under the changed conditions.

This proposed change would clarify requirements for H-1B amended petitions by codifying *Matter of Simeio*[168] and incorporating DOL rules on when a new LCA is not necessary. DHS estimates that this proposed change would save petitioners filing amended petitions 5 minutes for each petition (0.08 hours).

USCIS received a low of 17,057 amended petitions in FY 2022, and a high of 80,102 amended petitions in FY 2018. Based on the 5-year annual average, DHS

[168] *See* USCIS, "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," PM-602-0120 (July 21, 2015), *https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf*.

estimates that 59,947 petitioners file for an amended petition each year shown in Table 14. DHS does not know if all of these amended petitions are due to a change in an H-1B worker's place of employment. Because of this, DHS cannot estimate how many of these new and amended petitions would benefit by consolidating existing requirements and providing clearer regulatory text pertaining to when a petitioner must submit an amended or new petition.

Table 14. Form I-129 H-1B Classification Amended Petitions, Petition for a Nonimmigrant Worker, FY 2018 through FY 2022

Fiscal Year	Form I-129 H-1B Receipts Received without Form G-28	Form I-129 H-1B Receipts Received with Form G-28	Total	Percentage of Form I-129 H-1B filed with Form G-28
2018	27,258	52,844	80,102	66%
2019	17,038	47,358	64,396	74%
2020	21,082	51,481	72,563	71%
2021	19,128	46,488	65,616	71%
2022	4,120	12,937	17,057	76%
5-year Total	**88,626**	**211,108**	**299,734**	**70%**
5-year Annual Average	**17,725**	**42,222**	**59,947**	**70%**

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), CLAIMS3 and ELIS databases, Mar. 13, 2023.

DHS conducted a sensitivity analysis to estimate the number of petitions that may benefit from this proposed change. Table 15 presents the lower and upper bound number of petitions filed annually for amended petitions and for new petitions, which corresponds to a range of 10 to 90 percent.

Table 15. Estimated Annual Number of Form I-129 H-1B Petitions that Are New or Amended

	Petitioners	Lower Bound (10%)	Upper Bound (90%)
Estimated Annual Amended Petitions	59,947	5,995	53,952

Source: USCIS analysis

Using the lower and upper bounds of the estimated annual population for the petitioners who would file amended petitions, DHS estimates the cost savings based on the opportunity cost of time of gathering and submitting information by multiplying the estimated time burden savings for those filing an amended petition (5 minutes or 0.08 hours) by the compensation rate of an HR specialist, in-house lawyer, or outsourced lawyer, respectively. DHS does not know the exact number of petitioners who will

choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Table 16 shows that the total annual cost savings would range from $59,545 to $535,801. DHS estimates the total cost savings to be the average between the lower bound and the upper bound estimates. Based on this DHS estimates the average cost savings from this provision to be $297,673.

Table 16. Estimated Cost Savings to Form I-129 H-1B Petitioners				
	Affected Population	Time Burden (Hours)	Compensation Rate	Total Annual Cost
	A	B	C	D=A×B×C
Lower Bound				
Estimated Number of Petitions (Lower Bound)				
HR specialist	1,799	0.08	$50.94	$7,331
In-house lawyer	4,197	0.08	$114.17	$38,334
Outsourced lawyer	4,197	0.08	$196.85	$66,094
Total - Lower Bound	5,996			**$59,545**
Upper Bound				
Estimated Number of Petitions (Upper Bound)				
HR specialist	16,186	0.08	$50.94	$65,961
In-house lawyer	37,766	0.08	$114.17	$344,940*
Outsourced lawyer	37,766	0.08	$196.85	$594,739*
Total - Upper Bound	53,952			**$535,801**
Total Cost Savings Average				**$297,673**
Source: USCIS analysis *Note: DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average.				

b. Deference to Prior USCIS Determinations of Eligibility in Requests for Extensions of Petition Validity

DHS seeks to codify and clarify its existing deference policy at proposed 8 CFR 214.1(c)(5). Deference has helped promote consistency and efficiency for both USCIS and its stakeholders. The deference policy instructs officers to consider prior determinations involving the same parties and facts, when there is no material error with the prior determination, no material change in circumstances or in eligibility, and no new material information adversely impacting the petitioner's, applicant's, or beneficiary's

eligibility. This provision proposes to codify the deference policy[169] dated April 27, 2021. Relative to the no action baseline there are no costs to the public. The benefit of codifying this policy is that there may be some transparency benefits to having the policy in the CFR so the public has the requirements in one place. Relative to a pre-policy baseline petitioners may need to take time to familiarize themselves with those changes made in the 2021 deference policy memo. The provision applies to all nonimmigrant classifications for which form I-129 is filed to request an extension of stay (i.e., E-1, E-2, E-3, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-1S, P-2, P-2S, P-3, P-3S, Q-1, R-1, and TN nonimmigrant classifications). The deference policy had been in effect since 2004 but was rescinded in 2017. After USCIS rescinded deference in 2017, the number of RFEs and denials increased.

Table 17 shows the number for Form I-129 RFEs filed for an extension of stay or amendment of stay, who are applying for a continuation of previously approved employment or a change in previously approved employment from FY 2018 through FY 2022. USCIS received a low of 13,467 RFEs for Form I-129 classifications in FY 2022, and a high of 43,430 RFEs for Form I-129 classifications in FY 2020. Based on a 5-year annual average, 31,327 petitioners who filed for an extension of stay or amendment of stay, who are applying for a continuation of previously approved employment or a change in previously approved employment receive an RFE for Form I-129 per year.

Table 17. Total Form I-129 Receipts Filed for an Extension of Stay or Amendment of Stay, Who Are Applying for a Continuation of Previously Approved Employment or a Change in Previously Approved Employment, FY 2018 Through FY 2022

Reported Fiscal Year	RFE Count	Non-RFE Count	Total
2018	34,202	114,425	**148,627**
2019	42,097	122,457	**164,554**
2020	43,430	142,622	**186,052**
2021	23,440	138,952	**162,392**
2022	13,467	126,767	**140,234**
5-year Total	**156,636**	**645,223**	**801,859**

[169] *See* USCIS, "Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity, Policy Alert," PA-2021-05 (April 27, 2021), *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf* (last visited on Mar. 23, 2023).

5-year Annual Average	**31,327**	**129,045**	**160,372**
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, Mar. 13, 2023.			

DHS is proposing to codify the deference policy that applies to the adjudication of a petition. This proposed change could affect the number of RFEs that USCIS sends for Form I-129. USCIS estimates that there may be a reduction in RFEs, as officers adjudicating a Form I-129 involving the same parties and the same underlying facts would not need to re-adjudicate eligibility. The reduction in RFEs may save time and make the overall process faster for petitioners and USCIS.

Table 18 shows the number of Form I-129 receipts, submitted concurrently with a Form G-28, filed for a continuation of previously approved employment or a change in previously approved employment, and requesting an extension of stay or amendment of stay, on which USCIS issued an RFE. Based on the 5-year annual average, DHS estimates that 23,475 petitioners who received an RFE filed with a Form G-28 and 7,853 petitioners who received an RFE filed without a Form G-28.

Table 18. Form I-129, Petition for a Nonimmigrant Worker Receipts Filed for an Extension of Stay or Amendment of Stay, Who Are Applying for a Continuation of Previously Approved Employment or a Change in Previously Approved Employment, with an RFE Submitted Concurrently with Form G-28, FY 2018 Through FY 2022

Fiscal Year	Form I-129 Receipts Received without Form G-28	Form I-129 Receipts Received with Form G-28	Total Form I-129 Receipts Received with RFE	Percentage of Form I-129 filed with Form G-28
2018	10,512	23,690	34,202	69%
2019	13,450	28,647	42,097	68%
2020	9,131	34,299	43,430	79%
2021	3,888	19,552	23,440	83%
2022	2,282	11,185	13,467	83%
5-year Total	**39,263**	**117,373**	**156,636**	**75%**
5-year Annual Average	**7,853**	**23,475**	**31,327**	**75%**

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, Mar. 13, 2023.

DHS conducted a sensitivity analysis to estimate the number of petitions that may benefit from codifying and clarifying its existing deference policy. Table 19 presents the lower and upper bound number of petitions filed annually for amended petitions and for new petitions, which corresponds to a range of 10 to 90 percent.

Table 19. Estimated Number of Form I-129 Petitions with RFEs			
	Petitioners	Lower Bound (10%)	Upper Bound (90%)
Estimated RFE Petitions	31,327	3,133	28,194
Source: USCIS analysis			

Using the lower and upper bounds of the estimated annual population for the petitioners who may no longer have to provide duplicative data, DHS estimates the cost savings based on the opportunity cost of time of gathering and submitting duplicative information by multiplying the estimated time burden to gather information 10 minutes (0.167 hours) by the compensation rate of an HR specialist, in-house lawyer, or outsourced lawyer, respectively. DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Table 20 shows that the total annual cost savings due to the codifying and clarifying its existing deference policy would range from $67,691 to $609,132. DHS estimates the total cost savings to be the average between the lower bound and the upper bound estimates. Based on this DHS estimates the average cost savings from this provision to be $338,412.

Table 20. Estimated Cost Savings to Form I-129 Petitioners due to Codifying and Clarifying the Deference Policy				
	Affected Population	Time Burden (Hours)	Compensation Rate	Total Annual Cost
	A	B	C	D=A×B×C
Lower Bound				
Estimated Number of Petitions (Lower Bound)				
HR specialist	783	0.167	$50.94	$6,661
In-house lawyer	2,350	0.167	$114.17	$44,806
Outsourced lawyer	2,350	0.167	$196.85	$77,254
Total - Lower Bound	3,133			**$67,691**
Upper Bound				
Estimated Number of Petitions (Upper Bound)				
HR specialist	7,049	0.167	$50.94	$59,966
In-house lawyer	21,146	0.167	$114.17	$403,178*
Outsourced lawyer	21,146	0.167	$196.85	$695,153*
Total - Upper Bound	28,195			**$609,132**
Total Cost Savings Average				**$338,412**
Source: USCIS analysis * Note: DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average.				

c. Evidence of Maintenance of Status

DHS seeks to clarify current requirements and codify current practices concerning evidence of maintenance of status at proposed 8 CFR 214.1(c)(1) through (7). Primarily, DHS seeks to clarify that evidence of maintenance of status is required for petitions where there is a request to extend or amend the beneficiary's stay.

This proposed change would list examples of additional evidence types that petitioners may provide, but would not limit petitioners to those specific evidence types. The proposed form instructions further state that if the beneficiary is employed in the United States, the petitioner may submit copies of the beneficiary's last two pay stubs, Form W-2, and other relevant evidence, as well as a copy of the beneficiary's Form I-94, passport, travel document, or Form I-797. This proposed change may decrease the number of RFEs and NOIDs by clearly stating what types of supporting documentation are relevant and clarifying that petitioners should submit such supporting documentation upfront, rather than waiting for USCIS to issue a request for additional information. This may benefit petitioners by saving them the time to review and respond to RFEs and NOIDs.

DHS is proposing to codify into regulation the instructions that, when seeking an extension of stay, the applicant or petitioner must submit supporting evidence to establish that the applicant or beneficiary maintained the previously accorded nonimmigrant status before the extension request was filed. Additionally, DHS is proposing to remove the sentence: "Supporting evidence is not required unless requested by the director."[170] DHS expects that these proposed changes would reduce confusion for applicants and

[170] *See* proposed 8 CFR 214.2(h)(14). *See also* proposed 8 CFR 214.2(l)(14)(i) (removing "Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director."); proposed 8 CFR 214.2(o)(11) and (p)(13) (removing "Supporting documents are not required unless requested by the Director.").

petitioners, clarify what evidence is required for all extension of stay requests, and simplify adjudications by decreasing the need for RFEs and NOIDs.

Based on the 5-year annual average, DHS estimates that 299,025 Form I-129 petitions are filed requesting an extension of stay. Of those total filed petitions, DHS estimates that 61,781 petitioners who requested an extension of stay received an RFE and the remaining 237,244 did not receive and RFE as shown in Table 21.

Table 21. Form I-129 Extension of Stay, Petition for a Nonimmigrant Worker, FY 2018 through FY 2022

Fiscal Year	RFE Count	Non-RFE Count	Total
2018	85,849	187,662	273,511
2019	83,454	199,477	282,931
2020	71,804	247,953	319,757
2021	40,990	270,396	311,386
2022	26,806	280,732	307,538
5-year Total	**308,903**	**1,186,220**	**1,495,123**
5-year Annual Average	**61,781**	**237,244**	**299,025**

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, Mar. 13, 2023.

DHS estimates that 29,195 petitions are filed requesting to amend the stay. Of those, DHS estimates that 9,723 petitions that are filed requesting to amend the stay receive an RFE and 19,473 do not receive an RFE.

Table 22. Form I-129 Amend the Stay, Petition for a Nonimmigrant Worker, FY 2018 through FY 2022

Fiscal Year	RFE Count	Non-RFE Count	Total
2018	21,617	16,328	37,945
2019	14,625	16,939	31,564
2020	7,235	20,056	27,291
2021	2,824	20,351	23,175
2022	2,312	23,690	26,002
5-year Total	**48,613**	**97,364**	**145,977**
5-year Annual Average	**9,723**	**19,473**	**29,195**

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, Mar. 13, 2023.

DHS estimates that 89,241 petitions are filed requesting to change status and extend the stay. Of those, DHS estimates that 30,318 petitions that are filed requesting to change status and extend the stay receive an RFE and 58,922 do not receive an RFE.

Table 23. Form I-129 Petition for a Nonimmigrant Worker Requesting New Employment with a COS, FY 2018 through FY 2022

Fiscal Year	RFE Count	Non-RFE Count	Total

2018	48,884	45,343	94,227
2019	44,096	50,879	94,975
2020	23,943	65,958	89,901
2021	18,354	61,641	79,995
2022	16,315	70,790	87,105
5-year Total	**151,592**	**294,611**	**446,203**
5-year Annual Average	**30,318**	**58,922**	**89,241**
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, Mar. 13, 2023.			

It is important to note that issuing RFEs and NOIDs takes time and effort for adjudicators – to send, receive, and adjudicate documentation – and it requires additional time and effort for applicants or petitioners to respond, resulting in extended timelines for adjudications.[171] Data on RFEs and NOIDs related to maintenance of status are not standardized or tracked in a consistent way, thus they are not very accurate or reliable. Within this context, the data can provide some insight, however minimal, that these requests and notices have been present and that they continue to occur.

DHS anticipates that USCIS adjudicators may issue fewer RFEs and NOIDs related to maintenance of status under this proposed rule due to clarity of what types of supporting documentation are relevant and clarification that petitioners should submit such supporting documentation upfront, rather than waiting for USCIS to issue a request for additional information, which would reduce the burden on applicants, petitioners, and adjudicators, and save time processing applications and petitions. Because the data are not standardized or tracked consistently DHS cannot estimate how many RFEs and NOIDs are related to maintenance of status.

d. Eliminating the Itinerary Requirement for H Programs

DHS is proposing to eliminate the H programs' itinerary requirement. *See* proposed 8 CFR 214.2(h)(2)(i)(B) and (F). Current 8 CFR 214.2(h)(2)(i)(B) states that "A petition that requires services to be performed or training to be received in more than

[171] The regulations state that when an RFE is served by mail, the response is timely filed if it is received no more than 3 days after the deadline, providing a total of 87 days for a response to be submitted if USCIS provides the maximum period of 84 days under the regulations. The maximum response time for a NOID is 30 days. *See https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6*.

one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions." In addition, current 8 CFR 214.2(h)(2)(i)(F) contains additional language requiring an itinerary for H petitions filed by agents as the petitioner.

DHS recognizes this change may affect H-1B petitioners filing for beneficiaries performing services in more than one location and submitting itineraries. However, due to the absence of detailed data on petitioners submitting itineraries, DHS estimates the affected population as the estimated number of petitions filed annually for workers placed at off-site locations. DHS assumes the petitions filed for workers placed at off-site locations are likely to indicate that beneficiaries may be performing services at multiple locations and, therefore, petitioners are likely to submit itineraries. Eliminating the itinerary requirement would reduce petitioner burden and promote more efficient adjudications, without compromising program integrity. This proposed change may benefit petitioners who have beneficiaries at alternative worksites.

Table 24 shows the total number of Form I-129 H-1B Receipts with and without Form G-28, FY 2018 through FY 2022. USCIS received a low of 398,285 Form I-129 H-1B Receipts in FY 2021, and a high of 474,311 Form I-129 H-1B Receipts in FY 2022. Based on the 5-year annual average, DHS estimates that there are 427,822 Form I-129 H-1B petitioners each year.

Table 24. Total Form I-129 H-1B Receipts with and without Form G-28, FY 2018 through FY 2022

FY	Form I-129 H-1B Receipts Received without Form G-28	Form I-129 H-1B Receipts Received with Form G-28	Total Form I-129 H-1B Receipts	Percentage of Form I-129 H-1B filed with Form G-28
2018	94,055	324,549	418,604	78%
2019	90,845	329,777	420,622	78%
2020	90,192	337,097	427,289	79%
2021	79,195	319,090	398,285	80%
2022	90,574	383,737	474,311	81%
5-year Total	**444,861**	**1,694,250**	**2,139,111**	**79%**
5-year Annual Average	**88,972**	**338,850**	**427,822**	**79%**

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, Mar. 13, 2023.

Table 25 shows the average number of Form I-129 H-1B petitions approved in FYs 2018–22 for workers placed at off-site locations. Nearly 31 percent of petitions were approved for workers placed at off-site locations. DHS uses the estimated 31 percent as the proportion of both the population of received petitions and the population of approved petitions that are for workers placed at off-site locations.

Table 25. Form I-129 H-1B Petitions for Workers Placed at Off-site Locations, FY 2018 through FY 2022

FY	Total Approved Petitions for Workers Placed at Off-site locations	Total Approved Petitions	Percent Placed at Off-site locations
2018	108,981	289,142	38%
2019	118,948	332,384	36%
2020	138,229	363,428	38%
2021	99,974	356,046	28%
2022	73,176	413,395	18%
5-year Total	**539,308**	**1,754,395**	**31%**
5-year Annual Average	**107,862**	**350,879**	**31%**

Source: USCIS, Office of Policy and Strategy, PRD. April 6, 2023

DHS conducted a sensitivity analysis to estimate the number of H-1B petitions filed annually for workers placed at off-site locations that may contain itineraries (132,625).[172] Table 26 presents the lower and upper bound number of petitions filed annually for workers placed at off-site locations who may submit itineraries, which corresponds to a range of 10 to 90 percent.

Table 26. Estimated Number of Form I-129 H-1B Petitions Who May Submit Itineraries

Estimated Number of Petitions Filed Annually for Workers Placed at Off-site Locations	Estimated Number of Petitions Submit Itineraries among Workers Placed at Off-site Locations	
	Lower Bound (10%)	Upper Bound (90%)
A	B=A×10%	C=A×90%
132,625	13,263	119,363

Source: USCIS analysis

Using the lower and upper bounds of the estimated annual population for H-1B petitioners who may no longer be required to gather and submit itinerary information, DHS estimates the cost savings based on the opportunity cost of time of gathering and

[172] DHS uses the proportion of petitions approved for off-site workers (31 percent from Table 25) as an approximate measure to estimate the number of petitions received annually for off-site workers from the total number of petitions filed. 132,625 petitions filed requesting off-site workers = 427,822 petitions filed annually × 31 percent.

submitting itinerary information by multiplying the estimated time burden to gather itinerary information (0.08 hours) by the compensation rate of an HR specialist, in-house lawyer, or outsourced lawyer, respectively. Table 27 shows that the total annual cost savings due to the itinerary exemption would range from $141,704 to $1,275,277. Since the itinerary information normally is submitted with the Form I-129 H-1B package, there would be no additional postage cost savings. DHS estimates the total cost savings to be the average between the lower bound and the upper bound estimates. Based on this DHS estimates the average cost savings from this provision to be $708,491.

Table 27. Estimated Cost Savings to Form I-129 H-1B Petitioners due to Not Submitting an Itinerary

	Affected Population	Time Burden (Hours)	Compensation Rate	Total Annual Cost
	A	B	C	D=A×B×C
Lower Bound				
Estimated Number of Petitions Submit Itineraries (Lower Bound)				
HR specialist	2,785	0.08	$50.94	$11,349
In-house lawyer	10,478	0.08	$114.17	$95,702
Outsourced lawyer	10,478	0.08	$196.85	$165,008
Total - Lower Bound	**13,263**			**$141,704**
Upper Bound				
Estimated Number of Petitions Submit Itineraries (Upper Bound)				
HR specialist	25,066	0.08	$50.94	$102,149
In-house lawyer	94,297	0.08	$114.17	$861,269
Outsourced lawyer	94,297	0.08	$196.85	$1,484,986
Total - Upper Bound	**119,363**			**$1,275,277**
Total Cost Savings Average				**$708,491**

Source: USCIS analysis
HR specialist (2,785) = Total-lower bound (13,263) × Percent of petitions filed by HR specialist (21%)
In-house lawyer (10,478) = Total-lower bound (13,263) × Percent of petitions filed by in-house lawyer (79%)
Outsourced lawyer (10,478) = Total-lower bound (13,263) × Percent of petitions filed by outsourced lawyer (79%)
DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average.

HR specialist (25,066) = Total-upper bound (119,363) × Percent of petitions filed by HR specialist (21%)
In-house lawyer (94,297) = Total- upper bound (119,363) × Percent of petitions filed by in-house lawyer (79%)
Outsourced lawyer (94,297) = Total- upper bound (119,363) × Percent of petitions filed by outsourced lawyer (79%)

DHS acknowledges the proposal to eliminate the itinerary requirement may also affect H petitions filed by agents as well as H-2 petitions filed for beneficiaries

performing work in more than one location or for multiple employers, however, DHS has not estimated these cost savings here.

e. Validity Period Expires Before Adjudication

DHS proposes to allow H-1B petitions to be approved or have their requested validity period dates extended if USCIS adjudicates and deems the petition approvable after the initially requested validity period end-date, or the period for which eligibility has been established, has passed. This typically would happen if USCIS deemed the petition approvable upon a favorable motion to reopen, motion to reconsider, or appeal.

If USCIS adjudicates an H-1B petition and deems it approvable after the initially requested validity period end-date, or the last day for which eligibility has been established, USCIS may issue an RFE asking whether the petitioner wants to update the dates of intended employment. This change may increase the number of RFE's; however, it may save petitioners from having to file another H-1B petition and USCIS from having to intake and adjudicate another petition.

If in response to the RFE the petitioner confirms that it wants to update the dates of intended employment and submits a different LCA that corresponds to the new requested validity dates, even if that LCA was certified after the date the H-1B petition was filed, and assuming all other eligibility criteria are met, USCIS would approve the H-1B petition for the new requested period or the period for which eligibility has been established, as appropriate, rather than require the petitioner to file a new or amended petition. Under a no-action baseline, the requirement to file an amended or new petition results in additional filing costs and burden for the petitioner. DHS expects that this proposed change would save petitioners the difference between the opportunity cost of time and the fee to file an additional form, and the nominal opportunity cost of time and expense associated with responding to the RFE. This proposed change would benefit beneficiaries selected under the cap, who would retain cap-subject petitions while their

petition validity dates are extended or whose petitions now may be approved rather than denied based on this technicality.

f. H-1B Cap Exemptions

DHS proposes to revise the requirements to qualify for H-1B cap exemption when a beneficiary is not directly employed by a qualifying institution, organization, or entity at 8 CFR 214.2(h)(8)(iii)(F)(*4*). These proposed changes intend to clarify, simplify, and modernize eligibility for cap-exempt H-1B employment, so that they are less restrictive and better reflect modern employment relationships. The proposed changes also intend to provide additional flexibility to petitioners to better implement Congress's intent to exempt from the annual H-1B cap certain H-1B beneficiaries who are employed at a qualifying institution, organization, or entity.

DHS is also proposing to revise 8 CFR 214.2(h)(19)(iii)(C), which states that a nonprofit research organization is an entity that is "primarily engaged in basic research and/or applied research," and a governmental research organization is a Federal, State, or local entity "whose primary mission is the performance or promotion of basic research and/or applied research." DHS proposes to replace "primarily engaged" with "a fundamental activity of" in order to permit a nonprofit entity that conducts research as a fundamental activity but is not primarily engaged in research to meet the definition of a nonprofit research entity. This would likely increase the population of petitioners who are now eligible for the cap exemption and, by extension, would likely increase the number of petitions that may be cap-exempt.

These proposed changes would result in a transfer to petitioners who qualify for a cap exemption for their employees under the proposed rule. This would reduce transfers for petitioners because the petitioners would no longer have to pay the registration fee or ACWIA fees applicable to initial cap-subject petitions. DHS does not have data to precisely estimate how many additional petitioners would now qualify for these cap

exemptions, but we welcome public comment on this topic to help inform analysis in the final rule. This proposed change would be a reduction in transfers from the petitioners to USCIS because USCIS would no longer receive these petitioners' registration fees. There would be no change in DHS resources. While DHS cannot estimate the precise reduction in transfers, DHS estimates that a fairly small population, between 0.3 percent - 0.8 percent of annual petitioners, may no longer use the H-1B registration tool as a result of these new exemptions. Using these percentages, DHS estimates that approximately 1,067[173] (0.3 percent) up to 2,845[174] (0.8 percent) registrants would no longer pay the $10 registration fee. DHS estimates the reduction in transfers from registrants to range from $10,670[175] to $28,450[176] annually. DHS invites public comment on these transfers to cap exempt petitioners and the percentage of current registrants (prospective petitioners who are cap subject) who may no longer submit a registration for the H-1B cap. While DHS discusses these transfers qualitatively in this proposal, DHS intends to quantify them in the final rule.

Aside from the reduction in transfers from not having to pay the registration fee, petitioners that qualify under the proposed cap exemptions would also benefit from not having to wait for H-1B cap season to commence employment. This may allow approved petitioners to have their H-1B workers commence employment earlier, prior to the beginning of the fiscal year on October 1.

g. Automatic Extension of Authorized Employment "Cap-Gap"

DHS proposes to extend the automatic cap-gap extension at 8 CFR 214.2(f)(5)(vi). Currently, the automatic extension is valid only until October 1 of the fiscal year for which H-1B status is being requested, but DHS proposes to extend this

[173] Calculation: 355,592 registrations * 0.3% = 1,067 registrations.
[174] Calculation: 355,592 registrations * 0.8% = 2,845 registrations.
[175] Calculation: 1,067 registrations * $10 registration fee = $10,670 cost savings.
[176] Calculation: 2,845 registrations * $10 registration fee = $28,450 cost savings.

until April 1 of the fiscal year. *See* proposed 8 CFR 214.2(f)(5)(vi). This change would result in more flexibility for both students and USCIS and would help to avoid disruption to U.S. employers that are lawfully employing F-1 students while a qualifying H-1B cap-subject petition is pending.

Each year, a number of U.S. employers seek to employ F-1 students via the H-1B program by requesting a COS and filing an H-1B cap petition with USCIS. Many F-1 students complete a program of study or post-completion OPT in mid-spring or early summer. Per current regulations, after completing their program or post-completion OPT, F-1 students have 60 days to take the steps necessary to maintain legal status or depart the United States.[177] However, because the change to H-1B status cannot occur earlier than October 1, an F-1 student whose program or post-completion OPT expires in mid-spring has two or more months following the 60-day period before the authorized period of H-1B status begins.

Under current regulations, the automatic cap-gap extension is valid only until October 1 of the fiscal year for which H-1B status is being requested. DHS is proposing to change the automatic extension end date from October 1 to April 1 to avoid disruptions in employment authorization that some F-1 nonimmigrants awaiting the change to H-1B status have been experiencing over the past several years. Table 28 shows the historical completions volumes. Based on the 5-year annual average, DHS estimates that 31,834 F-1 nonimmigrants annually may be able to avoid employment disruptions while waiting to obtain H-1B status. Preventing such employment disruptions would also benefit employers of F-1 nonimmigrants with cap-gap extensions. The change in the automatic extension end date may benefit petitioners as well.

Table 28. Historical Form I-129 Petitions Seeking Initial H-1B Status for Beneficiaries Who Are in F-1 Status and Seeking a COS to H-1B Pending October 1-April 1 Volume, FY 2018 through FY 2022

Fiscal Year	Pending Petitions October 1-April 1
2018	41,606
2019	43,975

[177] *See* 8 CFR 214.2(f)(5)(iv).

2020	26,967
2021	23,339
2022	23,282
5-year Total	**159,169**
5-year Annual Average	**31,834**
Source: USCIS, OP&S PRD, C3 May 4, 2023.	

This proposed change in the automatic extension end date would also allow USCIS greater flexibility in allocating officer resources to complete adjudications without the pressure of completing as many COS requests as possible before October 1. There are additional benefits of this proposed rule that have not been captured in the summary of costs and benefits of this rulemaking. DHS estimates that this change would benefit up to 5 percent (1,592) of the population (31,834) on an annual basis and on the low end 318 (1 percent); however, F-1 students who are beneficiaries of H-1B cap petitions that provide cap-gap relief would be able to avoid employment disruptions while waiting to obtain H-1B status. DHS estimates that an F-1 student who is the beneficiary of an H-1B cap petition makes $42.48[178] per hour in compensation. Based on a 40 hour work week,[179] DHS estimates the potential compensation for each F-1 student who is the beneficiary of an H-1B cap petition to be $44,174[180] for 6 months of employment from October 1st to April 1st. DHS estimates that this potential compensation may be a benefit to F-1 students who are seeking a COS to a H-1B status. This benefit ranges from $14,047,332[181] to $70,325,008[182] annually. In addition, other impacts such as payroll taxes and adjustments for the value of time have not been monetized here, which would reduce the monetized benefit of this compensation. DHS intends to include these

[178] $42.48 Total Employee Compensation per hour. *See* BLS, Economic News Release, "Employer Costs for Employee Compensation - December 2022," Table 1. "Employer Costs for Employee Compensation by ownership [Dec. 2022]," *https://www.bls.gov/news.release/archives/ecec_03172023.htm* (last visited Mar. 21, 2023).
[179] *See, e.g.,* 8 CFR 214.2(f)(5)(vi)(A) (describing cap-gap employment) and (f)(11)(ii)(B) (describing OPT and noting that it may be full-time).
[180] Calculation: $42.48* 40 hours = $1,699 per week * 26 weeks = $44,174 per 6 months.
[181] Calculation: $44,174 per 6 months* 318 (1 percent of 31,834) F-1 students= $14,047,332.
[182] Calculation: $44,174 per 6 months* 1,592 (5 percent of 31,834) F-1 students= $70,325,008.

impacts in the final rule and invites public comment on these additional benefits to F-1 students who would be the beneficiaries of H-1B petitions.

h. Start Date Flexibility for Certain H-1B Cap-Subject Petitions

DHS proposes to eliminate all the text currently at 8 CFR 214.2(h)(8)(iii)(A)(*4*), which relates to a limitation on the requested start date, because the current regulatory language is ambiguous. The removal of this text would provide clarity and flexibility to employers with regard to the start date listed on H-1B cap-subject petitions. This clarity may help petitioners by reducing confusion as to what start date they have to put on the petition.

In 2020, USCIS implemented the first electronic registration process for the FY 2021 H-1B cap. In that year, and for each subsequent fiscal year, prospective petitioners seeking to file H-1B cap-subject petitions (including for beneficiaries eligible for the advanced degree exemption) were required to first electronically register and pay the associated H-1B registration fee for each prospective beneficiary. Because of this DHS only has data for Cap Year 2021 through FY 2023. Table 29 shows the number of cap-subject registrations received and selected by USCIS during Cap Year 2021 through FY 2023. Based on the 3-year annual average DHS estimates that 127,980 registrations are selected each year. DHS cannot estimate the number of petitioners that would benefit from this clarification to the start date on their petition.

Table 29. H-1B Cap-Subject Registrations Received and Selected by USCIS, Cap Year 2021 through FY 2023

Cap Year	Total Number of Registrations Received	Eligible Registrations for Beneficiaries with No Other Eligible Registrations	Eligible Registrations for Beneficiaries with Multiple Eligible Registrations	Selections
2021	274,237	241,299	28,125	124,415
2022	308,613	211,304	90,143	131,924
2023	483,927	309,241	165,180	127,600
3-Year Total	**1,066,777**	**761,844**	**283,448**	**383,939**
3-Year Average	**355,592**	**253,948**	**94,483**	**127,980**

Source: *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process* (Mar. 30, 2023).

This proposed change is also a potential cost savings to petitioners who, in the event USCIS cap-subject petitions that were rejected solely due to start date, would no longer need to re-submit their petition(s).

i. The H-1B Registration System

Through issuance of a final rule in 2019, *Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens*,[183] DHS developed a new way to administer the H-1B cap selection process to streamline processing and provide overall cost savings to employers seeking to file H-1B cap-subject petitions. In 2020, USCIS implemented the first electronic registration process for the FY 2021 H-1B cap. In that year, and for each subsequent fiscal year, prospective petitioners seeking to file H-1B cap-subject petitions (including for beneficiaries eligible for the advanced degree exemption) were required to first electronically register and pay the associated H-1B registration fee for each prospective beneficiary. When registration is required, an H-1B cap-subject petition is not eligible for filing unless it is based on a selected registration that was properly submitted by the prospective petitioner, or their representative, for the beneficiary.

Table 30 shows the number of cap registration receipts by year, as well as the number of registrations that were selected to file I-129 H-1B petitions. The number of registrations has increased over the past 3 years. DHS believes that this increase is partially due to the increase in multiple companies submitting registrations for the same beneficiary. USCIS received a low of 274,237 H-1B Cap-Subject Registrations for cap year FY 2021, and a high of 483,927 H-1B Cap-Subject Registrations for cap year 2023.

[183] *See* "Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens," 84 FR 888 (Jan. 31, 2019).

DHS has not included cap year 2024 data into this analysis because such data are incomplete.[184]

Table 30. H-1B Cap-Subject Registrations Received and Selected by USCIS, Cap Year 2021 through FY 2023				
Cap Year	**Total Number of H-1B Cap-Subject Registrations Submitted**	**Eligible Registrations for Beneficiaries with No Other Eligible Registrations**	**Eligible Registrations for Beneficiaries with Multiple Eligible Registrations**	**Selections**
2021	274,237	241,299	28,125	124,415
2022	308,613	211,304	90,143	131,924
2023	483,927	309,241	165,180	127,600
3-Year Total	**1,066,777**	**761,844**	**283,448**	**383,939**
3-Year Average	**355,592**	**253,948**	**94,483**	**127,980**
Source: *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process* Mar. 30, 2023. Note* The count of eligible registrations excludes duplicate registrations, those deleted by the prospective employer prior to the close of the registration period, and those with failed payments.				

DHS estimates the current public reporting time burden for an H-1B Registration is 31 minutes (0.5167 hours), which includes the time for reviewing instructions, gathering the required information, and submitting the registration.

The number of Form G-28 submissions allows USCIS to estimate the number of H-1B registrations that an attorney or accredited representative submits and thus estimate the opportunity costs of time for an attorney or accredited representative to file each form. Table 31 shows the number of Cap-Subject registrations received with and without Form G-28. USCIS received a low of 148,964 Cap-Subject Registrations with Form G-28 in cap year 2022, and a high of 207,053 Cap-Subject Registrations with Form G-28 in cap year 2023. Based on a 3-year annual average, DHS estimates the annual average receipts of Cap-Subject Registrations to be 171,330 with 48 percent of registrations submitted by an attorney or accredited representative.

Table 31. Total Form I-129 H-1B Cap-Subject Registrations Since the Beginning of the Registration System with and without Form G-28, Cap Year 2021 through Cap Year 2023				
Cap Year	**Total Number of H-1B Cap-Subject**	**Total Number of H-1B Cap-Subject**	**Total of H-1B Cap-Subject**	**Percentage of H-1B Cap-Subject**

[184] While the initial registration selection process has been completed, DHS is unable to determine at this time how many total petitions will be submitted within the filing period.

	Registrations Submitted without Form G-28	Registrations Submitted with Form G-28	Registrations Submitted	Registrations Submitted with Form G-28
2021	116,264	157,973	274,237	58%
2022	159,649	148,964	308,613	48%
2023	276,874	207,053	483,927	43%
3-Year Total	**552,787**	**513,990**	**1,066,777**	**48%**
3-Year Average	**184,262**	**171,330**	**355,592**	**48%**
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, Mar. 30, 2023.				

In order to estimate the opportunity costs of time for completing and filing an H-1B registration DHS assumes that a registrant will use an HR specialist, an in-house lawyer, or an outsourced lawyer to prepare an H-1B registration.[185] DHS uses the mean hourly wage of $35.13 for HR specialists to estimate the opportunity cost of the time for preparing and submitting the H-1B registration.[186] Additionally, DHS uses the mean hourly wage of $78.74 for in-house lawyers to estimate the opportunity cost of the time for preparing and submitting the H-1B registration.[187]

DHS accounts for worker benefits when estimating the total costs of compensation by calculating a benefits-to-wage multiplier using the BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full opportunity cost per petitioner, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, retirement, etc.[188] DHS multiplied the average hourly U.S. wage rate for HR specialists

[185] USCIS limited its analysis to HR specialists, in-house lawyers, and outsourced lawyers to present estimated costs. However, USCIS understands that not all entities employ individuals with these occupations and, therefore, recognizes equivalent occupations may also prepare and file these petitions or registrations.

[186] *See* BLS, "Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2022, 13-1071 Human Resources Specialists," *https://www.bls.gov/oes/2022/may/oes131071.htm* (last visited May 11, 2023).

[187] *See* BLS, "Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2022, 23-1011 Lawyers," *https://www.bls.gov/oes/2022/may/oes231011.htm* (last visited May. 11, 2023).

[188] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) / (Wages and Salaries per hour) ($42.48 Total Employee Compensation per hour) / ($29.32 Wages and Salaries per hour) = 1.44884 = 1.45 (rounded). *See* BLS, Economic News Release, "Employer Costs for Employee Compensation" (Dec. 2022), Table 1. "Employer Costs for Employee Compensation by ownership" (Dec. 2022), *https://www.bls.gov/news.release/archives/ecec_03172023.htm* (last visited Mar. 21, 2023). The Employer Costs for Employee Compensation measures the average cost to employers for wages and salaries and benefits per employee hour worked.

and in-house lawyers by 1.45 to account for the full cost of employee benefits, for a total of $50.94[189] per hour for an HR specialist and $114.17[190] per hour for an in-house lawyer. DHS recognizes that a firm may choose, but is not required, to outsource the preparation of these petitions and, therefore, presents two wage rates for lawyers. To determine the full opportunity costs of time if a firm hired an outsourced lawyer, DHS multiplied the average hourly U.S. wage rate for lawyers by 2.5[191] for a total of $196.85 [192] to approximate an hourly wage rate for an outsourced lawyer[193] to prepare and submit an H-1B registration.[194]

Table 32 displays the estimated annual opportunity cost of time for submitting an H-1B registration employing an in-house or outsourced lawyer to complete and submit an H-1B registration. DHS does not know the exact number of registrants who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. These current opportunity costs of time for submitting an H-1B

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[189] Calculation: $35.13 * 1.45 = $50.94 total wage rate for HR specialist.
[190] Calculation: $78.74 * 1.45 = $114.17 total wage rate for in-house lawyer.
[191] The ICE "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis for that rule remains sound for using 2.5 as a multiplier for outsourced labor wages in this proposed rule, see https://www.regulations.gov/document/ICEB-2006-0004-0922, at page G-4.
[192] Calculation: $78.74 * 2.5 = $196.85 total wage rate for an outsourced lawyer.
[193] The DHS analysis in "Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program," 83 FR 24905 (May 31, 2018), *https://www.federalregister.gov/documents/2018/05/31/2018-11732/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2018-numerical-limitation-for-the*, used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages. The DHS Immigration and Customs Enforcement (ICE) rule "Final Small Entity Impact Analysis: 'Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'" at G-4 (Aug. 25, 2008), *https://www.regulations.gov/document/ICEB-2006-0004-0922*, also uses a multiplier. The methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this proposed rule.
[194] The DHS analysis in "Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program," 83 FR 24905 (May 31, 2018), *https://www.federalregister.gov/documents/2018/05/31/2018-11732/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2018-numerical-limitation-for-the*, used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages. Also, the analysis for a DHS ICE rule, "Final Small Entity Impact Analysis: 'Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'" at G-4 (Aug. 25, 2008), *https://www.regulations.gov/document/ICEB-2006-0004-0922*, used a multiplier. The methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this proposed rule.

registration using an attorney or other representative are estimated to range from $10,107,038 to $17,426,385 with an average of $13,766,712.

Table 32. Current Average Opportunity Costs of Time for Submitting an H-1B Registration with an Attorney or Other Representative				
	Population Submitting with a Lawyer	**Time Burden to Complete H-1B Registration (Hours)**	**Cost of Time**	**Total Current Opportunity Cost**
	A	B	C	D=(A×B×C)
In-house lawyer	171,330	0.5167	$114.17	$10,107,038
Outsourced lawyer	171,330	0.5167	$196.85	$17,426,385
Average				**$13,766,712**
Source: USCIS Analysis				

To estimate the current remaining opportunity cost of time for an HR specialist submitting an H-1B registration without a lawyer, DHS applies the estimated public reporting time burden (0.5167 hours) to the compensation rate of an HR specialist. Table 33 estimates the current total annual opportunity cost of time to HR specialists completing and submitting an H-1B registration will be approximately $4,849,904.

Table 33. Current Average Opportunity Costs of Time for Submitting an H-1B Registration, without an Attorney or Accredited Representative				
	Population	**Time Burden to Complete H-1B Registration (Hours)**	**HR Specialist's Opportunity Cost of time**	**Total Opportunity Cost of Time**
	A	B	C	D=(A×B×C)
Estimate of H-1B Registrations	184,262	0.5167	$50.94	**$4,849,904**
Source: USCIS Analysis				

Table 34 shows the proposed estimated time burden will increase by 5 minutes to 36 minutes (0.6 hours) to the eligible population and compensation rates of those who may submit registrations with or without a lawyer due to changes in the instructions, adding clarifying language regarding denying or revoking approved H-1B petitions, adding passport instructional language, and adding verification before submitting instructions. DHS does not know the exact number of registrants who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. DHS estimates that these current opportunity costs of time for submitting an

H-1B registration using an attorney or other representative range from $11,736,448 to $20,235,786 with an average of $15,986,117.

Table 34. New Opportunity Costs of Time for an H-1B Registration, Petitioners Submitting with an Attorney or Other Representative				
	Population of Petitioners Submitting with a Lawyer	**Time Burden to Complete FH-1B Registration (Hours)**	**Cost of Time**	**Total Opportunity Cost**
	A	B	C	D=(A×B×C)
In House Lawyer	171,330	0.6	$114.17	$11,736,448
Outsourced Lawyer	171,330	0.6	$196.85	$20,235,786
Average				**$15,986,117**
Source: USCIS Analysis				

To estimate the current remaining opportunity cost of time for an HR specialist submitting an H-1B registration without a lawyer, DHS applies the proposed estimated public reporting time burden (0.6 hours) to the compensation rate of an HR specialist. Table 35 estimates the current total annual opportunity cost of time to HR specialists completing and submitting the H-1B registration will be approximately $5,631,784.

Table 35. Proposed Average Opportunity Costs of Time for an H-1B Registration, Submitting without an Attorney or Accredited Representative				
	Population	**Time Burden to Complete H-1B Registration (Hours)**	**HR Specialist's Opportunity Cost of time (48.40 /hr.)**	**Total Opportunity Cost of Time**
	A	B	C	D=(A×B×C)
Estimate H-1B Registration	184,262	0.6	$50.94	**$5,631,784**
Source: USCIS Analysis				

DHS estimates the total additional annual cost to petitioners completing and filing Form I-129 H-1B are expected to be $3,001,285 shown in Table 36. This table shows the current total opportunity cost of time to submit an H-1B registration and the proposed total opportunity cost of time.

Table 36. Total Costs to Complete the H-1B Registration	
Average Current Opportunity Cost Time for Lawyers to Complete the H-1B Registration	$13,766,712
Average Current Opportunity Cost Time for HR Specialist to Complete the H-1B Registration	$4,849,904

Total	**$18,616,616**
Average Proposed Opportunity Cost Time for Lawyers to Complete the H-1B Registration	$15,986,117
Average Proposed Opportunity Cost Time for HR Specialist to Complete the H-1B Registration	$5,631,784
Total	**$21,617,901**
Proposed Additional Opportunity Costs of Time to Complete the H-1B Registration	**$3,001,285**
Source: USCIS Analysis	

j. Beneficiary Centric Selection

Under the proposed provision, DHS would modify the random selection process. Registrants would continue to submit registrations on behalf of beneficiaries, and beneficiaries would continue to be able to have more than one registration submitted on their behalf, as generally allowed by applicable regulations. If a random selection were necessary (meaning, more registrations are submitted than the number of registrations USCIS projected as needed to reach the numerical allocations), then the random selection would be based on each unique beneficiary identified in the registration pool, rather than each registration. If a beneficiary is selected, then all registrants who properly submitted a registration for that selected beneficiary would be notified of the selection and that they are eligible to file an H-1B cap petition on behalf of the beneficiary during the applicable petition filing period.

DHS believes that changing how USCIS conducts the selection process to select by unique beneficiaries instead of registrations would give each unique beneficiary an equal chance at selection and would reduce the advantage that beneficiaries with multiple registrations submitted on their behalf have over beneficiaries with a single registration submitted on their behalf. DHS believes that it would also reduce the incentive that registrants may have to work with others to submit registrations for the same beneficiary to unfairly increase the chance of selection for the beneficiary because doing so under the beneficiary-centric selection approach would not result in an increase in the odds of

selection. Selecting by unique beneficiary could also result in other benefits, such as giving beneficiaries greater autonomy regarding their H-1B employment and improving the chances of selection for legitimate registrations.

Because the integrity of the new selection process would rely on USCIS's ability to accurately identify each individual beneficiary, and all registrations submitted on their behalf, DHS proposes to require the submission of valid passport information, including the passport number, country of issuance, and expiration date, in addition to the currently required information. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(*4*)(*ii*). While the proposed passport requirement could impact individuals who do not yet hold passports at the time of registration, DHS has determined the described benefits of program integrity outweigh any additional burden to prospective beneficiaries. DHS invites public comment on the proposed passport requirement.

DHS estimates that the annual average receipts of H-1B registrations is 355,592 with 71 percent of registrations being submitted for a beneficiary with only a single registration. DHS estimates that 29 percent[195] of registrations are submitted by companies for beneficiaries who have also had other registrations submitted on their behalf. Based on this new provision DHS estimates that there may be a reduction in registrations because beneficiaries will be less inclined to find as many different employers to submit registrations on their behalf as doing so would not affect their chance of selection. Also, DHS expects to see less abuse by unscrupulous registrants as they would not be able to increase the chance of selection for a beneficiary by working together with others to submit multiple registrations for the same beneficiary.

Table 37. H-1B Cap-Subject Registrations Received by USCIS for Unique Beneficiaries, Cap Year 2021 through 2023

Cap Year	Total Registrations	Total number of registrations submitted for	Total number of registrations submitted for	Total number of unique beneficiaries with	% of Total Registrations with Single Beneficiary

[195] Calculation: 100% - 71% Registrations for a single beneficiary = 29% Registrations submitted for multiple beneficiaries.

		beneficiaries with multiple registrations	beneficiaries with a single registration	registrations submitted on their behalf	
2021	274,237	34,349	239,888	253,331	87%
2022	308,613	98,547	210,066	235,720	68%
2023	483,927	176,444	307,483	357,222	64%
3-year Total	**1,066,777**	**309,340**	**757,437**	**846,273**	**71%**
3-year Annual Average	**355,592**	**103,113**	**252,479**	**282,091**	**71%**
Source: USCIS Office of Performance and Quality					

DHS estimates that 73,501[196] registrations annually may no longer be submitted due to this proposed change. Of those 73,501 registrations, DHS estimated that an attorney or accredited representative submitted 48 percent of registrations and an HR representative submitted the remaining 52 percent shown in Table 31.

Table 38 displays the estimated annual opportunity cost of time for submitting an H-1B registration employing an in-house or outsourced lawyer to complete and submit an H-1B registration. DHS does not know the exact number of prospective petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. DHS estimates that these current opportunity costs of time for submitting an H-1B registration using an attorney or other representative range from $2,081,225 to $3,588,413, with an average of $2,834,819.

Table 38. Current Annual Average Opportunity Costs of Time for Submitting an H-1B Registration, with an Attorney or Other Representative

	Population of Registrants Submitting with a Lawyer	Time Burden to Complete H-1B Registration (Hours)	Cost of Time	Total Current Opportunity Cost
	A	B	C	D=(A×B×C)
In House Lawyer	**35,280**	0.5167	$114.17	$2,081,225
Outsourced Lawyer	**35,280**	0.5167	$196.85	$3,588,413
Average				**$2,834,819**
Source: USCIS Analysis				

[196] Calculation: Total Registrations 355,592 - Total number of unique beneficiaries with registrations submitted on their behalf 282,091 = 73,501 Estimate of registrations that may no longer be submitted.

To estimate the current remaining opportunity cost of time for an HR specialist submitting an H-1B registration without a lawyer, DHS applies the estimated public reporting time burden (0.5167 hours) to the compensation rate of an HR specialist. Table 39 estimates the current total annual opportunity cost of time to HR specialists completing and submitting an H-1B registration will be approximately $1,006,003.

Table 39. Current Annual Average Opportunity Costs of Time for Submitting an H-1B Registration, without an Attorney or Accredited Representative				
	Population	**Time Burden to Complete H-1B Registration (Hours)**	**HR Specialist's Opportunity Cost of time**	**Total Opportunity Cost of Time**
	A	B	C	D=(A×B×C)
Estimate of H-1B Registrations	38,221	0.5167	$50.94	**$1,006,003**
Source: USCIS Analysis				

DHS estimates the total annual opportunity cost savings of time for not having to complete and submit H-1B registrations for beneficiaries with multiple registrations are expected to be $3,840,822, shown in Table 40.

Table 40. Total Annual Opportunity Cost Savings of Time for H-1B Registrations	
Average Current Opportunity Cost Time for Lawyers to Complete H-1B Registration	$2,834,819
Average Current Opportunity Cost Time for HR Specialist to Complete H-1B Registration	$1,006,003
Total	**$3,840,822**
Source: USCIS Analysis	

Prospective petitioners seeking to file H-1B cap-subject petitions, including for beneficiaries eligible for the advanced degree exemption, must first electronically register and pay the associated $10 H-1B registration fee for each prospective beneficiary. Due to this proposed change DHS estimates that prospective petitioners may now see an additional cost savings of $735,010. The annual total cost savings of this proposed beneficiary centric selection is $4,575,832.[197]

Table 41. Total Annual Cost Savings for Registration Fees	
Annual Registrations for the same beneficiaries	73,501

[197] Calculation: Total Opportunity Cost Savings of time for H-1B Registrations ($3,840,822) + Total Cost Savings for Registration Fees ($735,010) = $4,575,832 Total Cost Savings.

Registration Fee	$10
Total Cost savings	**$735,010**
Source: USCIS Analysis	

k. Bar on Multiple Registrations Submitted by Related Entities

DHS regulations already preclude the filing of multiple H-1B cap-subject petitions by related entities for the same beneficiary unless the related petitioners can establish a legitimate business need for filing multiple cap-subject petitions for the same beneficiary. DHS is not proposing to change this in the current regulation. Rather, DHS is proposing to extend a similar limitation to the submission of registrations by related entities. *See* proposed 8 CFR 214.2(h)(2)(i)(G). When an employer submits a registration, they attest that they intend to file a petition based on that registration and that there is a legitimate job offer. To allow related employers to submit registrations without a legitimate business need, but not allow them to file petitions without a legitimate business need, creates an inconsistency between the antecedent procedural step of registration and the petition filing. Extending the bar on multiple petition filings by related entities to multiple registration submissions by related entities for the same cap-subject beneficiary would harmonize the expectations for petition filing and registration submission.

While the proposed changes to the beneficiary centric selection are intended to reduce frivolous registrations, DHS cannot guarantee with certainty that such change would eliminate entities from working with each other to submit registrations to unfairly increase chances of selection for a beneficiary by submitting slightly different identifying information or other means. Therefore, this provision may serve as an additional deterrent to further reduce the incentive for companies filing multiple registrations to have a higher chance of selection. This change may benefit petitioners whose chances of selection have been negatively affected by companies filing multiple registrations to increase the chances of selection. DHS cannot estimate the number of petitioners that this provision

may benefit, because DHS cannot accurately measure how many petitioners are not submitting legitimate registrations or filing legitimate petitions in this manner.

l. Registrations with False Information or That Are Otherwise Invalid

Although registration is an antecedent procedural step undertaken prior to filing an H-1B cap-subject petition, the validity of the registration information is key to the registrant's eligibility to file a petition. As stated in the current regulations, "[t]o be eligible to file a petition for a beneficiary who may be counted against the H-1B regular cap or the H-1B advanced degree exemption for a particular fiscal year, a registration must be properly submitted in accordance with 8 CFR 103.2(a)(1), [8 CFR 214.2(h)(8)(iii),] and the form instructions." *See* 8 CFR 214.2(h)(8)(iii)(A)(*1*). USCIS does not consider a registration to be properly submitted if the information contained in the registration, including the required attestations, was not true and correct. Currently, the regulations state that it is grounds for denial or revocation if the statements of facts contained in the petition are not true and correct, inaccurate, fraudulent, or misrepresented a material fact. DHS proposes to clarify in the regulations that the grounds for denial of an H-1B petition or revocation of an H-1B petition approval extend to the information provided in the registration and to expressly state in the regulations that this includes attestations on the registration that are determined by USCIS to be false.

DHS is also proposing changes to the regulations governing registration that would provide USCIS with clearer authority to deny or revoke the approval of a petition based on a registration that was not properly submitted or was otherwise invalid.

Specifically, DHS is proposing to add that if a petitioner submits more than one registration per beneficiary in the same fiscal year, all registrations filed by that petitioner relating to that beneficiary for that fiscal year may be considered not only invalid, but that "USCIS may deny or revoke the approval of any petition filed for the beneficiary based on those registrations."

Additionally, DHS is proposing to add that USCIS may deny or revoke the approval of an H-1B petition if it determines that the fee associated with the registration is declined, not reconciled, disputed, or otherwise invalid after submission.

These proposed changes may increase the need for RFEs and NOIDs. It is important to note that issuing RFEs and NOIDs takes time and effort for adjudicators – to send, receive, and adjudicate documentation – and it requires additional time and effort for petitioners to respond, resulting in extended timelines for adjudications.[198] Data on RFEs and NOIDs related to H-1B false information are not standardized or tracked in a consistent way, thus they are not accurate or reliable.

m. Provisions to Ensure Bona Fide Job Offer for a Specialty Occupation Position

(1) Contracts

DHS proposes to codify USCIS' authority to request contracts, work orders, or similar evidence. *See* proposed 8 CFR 214.2(h)(4)(iv)(C). Such evidence may take the form of contracts or legal agreements, if available, or other evidence including technical documentation, milestone tables, or statements of work. Evidence submitted should show the contractual relationship between all parties, the terms and conditions of the beneficiary's work, and the minimum educational requirements to perform the duties.

While USCIS already has the authority to request contracts and other similar evidence, the regulations do not state this authority. By proposing to codify this authority, USCIS is putting stakeholders on notice of the kinds of evidence that could be requested to establish the terms and conditions of the beneficiary's work and the minimum educational requirements to perform the duties. This evidence, in turn, could establish that the petitioner has a bona fide job offer for a specialty occupation position for the beneficiary. Relative to the no action baseline, this change has no costs associated with it,

[198] The regulations state that when an RFE is served by mail, the response is timely filed if it is received no more than 3 days after the deadline, providing a total of 87 days for a response to be submitted if USCIS provides the maximum period of 84 days under the regulations. The maximum response time for a NOID is 30 days. *See https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6*.

and there may be transparency benefits due to this proposed change. Relative to the pre policy baseline petitioners may have taken time to find contracts or legal agreements, if available, or other evidence including technical documentation, milestone tables, or statements of work. DHS cannot estimate how much time it would have taken for petitioners to provide that information.

(2) Non-Speculative Employment

DHS proposes to codify its requirement that the petitioner must establish, at the time of filing, that it has a non-speculative position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. *See* proposed 8 CFR 214.2(h)(4)(iv)(D). This change is consistent with current DHS policy guidance that an H-1B petitioner must establish that employment exists at the time of filing the petition and that it may employ the beneficiary in a specialty occupation.[199] Relative to the no action baseline, this change has no costs associated with it, and there may be transparency benefits due to this proposed change. Relative to the pre policy baseline petitioners may require time to provide documentation to establish that their position was a non-speculative position in a specialty occupation. DHS cannot estimate how much time it takes for petitioners to provide that information.

(3) LCA Corresponds with the Petition

DHS is proposing to update the regulations to expressly include DHS's existing authority to ensure that the LCA properly supports and corresponds with the accompanying H-1B petition. Relative to the no action baseline, this change has no costs and may yield transparency benefits due to consistency between regulation and current policy. Relative to the pre policy baseline petitioners may have taken time to provide

[199] *See* USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020) (citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010)).

their LCA to DHS, however DHS cannot estimate how much time it would have taken for petitioners to provide that information.

(4) Revising the Definition of U.S. Employer

DHS is proposing to revise the definition of "United States employer." First, DHS proposes to eliminate the employer-employee relationship requirement. In place of the employer-employee relationship requirement, DHS proposes to codify the requirement that the petitioner has a bona fide job offer for the beneficiary to work, which may include telework, remote work, or other off-site work within the United States. DHS also proposes to replace the requirement that the petitioner "[e]ngages a person to work within the United States" with the requirement that the petitioner have a legal presence and is amenable to service of process in the United States. Relative to the no action baseline, this change has no costs associated with it, and there may be transparency benefits due to this proposed change. Relative to the pre policy baseline, petitioners may require time to provide documentation establishing a bona fide job offer for the beneficiary to work. DHS cannot estimate how much time petitioners take to provide that information.

(5) Employer-Employee Relationship

DHS proposes to eliminate the employer-employee relationship requirement, which, in the past, has been a significant barrier to the H-1B program for certain petitioners, including beneficiary-owned petitioners. This proposed change would benefit petitioners because it may decrease confusion and increase clarity for stakeholders. Relative to the no action baseline, this change has no costs associated with it, and there may be transparency benefits due to this proposed change. Relative to the pre policy baseline petitioners may have taken time to understand the change.

n. Beneficiary-Owners

DHS proposes to codify a petitioner's ability to qualify as a U.S. employer even when the beneficiary possesses a controlling interest in that petitioner. To promote access

to H-1Bs for entrepreneurs, start-up entities, and other beneficiary-owned businesses, DHS is proposing to add provisions to specifically address situations where a potential H-1B beneficiary owns a controlling interest in the petitioning entity. If more entrepreneurs are able to obtain H-1B status to develop their business enterprise, the United States could benefit from the creation of jobs, new industries, and new opportunities.[200] This proposed change would benefit H-1B petitions filed by start-up entities and other beneficiary-owned businesses, or filed on behalf of entrepreneurs who have a controlling interest in the petitioning entity. DHS is unable to estimate how many petitioners would benefit from this proposed change.

DHS is also proposing to limit the validity period for beneficiary-owned entities. DHS proposes to limit the validity period for the initial petition and first extension (including an amended petition with a request for an extension of stay) of such a petition to 18 months. *See* proposed 8 CFR 214.2(h)(9)(iii)(E). Any subsequent extension would not be limited and may be approved for up to 3 years, assuming the petition satisfies all other H-1B requirements. DHS proposes limiting the first two validity periods to 18 months as a safeguard against possible fraudulent petitions. While DHS sees a significant advantage in promoting the H-1B program to entrepreneurs and allowing these beneficiaries to perform a significant amount of non-specialty occupation duties, unscrupulous petitioners might abuse such provisions without sufficient guardrails. DHS believes that there may be a cost to petitioners associated with this change however cannot estimate how many petitioners may be affected by limiting the validity period.

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[200] *See, e.g.,* National Bureau of Economic Research*, "*Winning the H-1B Visa Lottery Boosts the Fortunes of Startups" (Jan. 2020), *https://www.nber.org/digest/jan20/winning-h-1b-visa-lottery-boosts-fortunes-startups* ("The opportunity to hire specialized foreign workers gives startups a leg up over their competitors who do not obtain visas for desired employees. High-skilled foreign labor boosts a firm's chance of obtaining venture capital funding, of successfully going public or being acquired, and of making innovative breakthroughs."). Pierre Azoulay, et. al, "Immigration and Entrepreneurship in the United States" (National Bureau of Economic Research, Working Paper 27778 (Sept. 2020) *https://www.nber.org/system/files/working_papers/w27778/w27778.pdf* ("immigrants act more as 'job creators' than 'job takers' and . . . non-U.S. born founders play outsized roles in U.S. high-growth entrepreneurship").

o. Site Visits

USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a petitioner and beneficiary are eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. These inspections, verifications, and other compliance reviews may be conducted telephonically or electronically, as well as through physical on-site inspections (site visits). DHS is proposing to add regulations specific to the H-1B program to codify its existing authority and clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections. Currently, site visit inspections are not mandatory for petitioners filing Form I-129 on behalf of H-1B specialty occupation nonimmigrant workers. Using its general authority, USCIS may conduct audits, on-site inspections, reviews, or investigations to ensure that a beneficiary is entitled to the benefits sought and that all laws have been complied with before and after approval of such benefits.[201] The authority to conduct on-site inspection is critical to the integrity of the H-1B program to detect and deter fraud and noncompliance.

In July 2009, USCIS started the Administrative Site Visit and Verification Program[202] as an additional method to verify information in certain visa petitions under scrutiny. Under this program, FDNS officers are authorized to make unannounced site visits to collect information as part of a compliance review, which verifies whether petitioners and beneficiaries are following the immigration laws and regulations that are

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[201] *See* INA section 103 and 8 CFR 2.1. As stated in subsection V.A.5.ii(d) of this analysis, regulation would also clarify the possible scope of an inspection, which may include the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable.

[202] *See* USCIS, "Administrative Site Visit and Verification Program," *https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program* (last visited Sept. 18, 2019). *See* USCIS, "Administrative Site Visit and Verification Program," *https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program* (last visited Sept. 18, 2019). *See* USCIS, "Administrative Site Visit and Verification Program," *https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-programhttps://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program* (last visited Sept. 18, 2019).

applicable in a particular case. This process includes researching information in government databases, reviewing public records and evidence accompanying the petition, interviewing the petitioner or beneficiary, and conducting site visits. Once the FDNS officers complete the site visit, they write a Compliance Review Report for any indicators of fraud or noncompliance to assist USCIS in final adjudicative decisions.

The site visits conducted under USCIS's existent, general authority, and thus part of the baseline against which this proposed rule's impact should be measured, have uncovered a significant amount of noncompliance in the H-1B program.[203] Further, when disaggregated by worksite location, the noncompliance rate was found to be higher for workers placed at an off-site or third-party location compared to workers placed at a petitioner's on-site location.[204] As a result, USCIS began conducting more targeted site visits related to the H-1B program, focusing on the cases of H-1B dependent employers (i.e., employers who have a high ratio of H-1B workers compared to U.S. workers, as defined by statute) for whom USCIS cannot validate the employer's basic business information through commercially available data, and on employers petitioning for H-1B workers who work off-site at another company or organization's location.

DHS believes that site visits are important to maintain the integrity of the H-1B program to detect and deter fraud and noncompliance in the H-1B program, which in turn ensures the appropriate use of the H-1B program and the protection of the interests of U.S. workers. These site visits would continue in the absence of this proposed rule and DHS notes that current Form I-129 instructions notify petitioners of USCIS' legal authority to verify information before or after a case decision, including by means of unannounced physical site inspection. Hence, DHS is proposing additional requirements specific to the H-1B program to set forth the scope of on-site inspections, and the

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[203] USCIS, Office of Policy and Strategy, PRD, Summary of H-1B Site Visits Data.
[204] *Id*.

consequences of a petitioner's or third party's refusal or failure to fully cooperate with existing inspections. DHS does not foresee the rule leading to more on-site inspections.

This proposed rule would provide a clear disincentive for petitioners that do not cooperate with compliance reviews and inspections while giving USCIS greater authority to access and confirm information about employers and workers as well as identify fraud.

The proposed regulations would make clear that inspections may include, but are not limited to, an on-site visit of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H-1B program. *See* proposed 8 CFR 214.2(h)(4)(i)(B)(*2*). The proposed regulation would also clarify that an inspection may take place at the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable. The proposed provisions would make clear that an H-1B petitioner or any employer must allow access to all sites where the labor will be performed for the purpose of determining compliance with applicable H-1B requirements. The proposed regulation would state the consequences if USCIS is unable to verify facts related to an H-1B petition due to the failure or refusal of the petitioner or a third-party worksite to cooperate with a site visit. These failures or refusals may be grounds for denial or revocation of any H-1B petition related to locations that are a subject of inspection, including any third-party worksites. *See* proposed 8 CFR 214.2(h)(4)(i)(B)(*2*).

In order to estimate the population impacted by site visits, DHS uses site inspection data used to verify facts pertaining to the H-1B petition adjudication process.

The site inspections were conducted at H-1B petitioners' on-site locations and third-party worksites during FY 2018 through FY 2022. For instance, from FY 2019 through FY 2022, USCIS conducted a total of 27,062 H-1B compliance reviews and found 5,037 of them, equal to 19 percent, to be noncompliant or indicative of fraud.[205] These compliance reviews (from FY 2019 through FY 2022) consisted of reviews conducted under both the Administrative Site Visit and Verification Program and the Targeted Site Visit and Verification Program, which began in 2017. The targeted site visit program allows USCIS to focus resources where fraud and abuse of the H-1B program may be more likely to occur.[206]

Table 42 shows the number of H-1B worksite inspections conducted each year and the number of visits that resulted in compliance and noncompliance. USCIS received a low of 1,057 fraudulent/noncompliant cases in FY 2022, and a high of 1,469 fraudulent/noncompliant cases in FY 2021. DHS estimates that, on average, USCIS conducted 6,766 H-1B worksite inspections annually from FY 2019 through FY 2022 and of those DHS finds a noncompliance rate of 19 percent. Assuming USCIS continues worksite inspections at the 4-year annual average rate, the population impacted by this proposed provision would be 1,259 or 19 percent of H-1B petitioners visited who are found noncompliant or indicative of fraud. The outcomes of site visits under the proposed rule are indeterminate as currently noncooperative petitioners might be found to be fully compliant, might continue to not cooperate with site visits despite penalties, or might be forced to reveal fraudulent practices to USCIS. The expected increase in cooperation from current levels would be the most important impact of the proposed provision, which DHS discusses below. DHS notes that the increased cooperation might come

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[205] DHS, USCIS, PRD (2022). PRD196. USCIS conducted these site visits through its Administrative and Targeted Site Visit Programs.

[206] *See* USCIS, "Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse," (April 3, 2017), *https://www.uscis.gov/archive/putting-american-workers-first-uscis-announces-further-measures-to-detect-h-1b-visa-fraud-and-abuse*.

disproportionately from site visits of third-party worksites that did not sign Form I-129 attesting to permit unannounced physical site inspections of residences and places of employment by USCIS.

Table 42. H-1B Compliance and Fraud/Noncompliance Percentages Closed by FDNS Overall, FY 2019 through FY 2022				
Fiscal Year	**Compliant**	**Fraud/Noncompliant**	**Total**	**Percent of Fraud/Noncompliance**
2019	7,891	1,431	9,322	15%
2020	4,063	1,080	5,143	21%
2021	5,413	1,469	6,882	21%
2022	4,658	1,057	5,715	18%
4-year Total	**22,025**	**5,037**	**27,062**	**19%**
4-year Annual Average	**5,506**	**1,259**	**6,766**	**19%**
Source: USCIS, Fraud Detection and National Security (FDNS) Jan. 23, 2023				

Table 43 shows the average duration of time to complete each inspection was 1.08 hours. Therefore, DHS assumes that USCIS would continue to conduct the same number of annual worksite inspections (7,252), on average, and that the average duration of time for a USCIS immigration officer to conduct each worksite inspection would be an average of 1.08 hours. The data in Table 42 and Table 43 differ slightly based on the different search criteria, pull dates and systems accessed. DHS also assumes that the average duration of time of 1.08 hours to conduct an inspection covers the entire inspection process, which includes interviewing the beneficiary, the on-site supervisor or manager and other workers, as applicable, and reviewing all records pertinent to the H-1B petitions available to USCIS when requested during inspection.

Table 43. Total Number of Worksite Inspections Conducted for H-1B Petitioners and Average Inspection Time, FY 2018 to FY 2022.		
Fiscal Year	**Number of Worksite Inspections**	**Average Duration for Worksite Inspection (Hours)**
2018	7,718	1.16
2019	10,384	1.23
2020	5,826	1.12
2021	6,780	0.86
2022	5,550	1.05
5-year Total	**36,258**	**5.42**
5-year Average	**7,252**	**1.08**
Source: USCIS, Fraud Detection and National Security (FDNS). Apr. 12, 2023		

DHS assumes that a supervisor or manager, in addition to the beneficiary, would be present on behalf of a petitioner while a USCIS immigration officer conducts the worksite inspection. The officer would interview the beneficiary to verify the date employment started, work location, hours, salary, and duties performed to corroborate with the information provided in an approved petition. The supervisor or manager would be the most qualified employee at the location who could answer all questions pertinent to the petitioning organization and its H-1B nonimmigrant workers. They would also be able to provide the proper records available to USCIS immigration officers. Consequently, for the purposes of this economic analysis, DHS assumes that on average two individuals would be interviewed during each worksite inspection: the beneficiary and the supervisor or manager. DHS uses their respective compensation rates in the estimation of the worksite inspection costs.[207] However, if any other worker or on-site manager is interviewed, the same compensation rates would apply.

DHS uses hourly compensation rates to estimate the opportunity cost of time a beneficiary and supervisor or manager would incur during worksite inspections. Based on data obtained from a USCIS report in 2022, DHS estimates that an H-1B worker earned an average of $116,000 per year in FY 2021.[208] DHS therefore estimates the salary of an H-1B worker is approximately $116,000 annually, or $55.77 hourly wage.[209] The annual

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[207] DHS does not estimate any other USCIS costs associated with the worksite inspections (i.e., travel and deskwork relating to other research, review and document write up) here because these costs are covered by fees collected from petitioners filing Form I-129 for H-1B petitions. All such costs are reported under the Federal Government Cost section.

[208] This is the annual average earning of all H-1B nonimmigrant workers in all industries with known occupations (excluding industries with unknown occupations) for FY 2021. It is what employers agreed to pay the nonimmigrant workers at the time the applications were filed and estimated based on full-time employment for 12 months, even if the nonimmigrant worker worked fewer than 12 months. USCIS, "Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2021 Annual Report to Congress, October 1, 2020–September 30, 2021," at 16, Table 9a (Mar. 2, 2022), *https://www.uscis.gov/sites/default/files/document/data/H1B_Characteristics_Congressional_Report_FY2021-3.2.22.pdf*.

[209] The hourly wage is estimated by diving the annual salary by the total number of hours worked in a year (2,080, which is 40 hours of full-time workweek for 52 weeks). $55.77 hourly wage = $116,000 annual pay÷2,080 annual work hours. According to DOL that certifies the LCA of the H-1B worker, a full-time H-1B employee works 40 hours per week for 52 weeks for a total of 2,080 hours in a year assuming full-time

salary does not include noncash compensation and benefits, such as health insurance and transportation. DHS adjusts the average hourly wage rate using a benefits-to-wage multiplier to estimate the average hourly compensation of $ 80.87 for an H-1B nonimmigrant worker.[210] In order to estimate the opportunity cost of time they would incur during a worksite inspection, DHS uses an average hourly compensation rate of $91.47 per hour for a supervisor or manager, where the average hourly wage is $63.08 per hour worked and average benefits are $28.39.[211] While the average duration of time to conduct an inspection is estimated at 1.08 hours in this analysis, DHS is not able to estimate the average duration of time for a USCIS immigration officer to conduct an interview with a beneficiary or supervisor or manager. In the absence of this information, DHS assumes that it would on average take 0.54 hours to interview a beneficiary and 0.54 hours to interview a supervisor or manager.[212]

In Table 44, DHS estimates the total annual opportunity cost of time for worksite inspections of H-1B petitions by multiplying the average annual number of worksite inspections (7,252) by the average duration the interview would take for a beneficiary or supervisor or manager and their respective compensation rates. DHS obtains the total annual cost of the H-1B worksite inspections to be $674,881 for this proposed rule.

Table 44. Form I-129 Petitioners' Annual Cost of Worksite Inspection for H-1B Workers

Cost Item	Number of Worksite Inspections (Annual Average)	Average Duration of Interview (Hours)	Compensation Rate	Total Cost

work is 40 hours per week. DOL, Wage and hour Division: "Fact Sheet # 68 – What Constitutes a Full-Time Employee Under H-1B Visa Program?" (July 2009), *https://www.dol.gov/whd/regs/compliance/whdfs68.htm* (Last visited July 30, 2019).

[210] Hourly compensation of $ 80.87 = $55.77 average hourly wage rate for H-1B worker × 1.45 benefits-to-wage multiplier. *See* section V.A.5. for estimation of the benefits-to-wage multiplier.

[211] Hourly compensation of $91.47 = $63.08 average hourly wage rate for Management Occupations (national) × 1.45 benefits-to-wage multiplier. *See* BLS, "Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2022, 11-0000 Management Occupations (Major Group)," *https://www.bls.gov/oes/2022/may/oes110000.htm* (last visited May 11, 2023).

[212] DHS assumes that beneficiary takes 50 percent of average inspection duration and supervisor or manager takes 50 percent. Average duration of interview hours for beneficiaries (0.54) = Average inspection duration (1.08)×50%=0.54 (rounded). Average duration of interview hours for Supervisors or managers (0.54) = Average inspection duration (1.08)×50%=0.54 (rounded).

	A	B	C	D=A×B×C
Beneficiaries' opportunity cost of time during worksite inspections	7,252	0.54	$80.87	$316,693
Supervisors or managers' opportunity cost of time during worksite inspections	7,252	0.54	$91.47	$358,188
Total	**-**	**1.08**	**-**	**$674,881**
Source: USCIS analysis				

This proposed change may affect employers who do not cooperate with site visits who would face denial or revocation of their petition(s), which could result in costs to those businesses. Petitioners may face financial losses because they may lose access to labor for extended periods, which could result in too few workers, loss of revenue, and some could go out of business. DHS expects program participants to comply with program requirements, however, and notes that those that do not could experience significant impacts due to this proposed rule. DHS expects that the proposed rule would hold certain petitioners more accountable for violations, including certain findings of labor law and other violations, and would prevent registrations with false information from taking a cap number for which they are ineligible.

p. Third-Party Placement (Codifying Defensor)

In this proposed provision, in certain circumstances USCIS would look at the third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation.

As required by both INA section 214(i)(1) and 8 CFR 214.2(h)(4)(i)(A)(*1*), an H-1B petition for a specialty occupation worker must demonstrate that the worker will perform services in a specialty occupation, which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty (or its equivalent) as a minimum requirement for entry into the occupation in the United States. This proposal would ensure that petitioners

are not circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party. Specifically, under proposed 8 CFR 214.2(h)(4)(i)(B)(*3*), if the beneficiary will be staffed to a third party, meaning they will be contracted to fill a position in a third party's organization, the actual work to be performed by the beneficiary must be in a specialty occupation. Therefore, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. Relative to the no action baseline, this change has no costs associated with it, and there may be transparency benefits due to this proposed change. Relative to the pre policy baseline petitioners may have taken time to demonstrate that the worker will perform services in a specialty occupation, which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty. Because this has been in place for a long time, DHS cannot estimate how much time it would have taken for petitioners to provide that information.

q. Additional Time Burden for Form I-129 H-1B

DHS estimates the current public reporting time burden is 2 hours and 20 minutes (2.34 hours), which includes the time for reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary documentation, and submitting the petition.[213] This proposed rule would increase the burden per response by 5 minutes. Table 45 shows the total receipts received for Form I-129 H-1B[214] for FY 2018 through FY 2022. The table also details the number of Form I-129 H-1B receipts filed with an attorney or accredited representative using Form G-28. The number of Form G-28 submissions allows USCIS to estimate the

[213] *See* Instructions for Petition for a Nonimmigrant Worker (time burden estimate in the Paperwork Reduction Act section). Form I-129 H-1B, *https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf*. OMB No. 1615-1615-0009. Expires Nov. 30, 2025. The public reporting burden for this collection of information is estimated at 2 hours and 20 minutes (2.34 hours) per response.
[214] The term "Form I-129 H-1B" refers to a Form I-129 that is filed for H-1B classification.

number of Form I-129 H-1B that are filed by an attorney or accredited representative and thus estimate the opportunity costs of time for a petitioner, attorney, or accredited representative to file each form. USCIS received a low of 319,090 H-1B receipts filed with Form G-28 in FY 2021, and a high of 383,737, H-1B receipts filed with Form G-28 in FY 2022. Based on a 5-year annual average, DHS estimates the annual average receipts of Form I-129 to be 338,850 with 79 percent of petitions filed by an attorney or accredited representative.

Table 45. Total Form I-129 H-1B Receipts with and without Form G-28, FY 2018 through FY 2022

Fiscal Year	Form I-129 H-1B Receipts Received without Form G-28	Form I-129 H-1B Receipts Received with Form G-28	Total Form I-129 H-1B Receipts	Percentage of Form I-129 H-1B filed with Form G-28
2018	94,055	324,549	418,604	78%
2019	90,845	329,777	420,622	78%
2020	90,192	337,097	427,289	79%
2021	79,195	319,090	398,285	80%
2022	90,574	383,737	474,311	81%
5-year Total	**444,861**	**1,694,250**	**2,139,111**	**79%**
5-year Annual Average	**88,972**	**338,850**	**427,822**	**79%**

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, Mar. 13, 2023.

In order to estimate the opportunity costs of time for completing and filing Form I-129 H-1B, DHS assumes that a petitioner will use an HR specialist, an in-house lawyer, or an outsourced lawyer to prepare Form I-129 H-1B petitions.[215] DHS uses the mean hourly wage of $35.13 for HR specialists to estimate the opportunity cost of the time for preparing and submitting Form I-129 H-1B.[216] Additionally, DHS uses the mean hourly wage of $78.74 for in-house lawyers to estimate the opportunity cost of the time for preparing and submitting Form I-129 H-1B.[217]

[215] USCIS limited its analysis to HR specialists, in-house lawyers, and outsourced lawyers to present estimated costs. However, USCIS understands that not all entities employ individuals with these occupations and, therefore, recognizes equivalent occupations may also prepare and file these petitions.
[216] *See* BLS, "Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2022, 13-1071 Human Resources Specialists," *https://www.bls.gov/oes/2022/may/oes131071.htm* (last visited May 11, 2023).
[217] *See* BLS, "Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2022, 23-1011 Lawyers," *https://www.bls.gov/oes/2022/may/oes231011.htm* (last visited May. 11, 2023).

DHS accounts for worker benefits when estimating the total costs of compensation by calculating a benefits-to-wage multiplier using the BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full opportunity cost per petitioner, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, retirement, etc.[218] DHS multiplied the average hourly U.S. wage rate for HR specialists and in-house lawyers by 1.45 to account for the full cost of employee benefits, for a total of $50.94[219] per hour for an HR specialist and $114.17[220] per hour for an in-house lawyer. DHS recognizes that a firm may choose, but is not required, to outsource the preparation of these petitions and, therefore, presents two wage rates for lawyers. To determine the full opportunity costs of time if a firm hired an outsourced lawyer, DHS multiplied the average hourly U.S. wage rate for lawyers by 2.5 for a total of $196.85[221] to approximate an hourly wage rate for an outsourced lawyer[222] to prepare and submit Form I-129 H-1B.[223]

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[218] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) / (Wages and Salaries per hour) ($42.48 Total Employee Compensation per hour) / ($29.32 Wages and Salaries per hour) = 1.44884 = 1.45 (rounded). *See* BLS, Economic News Release, "Employer Costs for Employee Compensation - December 2022," Table 1. "Employer Costs for Employee Compensation by ownership [Dec. 2022]," *https://www.bls.gov/news.release/archives/ecec_03172023.htm* (last visited Mar. 21, 2023). The Employer Costs for Employee Compensation measures the average cost to employers for wages and salaries and benefits per employee hour worked.

[219] Calculation: $35.13 * 1.45 = $50.94 total wage rate for HR specialist.

[220] Calculation: $78.74 * 1.45 = $114.17 total wage rate for in-house lawyer.

[221] Calculation: $78.74 * 2.5 = $196.85 total wage rate for an outsourced lawyer.

[222] The DHS analysis in "Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program," 83 FR 24905 (May 31, 2018), *https://www.federalregister.gov/documents/2018/05/31/2018-11732/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2018-numerical-limitation-for-the*, used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages.
The DHS ICE rule "Final Small Entity Impact Analysis: 'Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'" at G-4 (Aug. 25, 2008), *https://www.regulations.gov/document/ICEB-2006-0004-0922*, also uses a multiplier. The methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this proposed rule.

[223] The DHS analysis in "Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program," 83 FR 24905 (May 31, 2018), *https://www.federalregister.gov/documents/2018/05/31/2018-11732/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2018-numerical-limitation-for-the*, used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages.

To estimate the opportunity cost of time to complete and file Form I-129 H-1B, DHS applies the estimated time burden (2.34 hours) to the eligible population and compensation rates of those who may file with or without a lawyer.[224] Table 46 shows the estimated annual opportunity cost of time for Form I-129 H-1B petitioners employing an in-house or outsourced lawyer to complete and file Form I-129 H-1B petitions. DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. DHS estimates that these current opportunity costs of time for Form I-129 H-1B petitioners using an attorney or other representative range from $90,526,421 to $156,084,137 with an annual average of $123,305,279.

Table 46. Current Annual Average Opportunity Costs of Time for Form I-129 H-1B Petitioners Filing with an Attorney or Other Representative

	Eligible Population of Petitioners Filing with a Lawyer	**Time Burden to Complete Form I-129 H-1B (Hours)**	**Cost of Time**	**Total Current Opportunity Cost**
	A	B	C	D=(A×B×C)
In House Lawyer	338,850	2.34	$114.17	$90,526,421
Outsourced Lawyer	338,850	2.34	$196.85	$156,084,137
Average				**$123,305,279**
Source: USCIS Analysis				

To estimate the current remaining opportunity cost of time for an HR specialist filing Form I-129 H-1B without a lawyer, DHS applies the estimated public reporting time burden (2.34 hours) to the compensation rate of an HR specialist. Table 47 estimates the current total annual opportunity cost of time to HR specialists completing and filing I-129 H-1B requests will be approximately $10,605,427.

Table 47. Current Annual Average Opportunity Costs of Time for Form I-129 H-1B Petitioners Filing without an Attorney or Accredited Representative

Also, the analysis for a DHS ICE rule, "Final Small Entity Impact Analysis: 'Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'" at G-4 (Aug. 25, 2008), *https://www.regulations.gov/document/ICEB-2006-0004-0922*, used a multiplier. The methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this proposed rule.

[224] *See* "Instructions for Petition for a Nonimmigrant Worker," Form I-129, OMB No. 1615-0009, expires Nov. 30, 2025*, https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf* (last visited Nov. 3, 2022).

	Population	Time Burden to Complete Form I-129 H-1B (Hours)	HR Specialist's Opportunity Cost of time	Total Opportunity Cost of Time
	A	B	C	D=(A×B×C)
Estimate Form I-129 H-1B	88,972	2.34	$50.94	**$10,605,427**
Source: USCIS Analysis				

Table 48 shows the proposed estimated time burden (2.42 hours) to the eligible population and compensation rates of those who may file with or without a lawyer. DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. These current opportunity costs of time for Form I-129 H-1B petitioners using an attorney or other representative are estimated to range from $93,621,341 to $161,420,346 with an annual average of $127,520,844.

Table 48. New Annual Opportunity Costs of Time for Form I-129 H-1B Petitioners Filing with an Attorney or Other Representative

	Population of Petitioners Filing with a Lawyer	Time Burden to Complete Form I-129 H-1B (Hours)	Cost of Time	Total Opportunity Cost
	A	B	C	D=(A×B×C)
In House Lawyer	338,850	2.42	$114.17	$93,621,341
Outsourced Lawyer	338,850	2.42	$196.85	$161,420,346
Average				**$127,520,844**
Source: USCIS Analysis				

To estimate the current remaining opportunity cost of time for an HR specialist filing Form I-129 H-1B without a lawyer, DHS applies the estimated public reporting time burden (2.42 hours) to the compensation rate of an HR specialist. Table 49 estimates the current total annual opportunity cost of time to HR specialists completing and filing I-129 H-1B requests will be approximately $10,968,006.

Table 49. Proposed Annual Average Opportunity Costs of Time for Form I-129 H-1B Petitioners Filing without an Attorney or Accredited Representative

	Population	Time Burden to Complete Form I-129 H-1B (Hours)	HR Specialist's Opportunity Cost of time	Total Opportunity Cost of Time
	A	B	C	D=(A×B×C)
Estimate Form I-129 H-1B	88,972	2.42	$50.94	**$10,968,006**

Source: USCIS Analysis

DHS estimates the total additional annual cost to petitioners completing and filing Form I-129 H-1B are expected to be $4,578,144 shown in Table 50. This table shows the current total opportunity cost of time to file Form I-129 H-1B and the proposed total opportunity cost of time.

Table 50. Total Annual Costs to Form I-129 H-1B	
Average Current Opportunity Cost Time for Lawyers to Complete Form I-129 H-1B	**$123,305,279**
Average Current Opportunity Cost Time for HR Specialist to Complete Form I-129 H-1B	**$10,605,427**
Total	**$133,910,706**
Average Proposed Opportunity Cost Time for Lawyers to Complete Form I-129 H-1B	**$127,520,844**
Average Proposed Opportunity Cost Time for HR Specialist to Complete Form I-129 H-1B	**$10,968,006**
Total	**$138,488,850**
Proposed Additional Opportunity Costs of Time for Form I-129 H-1B	**$4,578,144**
Source: USCIS Analysis	

Finally, many DHS rulemakings include monetized or unquantified familiarization costs. This is appropriate when a likely consequence of proposed regulations could be additional individuals seeking out and consuming more specialized resources, such as immigration attorneys' time in order to access the same benefits. This section has emphasized that employers of H-1B beneficiaries already consume significant specialized resources. In contrast to policies that impose additional requirements upon petitioners and registrants, DHS believes the proposed modernization, efficiencies, flexibilities and integrity improvements have no likely consequence to current consumption of specialized resources such as HR Specialists' time, in-house attorneys' time, and even out-sourced attorneys time inclusive of indirect costs. An assumption that hundreds of thousands will spend 4 or more hours reading the entirety of this proposed rule, in addition to the 2.42 hour burden of Form I-129 H-1B, risks overrepresenting the interests of immigration

attorneys relative to the other impacts this Regulatory Impact Analysis describes using supporting data and evidence. DHS invites public comment on familiarization costs and how any such costs should be accurately modeled.

r. Additional Time Burden for H Classification Supplement to Form I-129

DHS estimates the current public reporting time burden at 2 hours, for the H Classification Supplement, which includes the time for reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary documentation, and submitting the petition.[225] This proposed rule would strengthen program integrity by codifying the authority to request contracts from petitioners. This change will increase the burden per response 5 minutes.

Table 51 shows the total receipts received for H-1B petitions for FY 2018 through FY 2022. The table also shows the number of H-1B petitions submitted by an attorney or accredited representative using Form G-28. The number of Form G-28 submissions allows USCIS to estimate the number of H-1B petitions that an attorney or accredited representative submitted and thus estimate the opportunity costs of time for an attorney or accredited representative to file each form USCIS received a low of 398,285 of H-1B petitions in FY 2021, and a high of 474,311 of H-1B petitions in FY 2022. Based on a 5-year annual average, DHS estimates the annual average receipts of H-1B petitions to be 338,850 with 79 percent of petitions filed by an attorney or accredited representative.

Table 51. Total H-1B Petitions with and without Form G-28, FY 2018 through FY 2022

Fiscal Year	Form I-129 H-1B Receipts Received without Form G-28	Form I-129 H-1B Receipts Received with Form G-28	Total Form I-129 H-1B Receipts	Percentage of Form I-129 H-1B filed with Form G-28
2018	94,055	324,549	418,604	78%
2019	90,845	329,777	420,622	78%
2020	90,192	337,097	427,289	79%
2021	79,195	319,090	398,285	80%
2022	90,574	383,737	474,311	81%

[225] *See* Instructions for Petition for a Nonimmigrant Worker (time burden estimate in the Paperwork Reduction Act section). Form I-129 H Classification Supplement, *https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf*. OMB No. 1615-1615-0009. Expires Nov. 30, 2025. The public reporting burden for this collection of information is estimated at 2 hours (2.0 hours) per response.

5-year Total	**444,861**	**1,694,250**	**2,139,111**	**79%**
5-year Annual Average	**88,972**	**338,850**	**427,822**	**79%**
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, Mar. 13, 2023.				

Table 52 shows the estimated annual opportunity cost of time for submitting an H-1B petition employing an in-house or outsourced lawyer to complete and submit an H-1B petition. DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. DHS estimates that these current annual opportunity costs of time for filing an H-1B petition using an attorney or other representative range from $77,373,009 to $133,405,245 with an average of $105,389,127.

Table 52. Current Annual Average Opportunity Costs of Time for Filing an H-1B H Supplement Filing with an Attorney or Other Representative

	Population of Petitioners Filing with a Lawyer	**Time Burden to Complete Form I-129 H Supplement (Hours)**	**Cost of Time**	**Total Current Opportunity Cost**
	A	B	C	D=(A×B×C)
In House Lawyer	338,850	2	$114.17	$77,373,009
Outsourced Lawyer	338,850	2	$196.85	$133,405,245
Average				**$105,389,127**
Source: USCIS Analysis				

To estimate the current remaining opportunity cost of time for an HR specialist filing Form I-129 H-1B without a lawyer, DHS applies the estimated public reporting time burden (2 hours) to the compensation rate of an HR specialist. Table 53 estimates the current total annual opportunity cost of time to HR specialists completing and filing an H-1B petition will be approximately $9,064,467.

Table 53. Current Average Opportunity Costs of Time for Filing an H-1B H Supplement Filing without an Attorney or Accredited Representative

	Population	**Time Burden to Complete Form I-129 H-1B H Supplement (Hours)**	**HR Specialist's Opportunity Cost of time**	**Total Opportunity Cost of Time**
	A	B	C	D=(A×B×C)
Estimate Form I-129 H-1B H Supplement	88,972	2	$50.94	**$9,064,467**
Source: USCIS Analysis				

Table 54 shows the proposed increased estimated time burden of 2 hours and 4 minutes (2.07 hours) to the eligible population and compensation rates of those who may file with or without a lawyer. DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. DHS estimates that these current annual opportunity costs of time for filing an H-1B petition using an attorney or other representative range from $80,081,064 to $138,074,429 with an average of $109,077,747.

Table 54. New Annual Opportunity Costs of Time for Form I-129 H-1B H Supplement Petitioners Filing with an Attorney or Other Representative

	Eligible Population of Petitioners Filing with a Lawyer	**Time Burden to Complete Form I-129 H-1B H Supplement (Hours)**	**Cost of Time**	**Total Opportunity Cost**
	A	B	C	D=(A×B×C)
In House Lawyer	338,850	2.07	$114.17	$80,081,064
Outsourced Lawyer	338,850	2.07	$196.85	$138,074,429
Average				**$109,077,747**
Source: USCIS Analysis				

To estimate the current remaining opportunity cost of time for an HR specialist filing Form I-129 H-1B without a lawyer, DHS applies the estimated public reporting time burden (2.07 hours) to the compensation rate of an HR specialist. Table 55 estimates the current total annual opportunity cost of time to HR specialists completing and filing an H-1B petition will be approximately $9,381,724.

Table 55. Proposed Annual Average Opportunity Costs of Time for Form I-129 H-1B H Supplement Petitioners Filing without an Attorney or Accredited Representative

	Population	**Time Burden to Complete Form I-129 H-1B H Supplement (Hours)**	**HR Specialist's Opportunity Cost of time**	**Total Opportunity Cost of Time**
	A	B	C	D=(A×B×C)
Estimate Form I-129 H-1B H Supplement	88,972	2.07	$50.94	**$9,381,724**
Source: USCIS Analysis				

DHS estimates the total additional annual cost to petitioners completing and filing Form I-129 H-1B are expected to be $4,005,877 shown in Table 56. This table shows the

current total opportunity cost of time to file an H-1B H Supplement and the proposed total opportunity cost of time.

Table 56. Total Annual Costs to Form I-129 H-1B H Supplement	
Average Current Opportunity Cost Time for Lawyers to Complete Form I-129 H-1B H Supplement	$105,389,127
Average Current Opportunity Cost Time for HR Specialist to Complete Form I-129 H-1B H Supplement	$9,064,467
Total	**$114,453,594**
Average Proposed Opportunity Cost Time for Lawyers to Complete Form I-129 H-1B H Supplement	$109,077,747
Average Proposed Opportunity Cost Time for HR Specialist to Complete Form I-129 H-1B H Supplement	$9,381,724
Total	**$118,459,471**
Proposed Additional Opportunity Costs of Time for Form I-129 H-1B H Supplement	**$4,005,877**
Source: USCIS Analysis	

4. Alternatives Considered

DHS considered the alternative of eliminating the registration system and reverting to the paper-based filing system stakeholders used prior to implementing registration. However, when DHS considered the immense cost savings that registration provides to both USCIS and stakeholders and the significant resources the agency would incur to revert back to a paper-based H-1B cap selection process, the benefits of having a registration system still outweigh the costs of potential abuse of the system.

DHS is also seeking public comment on how to ensure that the limited number of H-1B cap-subject visas, and new H-1B status grants available each fiscal year are used for non-speculative job opportunities. DHS is seeking public comments on the possible approaches described in the preamble, as well as soliciting ideas that would further curb or eliminate the possibility that petitioners may have speculative job opportunities at the time of filing or approval of H-1B petitions and delay admission of H-1B beneficiaries until they have secured work for them.

5. Total Quantified Net Costs of the Proposed Regulatory Changes

In this section, DHS presents the total annual cost savings of this proposed rule annualized over a 10-year period of analysis. Table 57 details the annual cost savings of this proposed rule. DHS estimates the total cost savings is $5,920,408.

Table 57. Summary of Cost Savings	
Description	**Cost Savings**
Amended Petitions	$297,673
Deference to prior USCIS Determinations of Eligibility	$338,412
Eliminating the Itinerary Requirement for H Programs	$708,491
Beneficiary Centric Selection Cost of Time	$3,840,822
Beneficiary Centric Selection Cost of Registrations	$735,010
Total Cost Savings	**$5,920,408**
Source: USCIS Analysis	

DHS summarizes the annual costs of this proposed rule. Table 58 details the annual costs of this proposed rule. DHS estimates the total cost is $12,260,187.

Table 58. Summary of Costs	
Description	**Costs**
The H-1B Registration System	$3,001,285
Cost of Worksite Inspection for H-1B Workers	$674,881
Additional Time Burden H-1B	$4,578,144
Additional Time Burden for H Classification Supplement	$4,005,877
Total Costs	**$12,260,187**
Source: USCIS Analysis	

Net costs to the public of $6,339,779 are the total costs minus cost savings.[226] Table 59 illustrates that over a 10-year period of analysis from FY 2023 through FY 2032 annualized costs would be $6,339,779 using 7-percent and 3-percent discount rates.

Table 59. Discounted Net Costs Over a 10-Year Period of Analysis		
Fiscal Year	**Total Estimated Cost**	
	$6,339,779 (Undiscounted)	
	Discounted at 3 percent	Discounted at 7 percent
2023	$6,155,125	$5,925,027
2024	$5,975,850	$5,537,409
2025	$5,801,796	$5,175,148
2026	$5,632,812	$4,836,587
2027	$5,468,749	$4,520,175
2028	$5,309,465	$4,224,462
2029	$5,154,820	$3,948,096
2030	$5,004,680	$3,689,809
2031	$4,858,913	$3,448,420

[226] Calculations: $12,260,187 Total Costs – $5,920,217 Total Cost Savings = $6,339,779 Net Costs.

2032	$4,717,391	$3,222,822
10-year Total	**$54,079,601**	**$44,527,955**
Annualized Cost	**$6,339,779**	**$6,339,779**

B. Regulatory Flexibility Act (RFA)

1. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 and 602, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.[227]

An "individual" is not considered a small entity and costs to an individual are not considered a small entity impact for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities.[228] Consequently, indirect impacts from a rule on a small entity are not considered as costs for RFA purposes.

a. USCIS's RFA analysis for this proposed rule focuses on the population of Form I-129 petitions for H-1B workers. Where cost savings occur from multiple registrants no longer registering on behalf of a common beneficiary, either deliberately or inadvertently, USCIS is unable to quantify the portion of potential cost savings accruing to small entities. Some of these cost savings may be partially offset by the advantage multiple registrations conferred over single, unique registrants, but it is ambiguous whether such small entities enjoy this advantage or feel increasingly compelled to do this by their belief that other lottery competitors are doing so. A Description of the Reasons Why the Action by the Agency is Being Considered.

The purpose of this rulemaking is to modernize and improve the regulations relating to the H-1B program by: (1) streamlining the requirements of the H-1B program;

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[227] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

[228] See Small Business Administration*, A Guide For Government Agencies, How to Comply with the* Regulatory Flexibility Act. https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf (last visited Aug. 23 2023)

(2) improving program efficiency; (3) providing greater flexibility for petitioners and beneficiaries; and (4) improving integrity measures.

b. A Statement of the Objectives of, and Legal Basis for, the Proposed Rule.

DHS's objectives and legal authority for this proposed rule are discussed earlier in the preamble.

c. A Description and, Where Feasible, an Estimate of the Number of Small Entities to which the Proposed Changes Would Apply.

For this analysis, DHS conducted a sample analysis of historical Form I-129 H-1B petitions to estimate the number of small entities impacted by this proposed rule. DHS utilized a subscription-based electronic database of U.S. entities, ReferenceUSA, as well as three other open-access, free databases of public and private entities, Manta, Cortera, and Guidestar to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity. To determine whether an entity is small for purposes of RFA, DHS first classified the entity by its NAICS code and then used Small Business Administration (SBA) guidelines to classify the revenue or employee count threshold for each entity. Some entities were classified as small based on their annual revenue, and some by their numbers of employees.

Using FY 2022 internal data on actual filings of Form I-129 H-1B petitions, DHS identified 44,593 unique entities. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. DHS first determined the minimum sample size necessary to achieve a 95-percent confidence level confidence interval estimation for the impacted population of entities using the standard statistical formula at a 5-percent margin of error. DHS then created a sample size greater than the minimum necessary to increase the likelihood that our matches would meet or exceed the minimum required sample.

DHS randomly selected a sample of 3,396 entities from the population of 44,593 entities that filed Form I-129 for H-1B petitions in FY 2022. Of the 3,396 entities, 1,724

entities returned a successful match of a filing entity in the ReferenceUSA, Manta, Cortera, and Guidestar databases; 1,672 entities did not return a match. Using these databases' revenue or employee count and their assigned NAICS code, DHS determined 1,209 of the 1,724 matches to be small entities, 515 to be non-small entities. DHS assumes filing entities without database matches or missing revenue/employee count data are likely to be small entities. As a result, in order to prevent underestimating the number of small entities this proposed rule would affect, DHS considers all the non-matched and missing entities as small entities for the purpose of this analysis. Therefore, DHS classifies 2,881 of 3,396 entities as small entities, including combined non-matches (1,672), and small entity matches (1,209). Thus, DHS estimates that 84.8 percent (2,881 of 3,396) of the entities filing Form I-129 H-1B petitions are small entities.

In this analysis DHS assumes that the distribution of firm size for our sample is the same as the entire population of Form I-129 H-1B petitioners. Thus, DHS estimates the number of small entities to be 84.8 percent of the population of 44,593 entities that filed Form I-129 under the H-1B classification, as summarized in Table 60 below. The annual numeric estimate of the small entities impacted by this proposed rule is 37,815 entities.[229]

Table 60. Number of Small Entities for Form I-129 for H-1B, FY 2022

Population	Number of Small Entities	Proportion of Population (Percent)
44,593	37,815	84.8%

It should be acknowledged here that DHS's sample frame excludes H-2 petitioners identified by the RIA as benefitting from the proposal to no longer require itineraries, because this requirement has no adverse impacts to small entities and DHS has not

[229] The annual numeric estimate of the small entities (37,815) = Population (44,593) * Percentage of small entities (84.8%).

identified opportunities to further enhance this benefit to small entities. Similarly, the proposal to codify deference has no adverse impacts to small entities. Additionally, while the proposed clarity for evidence of maintenance of status may indirectly impact small entities filing such petitions and applications, the costs and benefits fall predominantly and more directly upon the individuals.

Following the distributional assumptions above, DHS uses the set of 1,209 small entities with matched revenue data to estimate the economic impact of the proposed rule on each small entity. The economic impact, in percentage, for each small entity is the sum of the impacts of the proposed changes divided by the entity's sales revenue.[230] DHS constructed the distribution of economic impact of the proposed rule based on the sample of 1,209 small entities. USCIS multiplied the proposed increase in cost per petition by the number of petitions filed by a small entity in FY22 to estimate the increase in cost to that small entity. USCIS then divided the increase in cost to that small entity by the annual revenue generated by that small entity. The average number of petitions filed per small entity was 10.3. Consequently, the average quantified increase per small entity was $152.43. Based on FY 2022 revenue, of the 1,209 small entities, 0 percent (0 small entities) would experience a cost increase that is greater than 1 percent of revenues.

In addition to the quantitated costs to small entities, employers who do not cooperate with site visits who would face denial or revocation of their petition(s), which could result in costs to those businesses.

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[230] The economic impact, in percentage, for each small entity *i* = ((Cost of one petition for entity *i* x Number of petitions for entity *i*) / Entity *i*'s sales revenue) x 100.

The cost of one petition for entity *i* ($14.82) is estimated by dividing the total cost of this proposed rule by the estimated population. $6,339,779 /427,822 = $14.82

The entity's sales revenue is taken from ReferenceUSA, Manta, Cortera, and Guidestar databases.

d. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities that will be Subject to the Requirement and the Types of Professional Skills.

The proposed beneficiary-centric selection process would result in additional burden to employers reporting beneficiaries' passport information in the registration system, on Form I-129 H-1B petition and on H Classification Supplement to Form I-129. DHS estimates increase for each of these respective burdens is 5 minutes.

e. An Identification of All Relevant Federal Rules, to the Extent Practical, that May Duplicate, Overlap, or Conflict with the Proposed Rule.

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any comment and information regarding any such rules.

f. A Description of Any Significant Alternatives to the Proposed Rule that Accomplish the Stated Objectives of Applicable Statutes and that Minimize any Significant Economic Impact of the Proposed Rule on Small Entities.

With respect to beneficiary-centric lottery, there are no burdens to be minimized. While collection of passport information imposes some burden to prospective employers, USCIS found no other alternatives that achieved stated objectives with less burden to small entities.

C. Unfunded Mandates Reform Act of 1995 (UMRA)

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule, that includes any Federal mandate that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.[231]

[231] *See* 2 U.S.C. 1532(a).

In addition, the inflation-adjusted value of $100 million in 1995 is approximately $192 million in 2022 based on the Consumer Price Index for All Urban Consumers (CPI-U).[232] This proposed rule does not contain a Federal mandate as the term is defined under UMRA.[233] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

D. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

E. Executive Order 12988: Civil Justice Reform

This proposed rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This proposed rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this proposed rule meets the applicable standards provided in section 3 of E.O. 12988.

F. Executive Order 13175 (Consultation and Coordination with Indian Tribal

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[232] *See* BLS, "Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month," *www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202212.pdf* (last visited Jan. 19, 2023). Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2022); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2022 – Average monthly CPI-U for 1995)/(Average monthly CPI-U for 1995)]*100=[(292.655–152.383)/152.383]*100=(140.272/152.383)*100=0.92052263*100=92.05 percent = 92 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars*1.92=$192 million in 2022 dollars.

[233] The term "Federal mandate" means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1), 658(6).

Governments)

This proposed rule does not have "tribal implications" because, if finalized, it would not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

G. National Environmental Policy Act (NEPA)

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act (NEPA)[234] applies to them and, if so, what degree of analysis is required. DHS Directive 023-01, Rev. 01 (Directive) and Instruction Manual 023-01-001-01, Rev. 01 (Instruction Manual)[235] establish the procedures DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA.[236] The CEQ regulations allow Federal agencies to establish in their NEPA implementing procedures categories of actions ("categorical exclusions") that experience has shown normally do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require preparation of an Environmental Assessment or Environmental Impact Statement.[237] Instruction Manual, Appendix A, Table 1 lists the DHS categorical exclusions.

Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece

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[234] *See* Public Law 91-190, 42 U.S.C. 4321 through 4347.
[235] *See* DHS, "Implementing the National Environmental Policy Act," DHS Directive 023-01, Rev 01 (Oct. 31, 2014), and DHS Instruction Manual Rev. 01 (Nov. 6, 2014), *https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex*.
[236] *See* 40 CFR parts 1500 through 1508.
[237] *See* 40 CFR 1501.4(a).

of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.[238]

As discussed throughout this preamble, this rulemaking includes a number of proposed regulatory improvements affecting H-1B specialty occupation workers, as well as a couple of provisions affecting other nonimmigrant classifications, including: H-2, H-3, F-1, L-1, O, P, Q-1, R-1, E-3, and TN. If finalized, this proposed rule is intended to modernize and improve the efficiency of the H-1B program by: (1) amending the definition of a "specialty occupation" and the specialty occupation criteria; (2) clarifying when to file an amended petition; (3) codifying deference given to prior USCIS determinations regarding the petitioner's, beneficiary's, or applicant's eligibility, when adjudicating certain extension requests (both H-1B and other nonimmigrant classifications) involving the same parties and the same underlying facts; (4) clarifying when a petitioner is required to submit evidence of maintenance of status; (5) eliminating the itinerary requirement for H nonimmigrant classifications; and (6) allowing H-1B petitioners to amend requested validity periods when the validity expires before adjudication. If finalized, this rulemaking will also modernize exemptions from the H-1B cap, extend automatic "cap-gap" extensions, and codify start date flexibility for certain cap-subject H-1B petitions. In addition, any final rule resulting from this NPRM will improve program integrity by curbing abuse of the H-1B registration process, including through beneficiary-centric selection; codifying USCIS's authority to request contracts; requiring that the petitioner establish that it will employ the beneficiary in a non-speculative position in a specialty occupation; verifying that the LCA corresponds with the petition; revising the definition of U.S. employer; eliminating the employer-employee relationship requirement; codifying the existing requirement that the petitioner have a bona fide job offer for the beneficiary to work within the United States; requiring that

[238] *See* Instruction Manual, section V.B.2 (a-c).

petitioners have a legal presence in the United States and be amenable to service of process in the United States; clarifying that beneficiary-owners may qualify for H-1B status; conducting site visits; and codifying the requirement that the specialty occupation determination be assessed based on the third party, rather than the petitioner, if a beneficiary will be staffed to a third party.

DHS is not aware of any significant impact on the environment, or any change in the environmental effect from current H-1B and other impacted nonimmigrant program rules, that will result from the proposed rule changes. DHS therefore finds this proposed rule clearly fits within categorical exclusion A3 established in the Department's implementing procedures.

The proposed amendments, if finalized, would be stand-alone rule changes and are not a part of any larger action. In accordance with the Instruction Manual, DHS finds no extraordinary circumstances associated with the proposed rules that may give rise to significant environmental effects requiring further environmental analysis and documentation. Therefore, this action is categorically excluded and no further NEPA analysis is required.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501-12, DHS must submit to OMB, for review and approval, any reporting requirements inherent in a rule unless they are exempt.

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the Federal Register to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the agency name and

OMB Control Number 1615-0144 and/or 1615-0009 in the body of the letter. Please refer to the **ADDRESSES** and **I. Public Participation** section of this proposed rule for instructions on how to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

H-1B Registration Tool (OMB Control No. 1615-0144)

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: H-1B Registration Tool.

(3) Agency form number, if any, and the applicable component of DHS sponsoring the collection: OMB-64; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Business or other for-profit. USCIS uses the data collected on this form to determine which employers will be informed that they may submit a USCIS Form I-129, Petition for Nonimmigrant Worker, for H-1B classification.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of

respondents for the information collection H-1B Registration Tool (Businesses) is 20,950 and the estimated hour burden per response is 0.6 hours. The estimated total number of respondents for the information collection H-1B Registration Tool (Attorneys) is 19,339 and the estimated hour burden per response is 0.6 hours. The total number of responses (355,590) is estimated by averaging the total number of registrations received during the H-1B cap fiscal years 2021, 2022, and 2023.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection of information is 213,354 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is $0.

Form I-129 (OMB Control No. 1615-0009)

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: Petition for Nonimmigrant Worker.

(3) Agency form number, if any, and the applicable component of DHS sponsoring the collection: I-129, E-1/E-2 Classification Supplement, Trade Agreement Supplement, H Classification Supplement, H-1B and H-1B1 Data Collection and Filing Exemption Supplement, L Classification Supplement, O and P Classification Supplement, Q-1 Classification Supplement, and R-1 Classification Supplement; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Business or other for-profit. USCIS uses Form I-129 and accompanying supplements to determine whether the petitioner and beneficiary(ies) is (are) eligible for the nonimmigrant classification. A U.S. employer, or agent in some instances, may file a petition for nonimmigrant worker to employ foreign nationals under

the following nonimmigrant classifications: H-1B, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, P-1S, P-2S, P-3S, Q-1, or R-1 nonimmigrant worker. The collection of this information is also required from a U.S. employer on a petition for an extension of stay or change of status for E-1, E-2, E-3, Free Trade H-1B1 Chile/Singapore nonimmigrants and TN (USMCA workers) who are in the United States.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I-129 is 294,751 and the estimated hour burden per response is 2.42 hours. The estimated total number of respondents for the information collection E-1/E-1 Classification Supplement is 4,760 and the estimated hour burden per response is 0.67 hours. The estimated total number of respondents for the information collection Trade Agreement Supplement is 3,057 and the estimated hour burden per response is 0.67 hours. The estimated total number of respondents for the information collection H Classification is 96,291 and the estimated hour burden per response is 2.07 hours. The estimated total number of respondents for the information collection H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement is 96,291 and the estimated hour burden per response is 1 hour. The estimated total number of respondents for the information collection L Classification Supplement is 37,831 and the estimated hour burden per response is 1.34 hour. The estimated total number of respondents for the information collection O and P Classification Supplement is 22,710 and the estimated hour burden per response is 1 hour. The estimated total number of respondents for the information collection Q-1 Classification Supplement is 155 and the estimated hour burden per response is 0.34 hours. The estimated total number of respondents for the information collection R-1 Classification Supplement is 6,635 and the estimated hour burden per response is 2.34 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection of information is 1,103,130 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is $70,681,290.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 214 -- NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

2. Amend § 214.1 by:

a. Revising paragraphs (c)(1) and (4);

b. Redesignating paragraph (c)(5) as paragraph (c)(7);

c. Adding new paragraph (c)(5) and paragraph (c)(6); and

d. Revising newly redesignated paragraph (c)(7).

The revisions and additions read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(1) *Extension or amendment of stay for certain employment-based nonimmigrant workers.* An applicant or petitioner seeking the services of an E-1, E-2, E-3, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, P-1S, P-2S, P-3S, Q-1, R-1, or TN nonimmigrant beyond the period previously granted, or seeking to amend the terms and conditions of the nonimmigrant's stay without a request for additional time, must file for an extension of stay or amendment of stay, on Form I-129, with the fee prescribed in 8 CFR 103.7, with the initial evidence specified in § 214.2, and in accordance with the form instructions. Dependents holding derivative status may be included in the petition if it is for only one worker and the form version specifically provides for their inclusion. In all other cases, dependents of the worker should file extensions of stay using Form I-539.

* * * * *

(4) *Timely filing and maintenance of status.* (i) An extension or amendment of stay may not be approved for an applicant or beneficiary who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that USCIS may excuse the late filing in its discretion where it is demonstrated at the time of filing that:

(A) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and USCIS finds the delay commensurate with the circumstances;

(B) The applicant or beneficiary has not otherwise violated their nonimmigrant status;

(C) The applicant or beneficiary remains a bona fide nonimmigrant; and

(D) The applicant or beneficiary is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

(ii) If USCIS excuses the late filing of an extension of stay or amendment of stay request, it will do so without requiring the filing of a separate application or petition and will grant the extension of stay from the date the previously authorized stay expired or the amendment of stay from the date the petition was filed.

(5) *Deference to prior USCIS determinations of eligibility*. When adjudicating a request filed on Form I-129 involving the same parties and the same underlying facts, USCIS gives deference to its prior determination of the petitioner's, applicant's, or beneficiary's eligibility. However, USCIS need not give deference to a prior approval if: there was a material error involved with a prior approval; there has been a material change in circumstances or eligibility requirements; or there is new, material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility.

(6) *Evidence of maintenance of status.* When requesting an extension or amendment of stay on Form I-129, an applicant or petitioner must submit supporting evidence to establish that the applicant or beneficiary maintained the previously accorded nonimmigrant status before the extension or amendment request was filed. Evidence of such maintenance of status may include, but is not limited to: copies of paystubs, W-2 forms, quarterly wage reports, tax returns, contracts, and work orders.

(7) *Decision on extension or amendment of stay request*. Where an applicant or petitioner demonstrates eligibility for a requested extension or amendment of stay, USCIS may grant the extension or amendment in its discretion. The denial of an extension or amendment of stay request may not be appealed.

* * * * *

3. Amend § 214.2 by:

a. Revising paragraph (f)(5)(vi)(A);

b. Removing and reserving paragraph (h)(2)(i)(B);

c. Revising paragraphs (h)(2)(i)(E), (F), and (G) and (h)(4)(i)(B);

d. Revising the definitions of “Specialty occupation” and “United States employer” in paragraph (h)(4)(ii);

e. Revising paragraphs (h)(4)(iii) heading and (h)(4)(iii)(A);

f. Adding paragraph (h)(4)(iii)(F);

g. Revising paragraph (h)(4)(iv) introductory text;

h. Adding paragraph (h)(4)(iv)(C);

i. Revising paragraphs (h)(8)(iii)(A)(*1*), (*2*), (*4*), and (*5*), (h)(8)(iii)(A)(*6*)(*i*) and (*ii*), (h)(8)(iii)(A)(*7*), (h)(8)(iii)(D) and (E), (h)(8)(iii)(F)(*2*)(*iv*), (h)(8)(iii)(F)(*4*), and (h)(9)(i);

j. Adding paragraphs (h)(9)(ii)(D) and (h)(9)(iii)(E);

k. Revising paragraph (h)(10)(ii);

l. Adding paragraph (h)(10)(iii);

m. Revising paragraphs (h)(11)(ii) and (h)(11)(iii)(A)(*2*) and (*5*);

n. Adding paragraphs (h)(11)(iii)(A)(*6*) and (*7*); and

o. Revising paragraphs (h)(14), (h)(19)(iii)(B)(*4*), (h)(19)(iii)(C), (h)(19)(iv), (l)(14)(i), (o)(11), and (p)(13).

The revisions and additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(f) * * *

(5) * * *

(vi) * * *

(A) The duration of status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), of an F-1 student who is the beneficiary of an H-1B petition subject to section 214(g)(1)(A) of the Act (8 U.S.C. 1184(g)(1)(A)) and who requests a change of status will be automatically extended until April 1 of the fiscal year

for which such H-1B status is being requested or until the validity start date of the approved petition, whichever is earlier, where such petition:

(*1*) Has been timely filed;

(*2*) Requests an H-1B employment start date in the fiscal year for which such H-1B status is being requested consistent with paragraph (h)(2)(i)(I) of this section; and

(*3*) Is nonfrivolous.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(E) *Amended or new petition*—(*1*) *General provisions.* The petitioner must file an amended or new petition, with the appropriate fee and in accordance with the form instructions, to reflect any material changes in the terms and conditions of employment or training or the beneficiary's eligibility as specified in the original approved petition. An amended or new H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, the requirement in this paragraph (h)(2)(i)(E)(*1*) includes a current or new certified labor condition application.

(*2*) *Additional H-1B provisions*. The amended or new petition must be properly filed before the material change(s) takes place. The beneficiary is not authorized to work under the materially changed terms and conditions of employment until the new or amended H-1B petition is approved and takes effect, unless the beneficiary is eligible for H-1B portability pursuant to paragraph (h)(2)(i)(H) of this section. Any change in the place of employment to a geographical area that requires a corresponding labor condition application to be certified to USCIS is considered a material change and requires an amended or new petition to be filed with USCIS before the H-1B worker may begin work

at the new place of employment. Provided there are no material changes in the terms and conditions of the H-1B worker's employment, a petitioner does not need to file an amended or new petition when:

(*i*) Moving a beneficiary to a new job location within the same area of intended employment as listed on the labor condition application certified to USCIS in support of the current H-1B petition approval authorizing the H-1B nonimmigrant's employment;

(*ii*) Placing a beneficiary at a short-term placements(s) or assignment(s) at any worksite(s) outside of the area of intended employment for a total of 30 days or less in a 1-year period, or for a total of 60 days or less in a 1-year period where the H-1B beneficiary continues to maintain an office or work station at their permanent worksite, the beneficiary spends a substantial amount of time at the permanent worksite in a 1-year period, and the beneficiary's residence is located in the area of the permanent worksite and not in the area of the short-term worksite(s); or

(*iii*) An H-1B beneficiary is going to a non-worksite location to participate in employee development, will be spending little time at any one location, or when the job is peripatetic in nature, in that the normal duties of the beneficiary's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location. Peripatetic jobs include situations where the job is primarily at one location, but the beneficiary occasionally travels for short periods to other locations on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding 5 consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations).

(F) *Agents as petitioners*. A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases

where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary; the representative of both the employer and the beneficiary; or a person or entity authorized by the employer to act for, or in place of, the employer as its agent. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required.

(*1*) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition.

(*2*) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

(G) *Multiple H-1B petitions or registrations*. An employer may not file or submit, in the same fiscal year, more than one H-1B petition or registration on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is eligible for exemption from those limitations under section 214(g)(5)(C) of the Act. However, if an H-1B petition is denied, on a basis other than fraud or misrepresentation, the employer may file a subsequent H-1B petition on behalf of the same alien in the same fiscal year, provided that USCIS continues to accept registrations, or petitions if registration is suspended, towards the numerical allocations and there is a valid registration that was selected on behalf of that beneficiary, or if the filing qualifies as exempt from the applicable numerical limitations. Otherwise, filing or submitting more than one H-1B petition or registration by an employer on behalf of the same alien in the same fiscal year may result in the denial or revocation of all such petitions and invalidation of all such registrations. If USCIS believes that related entities (including,

but not limited to, a parent company, subsidiary, or affiliate) may not have a legitimate business need to file or submit more than one H-1B petition or registration on behalf of the same alien subject to the numerical limitations of section 214(g)(1)(A) of the Act or otherwise eligible for an exemption under section 214(g)(5)(C) of the Act, USCIS may issue a request for evidence, notice of intent to deny, or notice of intent to revoke each petition. If any of the related entities fail to demonstrate a legitimate business need to file or submit an H-1B petition or registration on behalf of the same alien, all petitions filed on that alien's behalf by the related entities may be denied or revoked, and all such registrations invalidated. This limitation on petitions and registrations will not apply if the multiple filings or submissions occurred as a result of USCIS requiring petitioners to refile or resubmit previously submitted petitions or registrations.

* * * * *

(4) * * *

(i) * * *

(B) *General requirements for petitions involving a specialty occupation*—(*1*) *Labor condition application requirements*. (*i*) Before filing a petition for H-1B classification in a specialty occupation, the petitioner must obtain a certified labor condition application from the Department of Labor in the occupational specialty in which the alien(s) will be employed.

(*ii*) Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by the agency that the occupation in question is a specialty occupation. USCIS will determine whether the labor condition application involves a specialty occupation as defined in section 214(i)(1) of the Act and properly corresponds with the petition. USCIS will also determine whether all other eligibility requirements have been met, such as whether the alien for whom H-

1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

(*iii*) If all of the beneficiaries covered by an H-1B labor condition application have not been identified at the time a petition is filed, petitions for newly identified beneficiaries may be filed at any time during the validity of the labor condition application using photocopies of the same certified labor condition application. Each petition must refer by file number to all previously approved petitions for that labor condition application.

(*iv*) When petitions have been approved for the total number of workers specified in the labor condition application, substitution of aliens against previously approved openings cannot be made. A new labor condition application will be required.

(*v*) If the Secretary of Labor notifies USCIS that the petitioning employer has failed to meet a condition of paragraph (B) of section 212(n)(1) of the Act, has substantially failed to meet a condition of paragraphs (C) or (D) of section 212(n)(1) of the Act, has willfully failed to meet a condition of paragraph (A) of section 212(n)(1) of the Act, or has misrepresented any material fact in the application, USCIS will not approve petitions filed with respect to that employer under section 204 or 214(c) of the Act for a period of at least 1 year from the date of receipt of such notice.

(*vi*) If the employer's labor condition application is suspended or invalidated by the Department of Labor, USCIS will not suspend or revoke the employer's approved petitions for aliens already employed in specialty occupations if the employer has certified to the Department of Labor that it will comply with the terms of the labor condition application for the duration of the authorized stay of aliens it employs.

(*2*) *Inspections, evaluations, verifications, and compliance reviews*. (*i*) The information provided on an H-1B petition and the evidence submitted in support of such petition may be verified by USCIS through lawful means as determined by USCIS,

including telephonic and electronic verifications and onsite inspections. Such verifications and inspections may include, but are not limited to: electronic validation of a petitioner's or third party's basic business information; visits to the petitioner's or third party's facilities; interviews with the petitioner's or third party's officials; reviews of the petitioner's or third party's records related to compliance with immigration laws and regulations; and interviews with any other individuals possessing pertinent information, as determined by USCIS, which may be conducted in the absence of the employer or the employer's representatives; and reviews of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the H-1B petition, such as facts relating to the petitioner's and beneficiary's H-1B eligibility and compliance. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the interviewee and USCIS away from the employer's property. An inspection may be conducted at locations including the petitioner's headquarters, satellite locations, or the location where the beneficiary works, has worked, or will work, including third party worksites, as applicable. USCIS may commence verification or inspection under this paragraph for any petition and at any time after an H-1B petition is filed, including any time before or after the final adjudication of the petition. The commencement of such verification and inspection before the final adjudication of the petition does not preclude the ability of USCIS to complete final adjudication of the petition before the verification and inspection are completed.

(*ii*) USCIS conducts on-site inspections or other compliance reviews to verify facts related to the adjudication of the petition and compliance with H-1B petition requirements. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or a third party to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H-1B petition for H-1B workers performing services

at the location or locations that are a subject of inspection or compliance review, including any third party worksites.

(*3*) *Third party requirements.* If the beneficiary will be staffed to a third party, meaning they will be contracted to fill a position in a third party's organization and becomes part of that third party's organizational hierarchy by filling a position in that hierarchy (and not merely providing services to the third party), the actual work to be performed by the beneficiary must be in a specialty occupation. When staffed to a third party, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation.

* * * * *

(ii) * * *

Specialty occupation means an occupation that requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and that requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. The required specialized studies must be directly related to the position. A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. A position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position.

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States that:

(*1*) Has a bona fide job offer for the beneficiary to work within the United States, which may include telework, remote work, or other off-site work within the United States;

(*2*) Has a legal presence in the United States and is amenable to service of process in the United States; and

(*3*) Has an Internal Revenue Service Tax identification number.

(*4*) If the H-1B beneficiary possesses a controlling interest in the petitioner, such a beneficiary may perform duties that are directly related to owning and directing the petitioner's business as long as the beneficiary will perform specialty occupation duties a majority of the time, consistent with the terms of the H-1B petition.

(iii) *General H-1B requirements*—(A) *Criteria for specialty occupation position*. A position does not meet the definition of specialty occupation in paragraph (h)(4)(ii) of this section unless it also satisfies at least one of the following criteria at paragraphs (h)(4)(iii)(A)(*1*) through (*4*) of this section:

(*1*) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular occupation;

(*2*) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is normally required for parallel positions among similar organizations in the employer's United States industry;

(*3*) The employer, or third party if the beneficiary will be staffed to that third party, normally requires a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, for the position; or

(*4*) The specific duties of the proffered position are so specialized, complex, or unique that the knowledge required to perform the duties are normally associated with the

attainment of a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent.

(*5*) For purposes of the criteria at paragraphs (h)(4)(iii)(A)(*1*) through (*4*) of this section, normally means conforming to a type, standard, or regular pattern, and is characterized by that which is considered usual, typical, common, or routine. Normally does not mean always.

* * * * *

(F) *Non-speculative position in a specialty occupation*. At the time of filing, the petitioner must establish that it has a non-speculative position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.

(iv) *General documentary requirements for H–1B classification in a specialty occupation*. Except as specified in paragraph (h)(4)(iv)(C) of this section, an H–1B petition involving a specialty occupation must be accompanied by:

* * * * *

(C) In accordance with 8 CFR 103.2(b) and paragraph (h)(9) of this section, USCIS may request evidence such as contracts, work orders, or other similar evidence between all parties in a contractual relationship showing the terms and conditions of the beneficiary's work and the minimum educational requirements to perform the duties.

* * * * *

(8) * * *

(iii) * * *

(A) * * *

(*1*) *Registration requirement*. Except as provided in paragraph (h)(8)(iv) of this section, before a petitioner can file an H-1B cap-subject petition for a beneficiary who may be counted under section 214(g)(1)(A) of the Act ("H-1B regular cap") or eligible

for exemption under section 214(g)(5)(C) of the Act ("H-1B advanced degree exemption"), the petitioner must register to file a petition on behalf of a beneficiary electronically through the USCIS website (www.uscis.gov). To be eligible to file a petition for a beneficiary who may be counted against the H-1B regular cap or the H-1B advanced degree exemption for a particular fiscal year, a registration must be properly submitted in accordance with 8 CFR 103.2(a)(1), paragraph (h)(8)(iii) of this section, and the form instructions, for the same fiscal year.

(*2*) *Limitation on beneficiaries*. A prospective petitioner must electronically submit a separate registration for each beneficiary it seeks to register, and each beneficiary must be named. A petitioner may only submit one registration per beneficiary in any fiscal year. If a petitioner submits more than one registration per beneficiary in the same fiscal year, all registrations filed by that petitioner relating to that beneficiary for that fiscal year may be considered invalid, and USCIS may deny or revoke the approval of any petition filed for the beneficiary based on those registrations. If USCIS determines that registrations were submitted for the same beneficiary by the same or different registrants, but using different identifying information, USCIS may find those registrations invalid and deny or revoke the approval of any petition filed based on those registrations. Petitioners will be given notice and the opportunity to respond before USCIS denies or revokes the approval of a petition.

* * * * *

(*4*) *Selecting registrations based on unique beneficiaries*. Registrations will be counted based on the number of unique beneficiaries who are registered.

(*i*) Should a random selection be necessary, each unique beneficiary will only be counted once towards the random selection of registrations, regardless of how many registrations were submitted for that beneficiary. A petitioner may file an H-1B cap-subject petition on behalf of a registered beneficiary only after a registration for that

beneficiary has been selected for that fiscal year. USCIS will notify all registrants that submitted a registration on behalf of a selected beneficiary that they may file a petition for that beneficiary.

(*ii*) Registrations must include the beneficiary's valid passport information, as specified in the form instructions. Each beneficiary must only be registered under one passport, and if the beneficiary is abroad, the passport information must correspond to the passport the beneficiary intends to use to enter the United States.

(*5*) *Regular cap selection*. In determining whether there are enough registrations for unique beneficiaries to meet the H-1B regular cap, USCIS will consider all properly submitted registrations relating to beneficiaries that may be counted under section 214(g)(1)(A) of the Act, including those that may also be eligible for exemption under section 214(g)(5)(C) of the Act. Registrations will be counted based on the number of unique beneficiaries that are registered.

(*i*) *Fewer registrations than needed to meet the H-1B regular cap*. At the end of the annual initial registration period, if USCIS determines that it has received fewer registrations for unique beneficiaries than needed to meet the H-1B regular cap, USCIS will notify all petitioners that have properly registered that their registrations have been selected. USCIS will keep the registration period open beyond the initial registration period, until it determines that it has received a sufficient number of registrations for unique beneficiaries to meet the H-1B regular cap. Once USCIS has received a sufficient number of registrations for unique beneficiaries to meet the H-1B regular cap, USCIS will no longer accept registrations for petitions subject to the H-1B regular cap under section 214(g)(1)(A). USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations for unique beneficiaries (the "final registration date"). The day the public is notified will not control the applicable final registration date. When necessary to ensure

the fair and orderly allocation of numbers under section 214(g)(1)(A) of the Act, USCIS may randomly select the remaining number of registrations for unique beneficiaries deemed necessary to meet the H-1B regular cap from among the registrations received on the final registration date. This random selection will be made via computer-generated selection, based on the unique beneficiary.

(*ii*) *Sufficient registrations to meet the H-1B regular cap during initial registration period*. At the end of the initial registration period, if USCIS determines that it has received more than sufficient registrations for unique beneficiaries to meet the H-1B regular cap, USCIS will no longer accept registrations under section 214(g)(1)(A) of the Act and will notify the public of the final registration date. USCIS will randomly select from among the registrations properly submitted during the initial registration period the number of registrations for unique beneficiaries deemed necessary to meet the H-1B regular cap. This random selection will be made via computer-generated selection, based on the unique beneficiary.

(*6*) * * *

(*i*) *Fewer registrations than needed to meet the H-1B advanced degree exemption numerical limitation*. If USCIS determines that it has received fewer registrations for unique beneficiaries than needed to meet the H-1B advanced degree exemption numerical limitation, USCIS will notify all petitioners that have properly registered that their registrations have been selected. USCIS will continue to accept registrations to file petitions for beneficiaries that may be eligible for the H-1B advanced degree exemption under section 214(g)(5)(C) of the Act until USCIS determines that it has received enough registrations for unique beneficiaries to meet the H-1B advanced degree exemption numerical limitation. USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations for unique beneficiaries (the "final registration date"). The day the public is

notified will not control the applicable final registration date. When necessary to ensure the fair and orderly allocation of numbers under sections 214(g)(1)(A) and 214(g)(5)(C) of the Act, USCIS may randomly select the remaining number of registrations for unique beneficiaries deemed necessary to meet the H-1B advanced degree exemption numerical limitation from among the registrations properly submitted on the final registration date. This random selection will be made via computer-generated selection, based on the unique beneficiary.

(*ii*) *Sufficient registrations to meet the H-1B advanced degree exemption numerical limitation*. If USCIS determines that it has received more than enough registrations for unique beneficiaries to meet the H-1B advanced degree exemption numerical limitation, USCIS will no longer accept registrations that may be eligible for exemption under section 214(g)(5)(C) of the Act and will notify the public of the final registration date. USCIS will randomly select the number of registrations for unique beneficiaries needed to meet the H-1B advanced degree exemption numerical limitation from among the remaining registrations for unique beneficiaries who may be counted against the advanced degree exemption numerical limitation. This random selection will be made via computer-generated selection, based on the unique beneficiary.

(*7*) *Increase to the number of beneficiaries projected to meet the H-1B regular cap or advanced degree exemption allocations in a fiscal year*. Unselected registrations will remain on reserve for the applicable fiscal year. If USCIS determines that it needs to increase the number of registrations for unique beneficiaries projected to meet the H-1B regular cap or advanced degree exemption allocation, and select additional registrations for unique beneficiaries, USCIS will select from among the registrations that are on reserve a sufficient number to meet the H-1B regular cap or advanced degree exemption numerical limitation, as applicable. If all of the registrations on reserve are selected and there are still fewer registrations than needed to meet the H-1B regular cap or advanced

degree exemption numerical limitation, as applicable, USCIS may reopen the applicable registration period until USCIS determines that it has received a sufficient number of registrations for unique beneficiaries projected as needed to meet the H-1B regular cap or advanced degree exemption numerical limitation. USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the new "final registration date"). The day the public is notified will not control the applicable final registration date. When necessary to ensure the fair and orderly allocation of numbers, USCIS may randomly select the remaining number of registrations for unique beneficiaries deemed necessary to meet the H-1B regular cap or advanced degree exemption numerical limitation from among the registrations properly submitted on the final registration date. If the registration period will be re-opened, USCIS will announce the start of the re-opened registration period on the USCIS website at www.uscis.gov.

* * * * *

(D) *H-1B cap-subject petition filing following registration*—(*1*) *Filing procedures*. In addition to any other applicable requirements, a petitioner may file an H-1B petition for a beneficiary who may be counted under section 214(g)(1)(A) or eligible for exemption under section 214(g)(5)(C) of the Act only if the petition is based on a valid registration, which means that the registration was properly submitted in accordance with 8 CFR 103.2(a)(1), paragraph (h)(8)(iii) of this section, and the registration tool instructions, and was submitted by the petitioner, or its designated representative, on behalf of the beneficiary who was selected for that cap season by USCIS. A petitioner may not substitute the beneficiary named in the original registration or transfer the registration to another petitioner. Any H-1B petition filed on behalf of a beneficiary must contain and be supported by the same identifying information provided in the selected registration. Petitioners must submit evidence of the passport used at the time of

registration to identify the beneficiary. In its discretion, USCIS may find that a change in identifying information in some circumstances would be permissible. Such circumstances could include, but are not limited to, a legal name change due to marriage, change in gender identity, or a change in passport number or expiration date due to renewal or replacement of a stolen passport, in between the time of registration and filing the petition. USCIS may deny or revoke the approval of an H-1B petition that does not meet these requirements.

(*2*) *Registration fee*. USCIS may deny or revoke the approval of an H-1B petition if it determines that the fee associated with the registration is declined, not reconciled, disputed, or otherwise invalid after submission. The registration fee is non-refundable and due at the time the registration is submitted.

(*3*) *Filing period*. An H-1B cap-subject petition must be properly filed within the filing period indicated on the relevant selection notice. The filing period for filing the H-1B cap-subject petition will be at least 90 days. If petitioners do not meet the requirements of this paragraph (h)(8)(iii)(D), USCIS may deny or reject the H-1B cap-subject petition.

(E) *Calculating the number of registrations needed to meet the H-1B regular cap and H-1B advanced degree exemption allocation*. When calculating the number of registrations for unique beneficiaries needed to meet the H-1B regular cap and the H-1B advanced degree exemption numerical limitation for a given fiscal year, USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. If necessary, USCIS may increase those numbers throughout the fiscal year.

(F) * * *

(*2*) * * *

(*iv*) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship

between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. A nonprofit entity may engage in more than one fundamental activity.

* * * * *

(*4*) An H-1B beneficiary who is not directly employed by a qualifying institution, organization, or entity identified in section 214(g)(5)(A) or (B) of the Act will qualify for an exemption under such section if the H-1B beneficiary will spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research. Work performed "at" the qualifying institution may include work performed in the United States through telework, remote work, or other off-site work. When considering whether a position is cap-exempt, USCIS will focus on the job duties to be performed, rather than where the duties are physically performed.

* * * * *

(9) * * *

(i) *Approval.* (A) USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication. USCIS will notify the petitioner of the approval of the petition on a Notice of Action. The approval notice will include the beneficiary's (or beneficiaries') name(s) and classification and the petition's period of validity. A petition for more than one beneficiary and/or multiple services may be approved in whole or in part. The approval notice will cover only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act.

(B) Where an H-1B petition is approved for less time than requested on the petition, the approval notice will provide or be accompanied by a brief explanation for the validity period granted.

(ii) * * *

(D)(*1*) If an H-1B petition is adjudicated and deemed approvable after the initially requested validity period end-date or end-date for which eligibility is established, the officer may issue a request for evidence (RFE) asking the petitioner whether they want to update the requested dates of employment. Factors that inform whether USCIS issues an RFE could include, but would not be limited to: additional petitions filed or approved on the beneficiary's behalf, or the beneficiary's eligibility for additional time in H-1B status. If the new requested period exceeds the validity period of the labor condition application already submitted with the H-1B petition, the petitioner must submit a certified labor condition application with a new validity period that properly corresponds to the new requested validity period on the petition and an updated prevailing or proffered wage, if applicable, except that the petitioner may not reduce the proffered wage from that originally indicated in their petition. This labor condition application may be certified after the date the H-1B petition was filed with USCIS. The request for new dates of employment and submission of a labor condition application corresponding with the new dates of employment, absent other changes, will not be considered a material change. An increase to the proffered wage will not be considered a material change, as long as there are no other material changes to the position.

(*2*) If USCIS does not issue an RFE concerning the requested dates of employment, if the petitioner does not respond, or the RFE response does not support new dates of employment, the petition will be approved, if otherwise approvable, for the originally requested period or until the end-date eligibility has been established, as appropriate. However, the petition will not be forwarded to the Department of State nor

will any accompanying request for a change of status, an extension of stay, or amendment of stay, be granted.

(iii) * * *

(E) *H-1B petition for certain beneficiary-owned entities.* The initial approval of a petition filed by a United States employer in which the H-1B beneficiary possesses a controlling ownership interest in the petitioning organization or entity will be limited to a validity period of up to 18 months. The first extension (including an amended petition with a request for an extension of stay) of such a petition will also be limited to a validity period of up to 18 months.

* * * * *

(10) * * *

(ii) *Denial for statement of facts on the petition, H-1B registration, temporary labor certification, labor condition application, or invalid H-1B registration.* The petition will be denied if it is determined that the statements on the petition, H-1B registration (if applicable), the application for a temporary labor certification, or the labor condition application, were inaccurate, fraudulent, or misrepresented a material fact, including if the attestations on the registration are determined to be false. An H-1B cap-subject petition also will be denied if it is not based on a valid registration submitted by the petitioner (or its designated representative), or a successor in interest, for the beneficiary named or identified in the petition.

(iii) *Notice of denial*. The petitioner will be notified of the reasons for the denial and of the right to appeal the denial of the petition under 8 CFR part 103. There is no appeal from a decision to deny an extension of stay to the alien.

(11) * * *

(ii) *Immediate and automatic revocation*. The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a

written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based. The approval of an H-1B petition is also immediately and automatically revoked upon notification from the H-1B petitioner that the beneficiary is no longer employed.

(iii) * * *

(A) * * *

(*2*) The statement of facts contained in the petition, H-1B registration (if applicable), the application for a temporary labor certification, or the labor condition application, was not true and correct, inaccurate, fraudulent, or misrepresented a material fact, including if the attestations on the registration are determined to be false; or

* * * * *

(*5*) The approval of the petition violated paragraph (h) of this section or involved gross error;

(*6*) The H-1B cap-subject petition was not based on a valid registration submitted by the petitioner (or its designated representative), or a successor in interest, for the beneficiary named or identified in the petition; or

(*7*) The petitioner failed to timely file an amended petition notifying USCIS of a material change or otherwise failed to comply with the material change reporting requirements in paragraph (h)(2)(i)(E) of this section.

* * * * *

(14) *Extension of visa petition validity.* The petitioner must file a request for a petition extension on the Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. A request for a petition extension generally may be filed only if the validity of the original petition has not expired.

* * * * *

(19) * * *

(iii) * * *

(B) * * *

(*4*) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. A nonprofit entity may engage in more than one fundamental activity.

(C) *A nonprofit research organization or government research organization*. When a fundamental activity of a nonprofit organization is engaging in basic research and/or applied research, that organization is a nonprofit research organization. When a fundamental activity of a governmental organization is the performance or promotion of basic research and/or applied research, that organization is a government research organization. A governmental research organization may be a Federal, state, or local entity. A nonprofit research organization or governmental research organization may perform or promote more than one fundamental activity. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. Both basic research and applied research may include research and investigation in the sciences, social sciences, or humanities and may

include designing, analyzing, and directing the research of others if on an ongoing basis and throughout the research cycle.

* * * * *

(iv) *Nonprofit or tax-exempt organizations*. For purposes of paragraphs (h)(19)(iii)(B) and (C) of this section, a nonprofit organization or entity must be determined by the Internal Revenue Service as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6).

* * * * *

(l) * * *

(14) * * *

(i) *Individual petition.* The petitioner must file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. A petition extension generally may be filed only if the validity of the original petition has not expired.

* * * * *

(o) * * *

(11) *Extension of visa petition validity.* The petitioner must file a request to extend the validity of the original petition under section 101(a)(15)(O) of the Act on the form prescribed by USCIS, in order to continue or complete the same activities or events specified in the original petition. A petition extension generally may be filed only if the validity of the original petition has not expired.

* * * * *

(p) * * *

(13) *Extension of visa petition validity.* The petitioner must file a request to extend the validity of the original petition under section 101(a)(15)(P) of the Act on the form

prescribed by USCIS in order to continue or complete the same activity or event specified in the original petition. A petition extension generally may be filed only if the validity of the original petition has not expired.

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Alejandro N. Mayorkas,
Secretary,
U.S. Department of Homeland Security.

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