

*The following is the text of the proposed rule that the Acting Secretary approved on October 28, 2020. The official version of this document will publish in the Federal Register and be available at <https://www.federalregister.gov>. The comment period will open on the date of the official version's publication in the Federal Register.*

9111-97P

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 214**

**[CIS No. 2674-20; DHS Docket No. USCIS-2020-0019]**

**RIN 1615-AC61**

**Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions**

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS or the Department) proposes to amend its regulations governing the process by which U.S. Citizenship and Immigration Services (USCIS) selects H-1B registrations for filing of H-1B cap-subject petitions (or H-1B petitions for any year in which the registration requirement will be suspended), by generally first selecting registrations based on the highest Occupational Employment Statistics (OES) prevailing wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code and area(s) of intended employment. This proposed rule would not affect the order of selection as between the regular cap and the advanced degree exemption. The wage level ranking would occur first for the regular cap selection and then for the advanced degree exemption.

Rote ordering of petitions leads to impossible results because petitions are submitted simultaneously. A random lottery system is reasonable, but inconsiderate of Congress's statutory purposes for the H-1B program and its administration. Instead, a registration system that faithfully implements the INA while prioritizing registrations based on wage level within each

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cap would increase the average and median wage levels of H-1B beneficiaries who would be selected for further processing under the H-1B allocations. Moreover, it would maximize H-1B cap allocations, so that they more likely would go to the best and brightest workers.

**DATES:** Written comments must be submitted on this proposed rule on or before [Insert date 30 days after date of publication in THE FEDERAL REGISTER]. Comments on the collection of information (see Paperwork Reduction Act section) must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments on both the proposed rule and the collection of information received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered by DHS and USCIS. Only comments on the collection of information received between [INSERT DATE 31 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] and [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered by DHS and USCIS. Comments received after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] on the proposed rule other than those specific to the collection of information will not be considered by DHS and USCIS.

**ADDRESSES:** You may submit comments on the entirety of this proposed rule package, identified by DHS Docket No. USCIS-2020-0019, through the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the website instructions for submitting comments. Comments submitted in a manner other than the one listed above, including e-mails 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

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comments that are hand delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. Due to COVID-19, USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using <http://www.regulations.gov>, please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (202) 658-9621 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, Department of Homeland Security, 20 Massachusetts Ave. NW, Suite 1100, Washington, DC 20529-2120. Telephone Number (202) 658-9621 (not a toll-free call).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

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## **II. 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

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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 DHS 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 supports such a recommended change. Comments submitted in a manner other than those listed in the ADDRESSES section, including e-mails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule. Please note that DHS and USCIS cannot accept any comments that are hand delivered or couriered. In addition, USCIS cannot accept mailed comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives.

**Instructions:** If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS-2020-0019 for this proposed rule. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://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 <http://www.regulations.gov>.

**Docket:** For access to the docket and to read background documents or comments

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received, go to <http://www.regulations.gov>, referencing DHS Docket No. USCIS-2020-0019.

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.

### **III. Background**

#### **A. Purpose and Summary of the Regulatory Action**

On April 18, 2017, the President issued an executive order that instructed DHS to “propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system.”<sup>1</sup> E.O. 13788 specifically mentioned the H-1B program and directed DHS and other agencies to “suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”<sup>2</sup> On June 22, 2020, the President issued a Proclamation, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak* (Proclamation).<sup>3</sup> Section 5 of the Proclamation directs the Secretary of Homeland Security to, “as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action regarding the efficient allocation of visas pursuant to section 214(g)(3) of the INA (8 U.S.C. 1184(g)(3)) and ensuring that the

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<sup>1</sup> See Executive Order 13788, *Buy American and Hire American*, 82 FR 18837, sec. 5 (Apr. 18, 2017).

<sup>2</sup> See *id.* at sec. 5(b).

<sup>3</sup> See Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 FR 38263 (June 25, 2020).

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presence in the United States of H-1B nonimmigrants does not disadvantage United States workers.”<sup>4</sup>

DHS proposes to amend its regulations governing the selection of registrations submitted by prospective petitioners eventually seeking to file H-1B cap-subject petitions (or the selection of petitions, if the registration process were suspended), which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to allow for ranking and selection based on wage levels. When applicable, USCIS would rank and select the registrations received generally on the basis of the highest OES wage level that the proffered wage would equal or exceed for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. The proffered wage is the wage that the employer intends to pay the beneficiary. As explained in greater detail below, this ranking process would not alter the prevailing wage level associated with a given position for U.S. Department of Labor (DOL) purposes, which is informed by a comparison of the requirements for the proffered position to the normal requirements for the occupational classification.

Prioritizing wage levels in the registration selection process incentivizes employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, to increase the likelihood of selection for an eventual petition. Similarly, it disincentivizes abuse of the H-1B program to fill lower-paid, lower-skilled positions, which is a significant problem under the present selection system.<sup>5</sup> With

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<sup>4</sup> *See id.*

<sup>5</sup> *See* U.S. Department of Homeland Security, U.S. Citizenship and Immigration. Services, Office of Policy and Strategy, Policy Research Division, *I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for*

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limited exceptions, H-1B petitioners are not required to demonstrate a labor shortage as a prerequisite for obtaining H-1B workers.

The number of H-1B cap-subject petitions, including those filed for the advanced degree exemption, has frequently exceeded the annual H-1B numerical allocations. For at least the last decade, USCIS has received more H-1B petitions than the annual H-1B numerical allocation in those respective years. Since the FY2014 cap season (April 2013), USCIS has received more H-1B petitions (or registrations) in the first five days of filing (or the initial registration period) than the annual H-1B numerical allocations. But the INA states that “aliens who are subject to the numerical limitations . . . shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status.”<sup>6</sup> A rote interpretation of this provision is impossible.<sup>7</sup> “365 days in a year and 85,000 available visas” means many submissions are received on the same day.<sup>8</sup> For example, under the prior petition selection process (which remains in effect in any year in which registration is suspended), USCIS received hundreds of thousands of full H-1B petitions in the mail on the same day and had no legitimate way to determine which petition was “filed” first. Therefore, DHS promulgated a regulation describing

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*H-1B Petitions filed in FY2018*, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 161,432 of the 189,963 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages); *I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for H-1B Petitions filed in FY2019*, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 87,589 of the 103,067 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages).

<sup>6</sup> See INA section 214(g)(3).

<sup>7</sup> See Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 FR 888, 896 (Jan. 31, 2019).

<sup>8</sup> See *Walker Macy LLC v. United States Citizenship & Immigration Servs.*, 243 F. Supp. 3d 1156, 1170 (D. Or. 2017).



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a random registration selection process before any petitions are filed.<sup>9</sup> A passive interpretation of the statutory requirement is similarly impossible to apply under the current electronic registration system because it would result in hundreds of thousands of registrants uploading registration information online at the exact same moment, at best leaving computer speed as the determinant as to who registered first.

The current random lottery selection process is reasonable, but not optimal. It has caused results that contradict the purpose of the statute. However, “[i]t is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose.”<sup>10</sup> Yet, under the current registration system the majority of H-1B cap-subject petitions have been filed for positions certified at the two lowest wage levels: level I or level II prevailing wages.<sup>11</sup> This contradicts the dominant legislative purpose of the statute because the intent of the H-1B program is to help U.S. employers fill labor shortages in positions requiring *highly skilled or highly educated* workers.<sup>12</sup> So, by changing the selection process, for these years of

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<sup>9</sup> See Registration Final Rule, *supra* note 7.

<sup>10</sup> See *Spilker v. Shayne Labs., Inc.*, 520 F.2d 523, 525 (9th Cir. 1975) (citing *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) (“[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate.”)).

<sup>11</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *H-1B Wage Level by Top 25 Metro*, Database Queried: July 10, 2020, Report Created: July 14, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019, Bureau of Labor Statistics: Occupational Employment Statistics for 2018, 2019 (establishing that, for the top 25 metropolitan service areas for which H-1B beneficiaries were sought in FYs 2018 and 2019, all level I wages, 84% of level II wages, and 76% of “No Wage Level” wages fell below the Bureau of Labor Statistics median wages); Daniel Costa and Ron Hira, Economic Policy Institute, *H-1B Visas and Prevailing Wage Level* (May 4, 2020), <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/> (explaining that “three-fifths of all H-1B jobs were certified at the two lowest prevailing wages in 2019...., and, “[i]n fiscal year (FY) 2019, a total of 60% of H-1B positions certified by Department of Labor (DOL) had been assigned wage levels [I and II]: 14% were at H-1B Level 1 (the 17th percentile) and 46% per at H-1B Level 2 (34th percentile)”). Data concerning FY 2018 and 2019 petition filings pre-dates the publication of DOL, ETA, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 FR 63872 (Oct. 8, 2020).

<sup>12</sup> See H.R. Rep. 101-723(I) (1990), as reprinted in 1990 U.S.C.C.A.N. 6710, 6721 (stating “The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American

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excess demand, from a random lottery selection to a wage-level-based selection process, DHS would implement the statute more faithfully to its dominant legislative purpose, increasing the chance of selection for registrations or petitions seeking to employ beneficiaries at wages that would equal or exceed the level IV or level III prevailing wage for the applicable occupational classification. A wage-level-based selection also is consistent with the administration's goal of improving policies such that H-1B classification is more likely to be awarded to petitioners seeking to employ higher-skilled and higher-paid beneficiaries.<sup>13</sup>

## **B. Legal Authority**

The Secretary of Homeland Security's authority for these regulatory amendments is found in various sections of the Immigration and Nationality Act (INA), 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 INA section 103(a), 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, as well as HSA section 102, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations. *See also* 6 U.S.C. 202(4) (charging the Secretary with "[e]stablishing and administering rules . . . governing the granting

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business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages").

<sup>13</sup> See Kirk Doran et al., University of Notre Dame, *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries* (Feb. 2016), <https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf> (noting that "additional H-1Bs lead to lower average employee earnings and higher firm profits" and the authors' "results are more supportive of the narrative about the effects of H-1Bs on firms in which H-1Bs crowd out alternative workers, are paid less than the alternative workers whom they crowd out, and thus increase the firm's profits despite no measurable effect on innovation"); John Bound et al., National Bureau of Economic Research, *Understanding the Economic Impact of the H-1B Program on the U.S.*, Working Paper 23153 (Feb. 2017), <http://www.nber.org/papers/w23153> ("In the absence of immigration, wages for US computer scientists would have been 2.6% to 5.1% higher and employment in computer science for US workers would have been 6.1% to 10.8% higher in 2001.").

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of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States’). Further authority for these regulatory amendments is found in:

- INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b), which classifies as nonimmigrants aliens coming temporarily to the United States to perform services in a specialty occupation or as a fashion model with distinguished merit and ability;
- INA section 214(a)(1), 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the terms and conditions of the admission of nonimmigrants;
- INA section 214(c), 8 U.S.C. 1184(c), which, among other things, authorizes the Secretary to prescribe how an importing employer may petition for an H nonimmigrant worker, and the information that an importing employer must provide in the petition; and
- INA section 214(g), 8 U.S.C. 1184(g), which, among other things, prescribes the H-1B numerical limitations, various exceptions to those limitations, and criteria concerning the order of processing H-1B petitions.

Further, under HSA section 101, 6 U.S.C. 111(b)(1)(F), a primary mission of DHS is to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”

Finally, as explained above, “Congress left to the discretion of USCIS how to handle simultaneous submissions.”<sup>14</sup> Accordingly, “USCIS has discretion to decide how best to order those petitions” in furtherance of Congress’ legislative purpose.<sup>15</sup>

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<sup>14</sup> See *Walker Macy v. USCIS*, 243 F.Supp.3d at 1176 (finding that USCIS’ rule establishing the random-selection process was a reasonable interpretation of the INA).

<sup>15</sup> *Id.*

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### **C. The H-1B Visa Program's Numerical Cap and Exemptions**

The H-1B visa program allows U.S. employers to temporarily hire foreign workers to perform services in a specialty occupation, services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, or services of distinguished merit and ability in the field of fashion modeling. *See* INA 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); Public Law 101-649, section 222(a)(2), 104 Stat. 4978 (Nov. 29, 1990); 8 CFR 214.2(h). A specialty occupation is defined as an occupation that requires the (1) theoretical and practical application of a body of highly specialized knowledge and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum qualification for entry into the occupation in the United States. *See* INA 214(i)(1), 8 U.S.C. 1184(i)(1).

Congress has established limits on the number of foreign workers who may be granted initial H-1B nonimmigrant visas or status each fiscal year (FY) (commonly known as the "cap"). *See* INA section 214(g), 8 U.S.C. 1184(g). The total number of foreign workers who may be granted initial H-1B nonimmigrant status during any FY currently may not exceed 65,000. *See* INA section 214(g), 8 U.S.C. 1184(g). Certain petitions are exempt from the 65,000 numerical limitation. *See* INA section 214(g)(5) and (7), 8 U.S.C. 1184(g)(5) and (7). The annual exemption from the 65,000 cap for H-1B workers for those who have earned a qualifying U.S. master's or higher degree may not exceed 20,000 foreign workers. *See* INA section 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C).

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Congressional intent behind creating the H-1B program was, in part, to help U.S. employers fill labor shortages in positions requiring highly skilled or highly educated workers.<sup>16</sup> A key goal of the program at its inception was to help U.S. employers obtain the temporary employees they need to meet their business needs to remain competitive in the global economy.<sup>17</sup> To address legitimate countervailing concerns of the adverse impact foreign workers could have on U.S. workers, Congress put in place a number of measures intended to protect U.S. workers, including the annual numerical cap. Congress was concerned that a surplus of foreign labor could depress wages for all workers in the long run and recognized the cap as a means of “continuous monitoring of all admissions.”<sup>18</sup>

The demand for H-1B workers subject to the annual numerical cap has exceeded the cap every year for more than a decade. This high demand created a rush of simultaneous submissions at the beginning of the H-1B petition period, preventing a straightforward application of the statutory provision that these H-1B cap numbers be awarded on a first-come, first served basis, i.e., “in the order in which the petitions are filed,” as described above. “It is not difficult to envision a scenario where many more petitions arrive on the final receipt date than are needed to fill the statutory cap, and processing them ‘in order’ . . . may also be random

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<sup>16</sup> See H.R. Rep. 101-723(I), *supra* note 12 at 6721.

<sup>17</sup> See Bipartisan Policy Council, *Immigration in Two Acts*, Nov. 2015, at 7, <https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-Immigration-Legislation-Brief.pdf>, citing H.R. Rep. 101-723(I) *supra* note 12 at 6721 (“At the time [1990], members of Congress were also concerned about U.S. competitiveness in the global economy and sought to use legal immigration as a tool in a larger economic plan, stating that ‘it is unlikely that enough U.S. workers will be trained quickly enough to meet legitimate employment needs, and immigration can and should be incorporated into an overall strategy that promotes the creation of the type of workforce needed in an increasingly global economy.’”).

<sup>18</sup> See H.R. Conf. Rep. 101-955, at 126 (1990), as reprinted in 1990 U.S.C.C.A.N. 6784, 6790–91.

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and arbitrary.”<sup>19</sup> To that end, DHS has implemented regulations over the years that provide for a random selection from all filings or registrations that occur within a certain timeframe.

However, while the random selection of petitions or registrations is reasonable, DHS believes it is neither the optimal, nor the exclusive, method of selecting petitions or registrations toward the numerical allocations when more registrations or petitions, as applicable, are submitted than projected as needed to reach the numerical allocations. Pure randomization does not serve the ends of the H-1B program or Congressional intent. Further, as one court has importantly held, “Congress left to the discretion of USCIS how to handle simultaneous submissions” and “USCIS has discretion to decide how best to order those petitions.”<sup>20</sup> In recognition of this clear discretion, DHS has it within its authority to further revise and refine how it believes USCIS can best order H-1B petitions or registrations. Therefore, DHS believes it is necessary and consistent with the intent of the H-1B statutory scheme to utilize the numerical cap in a way that incentivizes a U.S. employer’s recruitment of beneficiaries for positions requiring the highest skill levels within the visa classification or otherwise earning the highest wages in an occupational classification and area of intended employment, which correlates with higher skill levels. Put simply, because demand for H-1B visas has exceeded the annual supply for more than a decade,<sup>21</sup> DHS prefers that cap-subject H-1B visas go to beneficiaries earning the highest wages relative to their SOC codes and area(s) of intended employment. DHS

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<sup>19</sup> See *Walker Macy*, 243 F.Supp.3d at 1174.

<sup>20</sup> *Id.* at 1176.

<sup>21</sup> Total Number of H-1B Cap-Subject Petitions Submitted FYs 2016–2020, USCIS Service Center Operations (SCOPS), June 2019. Total Number of Selected Petitions data, USCIS Office of Performance and Qualify (OPQ), Performance Analysis and External Reporting (PAER), July 2020.

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believes that salary generally is a reasonable proxy for skill level.<sup>22</sup> In every fiscal year since FY 2011, the number of H-1B cap-subject petitions, including those filed for the advanced degree exemption, has exceeded the annual H-1B numerical allocations.<sup>23</sup> By engaging in a wage-level-based prioritization of registrations, DHS is better ensuring that new H-1B visas will go to the highest skilled or highest paid beneficiaries. Facilitating the admission of higher-skilled workers “would benefit the economy and increase the United States’ competitive edge in attracting the ‘best and the brightest’ in the global labor market,” consistent with the goals of the H-1B program.<sup>24</sup>

DHS data shows a correlation between higher salaries and higher wage levels.<sup>25</sup> As a position’s required skill level increases relative to the occupation, so, too, may the wage level, and necessarily, the corresponding prevailing wage.<sup>26</sup> In most cases where the proffered wage equals or exceeds the prevailing wage, a prevailing wage rate reflecting a higher wage level is a

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<sup>22</sup> See U.S. Department of Labor, Employment and Training Administration, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 FR 63872, 63874 (Oct. 8, 2020) (it is a “largely self-evident proposition that workers in occupations that require sophisticated skills and training receive higher wages based on those skills.”).

<sup>23</sup> Total Number of H-1B Cap-Subject Petitions Submitted FYs 2016–2020, USCIS Service Center Operations (SCOPS), June 2019. Total Number of Selected Petitions data, USCIS Office of Performance and Quality (OPQ), Performance Analysis and External Reporting (PAER), July 2020.

<sup>24</sup> See Muzaffar Chrishti and Stephen Yale-Loehr, Migration Policy Institute, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later* (July 2016), [https://www.migrationpolicy.org/sites/default/files/publications/1990-Act\\_2016\\_FINAL.pdf](https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf) (“Sponsors of [the Immigration Act of 1990 which created the H-1B program as it exists today] believed that facilitating the admission of higher-skilled immigrants would benefit the economy and increase the United States’ competitive edge in attracting the ‘best and the brightest’ in the global labor market.”)

<sup>25</sup> For example, in Computer and Mathematical Occupations, the 2019 national median salary for Level I was \$78,000; for Level II was \$90,000; for Level III was \$115,000; and for Level IV was \$136,000. Department of Homeland Security, USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, VIBE, DOL OFLC TLC Disclosure Data queried 9/2020 TRK 6446.

<sup>26</sup> U.S. Department of Labor, Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Revised Nov. 2009), available at [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf) (noting that a wage level increase may be warranted if a position’s requirements indicate skills that are beyond those of an entry level worker).

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reasonable proxy for the higher level of skill required for the position, based on the way prevailing wage determinations are made. DHS recognizes, however, that some employers may choose to offer a higher proffered wage to a certain beneficiary, beyond the required prevailing wage, to be more competitive in the H-1B selection process. In that situation, while the proffered wage may not necessarily reflect the skill level required for the position in the strict sense of DOL's prevailing wage determination, the proffered wage still is a reasonable reflection of the value the employer has placed on that specific beneficiary. DHS believes that an employer who offers a higher wage than required by the prevailing wage level does so because that higher wage is a clear reflection of the beneficiary's value to the employer, which, even if not related to the position's skill level per se, reflects the unique qualities the beneficiary possesses. Accordingly, the changes made by this proposed rule would better ensure that the H-1B cap prioritizes relatively higher-skilled, higher-valued, or higher-paid foreign workers rather than continuing to allow limited cap numbers to be allocated to workers in lower-skilled or lower-paid positions.<sup>27</sup> Ultimately, prioritizing in the above-described manner incentivizes employers to offer higher wages or higher skilled positions to H-1B workers and disincentivizes the existing widespread use of the H-1B program to fill lower paid or lower-skilled positions, for which there may be available and qualified U.S. workers.<sup>28</sup>

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<sup>27</sup> See Costa and Hira, *supra* note 11 (pointing to data that “all H-1B employers, but especially the largest employers, use the H-1B program *either* to hire relatively lower-wage workers (relative to the wages paid to other workers in their occupation) who possess ordinary skills *or* to hire skilled workers and pay them less than the true market value”); Norman Matloff, Barron's, “Where are the ‘Best and Brightest?’” (June 8, 2013) <https://www.barrons.com/articles/SB50001424052748703578204578523472393388746> (“The data show that most of the foreign tech workers are ordinary folks doing ordinary work.”); Norman Matloff, Center for Immigration Studies, H-1Bs: Still Not the Best and the Brightest (May 12, 2008), <https://cis.org/Report/H1Bs-Still-Not-Best-and-Brightest> (presenting “data analysis showing that the vast majority of the foreign workers — including those at most major tech firms — are people of just ordinary talent, doing ordinary work.”).

<sup>28</sup> See *id.*



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#### **D. Current Selection Process**

DHS implemented the current H-1B registration process after determining that it could introduce a cost-saving, innovative solution to facilitate the selection of H-1B cap-subject petitions toward the annual numerical allocations. Under the current regulation, all petitioners seeking to file an H-1B cap-subject petition must first electronically submit a registration for each beneficiary on whose behalf they seek to file an H-1B cap-subject petition, unless USCIS suspends the registration requirement. A prospective petitioner whose registration is selected is eligible to file an H-1B cap-subject petition for the selected registration during the associated filing period.

USCIS monitors the number of H-1B registrations it receives during the announced registration period and, at the conclusion of that period, if more registrations are submitted than projected as needed to reach the numerical allocations, randomly selects from among properly submitted registrations the number of registrations projected as needed to reach the H-1B numerical allocations. Under this random H-1B registration selection process, USCIS first selects registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption. USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption.

A prospective petitioner whose registration is selected is notified of the selection and instructed that the petitioner is eligible to file an H-1B cap-subject petition for the beneficiary named in the selected registration within a filing period that is at least 90 days in duration and begins no earlier than 6 months ahead of the actual date of need (commonly referred to as the

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employment start date).<sup>29</sup> See 8 CFR 214.2(h)(8)(iii)(D)(2). When registration is required, a petitioner seeking to file an H-1B cap-subject petition is not eligible to file the petition unless the petition is based on a valid, selected registration for the beneficiary named in the petition.<sup>30</sup>

In the event that an insufficient number of registrations are received during the annual initial registration period to meet the number projected as needed to reach the numerical limitation, USCIS would select all of the registrations properly submitted during the initial registration period and notify all of the registrants that they may proceed with the filing of an H-1B cap-subject petition based on their selected registration(s). USCIS would keep the registration period open beyond the initial registration period, allowing for the submission of additional registrations, until it determined that it had received a sufficient number of registrations to reach the applicable numerical limitations.

The current selection process also allows for selection based solely on the submission of petitions in any year in which the registration process is suspended due to technical or other issues. That process also allows for random selection in any year in which the number of petitions received on the final receipt date exceeds the number projected to meet the applicable numerical limitation.

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<sup>29</sup> If the petition is based on a registration that was submitted during the initial registration period, then the beneficiary's employment start date on the petition must be October 1 of the associated FY, consistent with the registration, regardless of when the petition is filed. See 8 CFR 214.2(h)(8)(iii)(A)(4).

<sup>30</sup> During the initial filing period, if USCIS does not receive a sufficient number of petitions projected as needed to reach the numerical allocations, USCIS will select additional registrations, or reopen the registration process, as applicable, to receive the number of petitions projected as needed to reach the numerical allocations. See 8 CFR 214.2(h)(8)(iii)(A)(7).

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#### **E. Wage Requirement**

An H-1B petitioner must file with the Department of Labor (DOL) a Labor Condition Application for Nonimmigrant Workers (LCA) attesting, among other things, that it will pay the beneficiary a wage that is the higher of the actual wage level that it pays to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupational classification in the area of intended employment, and that it will provide working conditions for the beneficiary that will not adversely affect the working conditions of workers similarly employed. *See* INA section 212(n)(1)(A)(i)–(ii), 8 U.S.C. 1182(n)(1)(A)(i)–(ii), 20 CFR 655.700, et seq. DOL regulations state that the wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to the H-1B nonimmigrant on the same basis, and in accordance with the same criteria, as the employer offers to similarly employed U.S. workers. *See* 20 CFR 655.731(c)(3). DOL regulations additionally provide that the employer must afford working conditions to the H-1B beneficiary on the same basis and in accordance with the same criteria as it affords to its U.S. workers who are similarly employed, and without adverse effect upon the working conditions of such U.S. workers. *See* 20 CFR 655.732(a).

The LCA, certified by DOL, requires that the petitioner specify, among other information: the SOC code, the wage that an employer will pay the nonimmigrant worker, the prevailing wage rate for the job opportunity, and the source of the prevailing wage rate, including the applicable prevailing wage level for the job opportunity if the OES survey is the source of the prevailing wage rate. If there is an applicable collective bargaining agreement (CBA) that was negotiated at arms-length between a union and the employer that contains a

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wage rate applicable to the occupation, then the CBA must be used to determine the prevailing wage for a petitioner's job opportunity. 20 CFR 655.731(a)(2). In the absence of an applicable CBA, the petitioner generally has the option of determining the prevailing wage by one of three avenues: (1) obtaining a Prevailing Wage Determination (PWD) issued by DOL;<sup>31</sup> (2) obtaining the prevailing wage from an independent authoritative source that satisfies the requirements set forth in 20 CFR 655.731(b)(3)(iii)(B); or (3) obtaining the prevailing wage from another legitimate source of wage information that satisfies the requirements set forth in 20 CFR 655.731(b)(3)(iii)(C). 20 CFR 655.731(a)(2)(ii)(A)–(C). An employer may also elect to rely on a wage determination issued pursuant to the provisions of the Davis Bacon Act (DBA), 40 U.S.C. 276a *et seq.*, or the McNamara O'Hara Service Contract Act (SCA), 41 U.S.C. 351 *et seq.*, if applicable. 20 CFR 655.731(b)(3)(i). When using the OES survey to determine the prevailing wage for a particular job opportunity, the first step is to select the most relevant occupational classification by examining the employer's job opportunity and comparing it to the tasks, knowledge, and work activities generally associated with relevant occupations to ensure that the most relevant occupational code has been selected.<sup>32</sup> Then, the relevant prevailing wage level is selected by comparing the requirements for the job opportunity to the occupational requirements, that is, the tasks, knowledge, skills, and specific vocational preparation (education, training, and experience) generally required for acceptable performance in that occupation.<sup>33</sup> DOL classifies the four prevailing wage levels as "entry[.]" "qualified[.]" "experienced[.]" and "fully competent[.]" respectively, relative to the occupation.<sup>34</sup>

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<sup>31</sup> U.S. Department of Labor Policy Guidance, *supra* note 26.

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

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Each registration submitted by a prospective petitioner must be based on a legitimate job offer and must list the prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code and area(s) of intended employment. It is important to note that an LCA is not a requirement for registration. Each prospective petitioner must attest, when submitting a registration, that the registration is based on a legitimate job offer and that they intend to file an H-1B petition on behalf of the beneficiary named in the registration if the registration is selected. Therefore, DHS expects each prospective petitioner to know and be able to provide the relevant wage level when submitting a registration, regardless of whether they have a certified LCA at that time.

#### **F. Proposed Rule**

DHS proposes to amend the way registrations for H-1B cap-subject petitions (or petitions, if the registration process is suspended), including those eligible for the advanced degree exemption, are selected.

Specifically, DHS proposes that, if more registrations were received during the annual initial registration period (or petition filing period, if applicable) than necessary to reach the applicable numerical allocation, USCIS would rank and select the registrations (or petitions, if the registration process were suspended) received generally on the basis of the highest OES wage level that the proffered wage were to equal or exceed for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I.<sup>35</sup> If the proffered wage were to fall below an OES wage

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<sup>35</sup> During the initial filing period, if USCIS were to receive an insufficient number of petitions projected as needed to reach the numerical allocations, USCIS would select additional registrations, or reopen the registration process, as applicable, to receive the number of petitions projected as needed to reach the numerical allocations. *See* 8 CFR 214.2(h)(8)(iii)(A)(7).

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level I, because the proffered wage were based on a prevailing wage from another legitimate source (other than OES) or an independent authoritative source, USCIS would rank the registration in the same category as OES wage level I.<sup>36</sup> During an annual initial registration period of at least 14 days, if fewer registrations than necessary to reach the regular cap were submitted, USCIS would select all registrations properly submitted during the annual initial registration period, regardless of wage level, and would continue to accept registrations until USCIS were to determine a final registration date based on the submission of a sufficient number of registrations to reach the regular cap. If more registrations were submitted on the final registration date than necessary to reach the regular cap, USCIS would rank and select registrations from among those submitted on the final registration date generally based on the highest corresponding OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment.

Thereafter, USCIS would complete the same ranking and selection process to meet the advanced-degree exemption. If a sufficient number of registrations were submitted during the annual initial registration period to reach the advanced-degree exemption, USCIS would rank and select registrations for beneficiaries who are eligible for the advanced-degree exemption generally on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. During the annual initial registration period, if fewer registrations than necessary to reach the advanced-

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<sup>36</sup> If the proffered wage were expressed as a range, USCIS would make the comparison using the lowest wage in the range.

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degree exemption were submitted, USCIS would select all registrations properly submitted during the annual initial registration period, regardless of wage level, and would continue to accept registrations until it were to determine a final registration date based on the submission of a sufficient number of registrations to reach the advanced-degree exemption. If more registrations were submitted on the final registration date than are needed to reach the advanced-degree exemption, USCIS would rank and select registrations from among those submitted on the final registration date generally based on the highest corresponding OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment.

If USCIS were to receive and rank more registrations at a particular wage level than the projected number needed to meet the applicable numerical allocation, USCIS would randomly select from all registrations within that particular wage level a sufficient number of registrations needed to reach the applicable numerical limitation.

In addition to the information required on the current electronic registration form (and on the H-1B petition) and for purposes of this selection process and to establish the ranking order, a registrant (or a petitioner if registration is suspended) would be required to provide the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended employment.<sup>37</sup> The proffered wage is the wage that the employer intends to pay the beneficiary. The SOC code and area of intended employment would be indicated on the LCA filed with the petition. For registrants relying on a prevailing wage that is not based on the OES

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<sup>37</sup> While the OES wage level assessment would be based on the SOC code, area of intended employment, and proffered wage, the registrant would not need to supply the SOC code, area of intended employment, and proffered wage at the registration stage.

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survey, if the proffered wage were less than the corresponding level I OES wage, the registrant would select the “Wage Level I and below” box on the registration form. If the H-1B beneficiary would work in multiple locations, or in multiple positions if the registrant is an agent, USCIS would rank and select the registration based on the lowest corresponding OES wage level that the proffered wage will equal or exceed. Therefore, the registrant would be required to specify on the registration the lowest corresponding OES wage level that the proffered wage would equal or exceed.

DHS recognizes that some occupations do not have current OES prevailing wage information available on DOL’s Online Wage Library (OWL).<sup>38</sup> In the limited instance where there is no current OES prevailing wage information for the proffered position, the registrant would follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration. DOL has provided guidance on its website, and through the Foreign Labor Certification Data Center.<sup>39</sup> DHS expects each registrant would be able to identify the appropriate SOC code for the proffered position because all petitioners are required to identify the appropriate SOC code for the proffered position on the LCA, even when there is no applicable wage level on the LCA. Using the SOC code and the above-mentioned DOL guidance, all registrants would be able to determine the appropriate OES wage level for purposes

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<sup>38</sup> The Foreign Labor Certification Data Center, a component of the U.S. Department of Labor Office of Foreign Labor Certification, is the location of the Online Wage Library for prevailing wage determinations. U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library (last visited Oct. 27, 2020)

<sup>39</sup> See U.S. Department of Labor Policy Guidance, *supra* note 26. In general, this guidance requires an increase to a wage level whenever the employer’s job offer has a requirement for education, experience (including special skills and other requirements), or supervisory duties greater than what is normally required for the occupation. This guidance also contains a worksheet (Appendix C) that registrants may use in determining the appropriate OES wage level.



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of completing the registration, regardless of whether they were to specify an OES wage level or utilize the OES program as the prevailing wage source on an LCA.

DHS requests comments on, including potential alternatives to, the proposed ranking and selection of registrations based on the OES prevailing wage level that corresponds to the requirements of the proffered position in situations where there is no current OES prevailing wage information. More generally, DHS requests comments and seeks alternatives for selecting from among all H-1B registrations or petitions, such as ranking and selecting all registrations or petitions according to the actual OES prevailing wage level that the position would be rated at rather than the wage level that the proffered wage equals or exceeds. Another alternative for which DHS seeks public comment is a process where all registrations or petitions, while still randomly selected, would be weighted according to their OES prevailing wage level, such that, for example, a level IV position would have four times greater chance of selection than a level I position, a level III position would have three times greater chance of selection than a level I position, and a level II position would have two times greater chance of selection than a level I position.

As is currently required, the registrant would be required to attest to the veracity of the contents of the registration and petition. If USCIS were to determine that the statement of facts contained on the registration submission was inaccurate, fraudulent, materially misrepresents any fact, or was not true and correct, USCIS would reject or deny the petition or, if approved, would revoke the petition approval. USCIS also would deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary for a lower wage level if USCIS were to determine that the filing of the new or amended petition was part of the

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petitioner's attempt to unfairly increase the odds of selection during the registration (or petition, if applicable) selection process.

This proposed rule would not affect the order of selection between the regular cap and the advanced degree exemption. If more registrations (or petitions, if registration were suspended) were submitted during the annual initial registration or cap-filing period than needed to reach the annual numerical allocations, the wage level ranking would occur first for the regular cap selection and then for the advanced degree exemption. *See* 8 CFR 214.2(h)(8)(iii)(A)(6) (establishing the order in which beneficiaries of the advanced degree exemption are selected relative to beneficiaries of the regular cap).

This proposed rule is consistent with and permissible under DHS's general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112. Congress expressly authorized DHS to determine eligibility for H-1B classification upon petition by the importing employer, and to determine the form and information required to establish eligibility. *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1). "Moreover, INA section 214(g)(3) does not provide that petitions must be processed in the order 'received,' 'submitted,' or 'delivered.' Instead, they must be processed in the order 'filed.' What it means to 'file' a petition and how to handle simultaneously received petitions are ambiguous and were not dictated by Congress in the INA."<sup>40</sup> Rather, these implementation details are entrusted for DHS to administer. So while the statute provides annual limitations on the number of aliens who may be issued initial H-1B visas or otherwise provided H-1B nonimmigrant status, the statute does not specify how petitions must be selected and counted toward the numerical

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<sup>40</sup> *See Walker Macy*, 243 F.Supp.3d at 1175.

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allocations when USCIS receives more petitions on the first day than are projected as needed to reach the H-1B numerical allocations. Consequently, “Congress left to the discretion of USCIS how to handle simultaneous submissions” and “USCIS has discretion to decide how best to order those petitions.”<sup>41</sup> In recognition of this clear discretion, DHS bears the statutory responsibility to continuously evaluate how it could best order H-1B petitions. As noted above, the current scheme of pure randomization of selectees does not optimally serve Congress’ purpose for the H-1B program. Therefore, DHS proposes this rule to revise the process to better align with the purpose of the H-1B program and Congressional intent, taking into account the pervasive oversubscription of demand for registrations and petitions.

DHS acknowledges that INA section 214(g)(3), 8 U.S.C. 1184(g)(3), states that aliens subject to the H-1B numerical limitation in INA section 214(g)(1), 8 U.S.C. 1184(g)(1), shall be issued H-1B visas or otherwise provided H-1B nonimmigrant status “in the order in which petitions are filed for such visas or status.” Of course, this statutory provision, and more specifically the term “filed” as used in INA 214(g)(3), 8 U.S.C. 1184(g)(3), is ambiguous.<sup>42</sup> As discussed in the preamble to the *Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens* Final Rule (H-1B Registration Final Rule), an

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<sup>41</sup> *Id.* at 1176.

<sup>42</sup> *Id.* at 1167–68 (finding that USCIS’s rule establishing the random-selection process was a reasonable interpretation of the INA that was entitled at least to *Skidmore* deference because what it means to “file” a petition is ambiguous and undefined under the INA and that Congress left to the discretion of USCIS how to handle simultaneous submissions. Specifically, the court said: “Additionally, because § 1184(g)(3) was passed by Congress in 1990 when there was not widespread public use of electronic submissions, it is logical that Congress anticipated H-1B petitions would be submitted either by U.S. mail or other carriers. Thus, *it was reasonable to anticipate multiple petitions would arrive on the same day. It is therefore a reasonable interpretation of ‘filed’ to include some further administrative step beyond mere receipt at a USCIS office to ‘order’ multiple petitions that arrived in such a manner on the same day.*”) (emphasis added). The availability of electronic submission of H-1B registrations has not alleviated this issue as multiple registrations can still be submitted simultaneously.

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indiscriminate application of this statutory language would lead to absurd or arbitrary results; the longstanding approach has been to project the number of petitions needed to reach the numerical allocations.<sup>43</sup>

DHS created the registration requirement, based on its general statutory authority and its discretion to determine how best to handle simultaneous submissions in excess of the numerical allocations, to effectively and efficiently administer the H-1B cap selection process. As provided in the H-1B Registration Final Rule, unless suspended by USCIS, registration is an antecedent procedural step that must be completed by prospective petitioners before they are eligible to file an H-1B cap-subject petition. As with the filing of petitions, and as explained above, a first-come, first-served basis for submitting electronic registrations is unreasonable and practically impossible. DHS, therefore, implemented a random selection process as that was considered a reasonable and operationally efficient way to select registrations when more registrations were submitted than projected as needed to reach the numerical allocations.

While the random selection of petitions or registrations is reasonable, it is neither the optimal nor the exclusive method of selecting petitions or registrations toward the numerical allocations when more registrations or petitions, as applicable, are submitted than projected as needed to reach the numerical allocations.

In that vein, prioritization and selection based on wage levels “is a reasonable and rational interpretation of USCIS’s obligations under the INA to resolve the issues of processing H-1B petitions”<sup>44</sup> in years of excess demand. The changes proposed by this rule would aid

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<sup>43</sup> See 84 FR 888, 896.

<sup>44</sup> *Id.* at 1175.

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petitioners by maintaining the effective and efficient administration of the cap selection process while providing prospective petitioners the ability to potentially improve their chance of selection by agreeing to pay H-1B beneficiaries higher wages that equal or exceed higher prevailing wage levels. Further, while nothing in the proposed rule would prohibit an employer from offering from offering a wage commensurate with a lower wage level with a reduced chance of selection, these proposed changes would incentivize petitioners to offer higher wages to H-1B workers or petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels.<sup>45</sup> Specifically, data reflects that, during FYs 2018 and 2019, 59.43 percent of H-1B petitions received were filed for level II and I wages.<sup>46</sup> Conversely, the data shows that only 28.53 percent of H-1B petitions received in FYs 2018 and 2019 were filed for level IV and III wages.<sup>47</sup> As registrations now would be selected in descending order from level IV to level I and below, as indicated by the highest wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, the selection of registrations with proffered wages that correspond to higher wage levels is expected to incentivize higher wages, reduce the adverse effect on similarly employed U.S. workers, and

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<sup>45</sup> See *supra* notes 5 and 13. See also U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *H-1B Petitions for Nonimmigrant Worker (I-129) DOL H-1B Cases broken down by Fiscal Year and Wage Level As of July 31, 2020*, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: DOL OFLC Performance DATA H1B for 2015, 2017 (showing that, for FYs 2015 and 2017, respectively, 79% and 64% of certified LCAs were for level I and II wages).

<sup>46</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *H1B Petitions for Non Immigrant Worker (I-129) Summarized by IT (SOC code 15) and Other by Wage Level As of August 28, 2020*, Database Queried: Aug. 28, 2020, Report Created: Aug. 28, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (reflecting total received H-1B petitions categorized by wage levels as follows: 13.2% for level I, 46.23% for level II, 17.85% for level III, 10.68% for level IV, and a combined 12.03% for N/A and blank wage levels).

<sup>47</sup> See *id.*

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prevent further stagnation of wages for U.S. information technology (IT) workers generally.<sup>48</sup>

DHS further believes that prioritizing according to wage level would better meet the directive of the *Buy American and Hire American* executive order to “help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”<sup>49</sup>

Beyond negatively impacting U.S. workers’ wages, in some circumstances, U.S. employers are replacing qualified and skilled U.S. workers with relatively lower-skilled H-1B workers. U.S. companies such as The Walt Disney Company, Hewlett-Packard, University of California San Francisco, Southern California Edison, Qualcomm, and Toys “R” Us have reportedly laid off their qualified U.S. workers and replaced them with H-1B workers provided by H-1B dependent outsourcing companies.<sup>50</sup> As one longtime IT worker said, “They are bringing in people with a couple of years’ experience to replace us and then we have to train them.”<sup>51</sup> The change in the selection process is expected to help militate against this kind of practice by reducing the influx of cap-subject H-1B workers for lower-paid positions.

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<sup>48</sup> Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, Economic Policy Institute, *Guestworkers in the High-Skill U.S. Labor Market: An analysis of supply, employment, and wage trends*, (Apr. 24, 2013), at 27, <https://files.epi.org/2013/bp359-guestworkers-high-skill-labor-market-analysis.pdf>. (“In other words, the data suggest that current U.S. immigration policies that facilitate large flows of guestworkers appear to provide firms with access to labor that will be in plentiful supply at wages that are too low to induce a significantly increased supply from the domestic workforce.”).

<sup>49</sup> See Executive Order 13788, *supra* note 1.

<sup>50</sup> See Sarah Pierce and Julia Gelatt, Migration Policy Institute, *Evolution of the H-1B: Latest Trends in a Program on the Brink of Reform* (Mar. 2018), at 24, <https://www.migrationpolicy.org/research/evolution-h-1b-latest-trends-program-brink-reform>; Ron Hira and Bharath Gopalaswamy, Atlantic Council, *Reforming US’ High-Skilled Guestworker Program* (2019), available at <https://www.atlanticcouncil.org/in-depth-research-reports/report/reforming-us-high-skilled-immigrationprogram/>; Patrick Thibodeau, *Southern California Edison IT Workers “Beyond Furious” Over H-1B Replacements*, Computerworld, Feb. 4, 2015, available at <https://www.computerworld.com/article/2879083/southern-california-edison-it-workers-beyond-furious-over-h-1b-replacements.html>.

<sup>51</sup> Thibodeau, *supra* note 50.

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DHS acknowledges that the preamble to the H-1B Registration Final Rule states that prioritization of registration selection on factors other than degree level, such as salary, would require statutory changes.<sup>52</sup> However, DHS did not provide further analysis regarding that conclusion. Upon further review and consideration of the issue initially raised in comments to the H-1B Registration Proposed Rule, DHS concludes that the statute is silent as to how USCIS must select H-1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand. DHS, therefore, is relying on its general statutory authority to implement the statute and proposes to revise the regulations to design a selection system that realistically, effectively, efficiently, and more faithfully administers the cap selection process. *See* INA section 103(a), 214(a) and (c)(1), 8 U.S.C. 1103(a), 1184(a) and (c)(1).

DHS understands that some petitioners have adjusted their recruitment and filing practices to file a high number of petitions or registrations, for varied beneficiaries, based on a concern that only a random selection of the H-1B cap-subject petitions or registrations that they have submitted would be selected and accepted for processing in years of excess demand. While some petitioners might prefer to continue to rely on a random selection process, DHS believes that the importance of prioritizing selection generally based on the highest prevailing wage level that a proffered wage equals or exceeds outweighs any reliance interests of petitioners in a random H-1B cap selection process. A random selection process may seem fair to petitioners seeking to obtain H-1B classification for relatively lower-paid H-1B workers, as the chance for selection of an H-1B worker who will be paid an entry level wage is the same as the chance of selection for an H-1B worker who will be paid at the highest wage level for the occupational

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<sup>52</sup> *See* Registration Final Rule, *supra* note 7.

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classification, but this system is neither optimally consistent with the statute passed by Congress nor fair to U.S. workers whose wages may be adversely impacted by an influx of relatively lower-paid H-1B workers. Similarly, it is not fair to U.S. employers that are seeking to petition for foreign workers at higher OES prevailing wage levels and are not selected due to the random lottery process. Further, it is not fair to an employer who has petitioned for a foreign worker at the top of the prevailing wage level for many years and has never obtained a visa, while another employer who petitioned for an entry-level worker for the first time and, due to randomness or luck, obtained a visa.<sup>53</sup> Selecting registrations (or petitions, if registration were suspended) generally based on the highest prevailing wage level that a proffered wage equals or exceeds would give petitioners greater ability to control the chance of selection in years of excess demand for H-1B visa numbers by agreeing to pay the H-1B beneficiary a higher wage, further protecting the economic interests of U.S. workers.

While DHS proposes to move away from a random selection process in order to better align with the intent of Congress to protect the interests of U.S. workers, H-1B workers, and petitioners, DHS nonetheless proposes to preserve an aspect of random selection within the applicable prevailing wage level – as discussed elsewhere in this rule. Namely, if USCIS were to receive and rank more registrations (or petitions in any year in which the registration process is suspended) at a particular prevailing wage level than the projected number needed to meet the numerical limitation, USCIS would randomly select from all registrations (or petitions, if applicable) within that particular prevailing wage level a sufficient number of registrations necessary to reach the H-1B numerical limitation. DHS believes that the interests of those

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<sup>53</sup> See *Walker Macy*, 243 F.Supp.3d at 1170.



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relying on the current random selection process do not outweigh the need to establish a selection process that is efficient and effective, but also fair to U.S. workers, H-1B workers, and petitioners.

#### **IV. Statutory and Regulatory Requirements**

##### **A. Executive Orders 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)**

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs, benefits, and transfers of available alternatives, and if 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.

This proposed rule is an “economically significant regulatory action” = under section 3(f)(1) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation.

##### **1. Summary of Economic Effects**

DHS is proposing to amend its regulations governing the selection of registrants eligible to file H-1B cap-subject petitions, which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to allow for ranking based on OES wage levels corresponding to their SOC codes. USCIS would rank and select the registrations received (or petitions in any year in which the registration process is suspended) generally on the basis of the highest OES wage level that the proffered wage were to equal or exceed for the relevant SOC code and in the area of intended employment. USCIS would begin with OES wage level IV and

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proceed in descending order with OES wage levels III, II, and I. DHS proposes to amend the relevant sections of DHS regulations to reflect these changes.

The described change in selection is expected to result in a different allocation of H-1B visas favoring petitioners that proffer relatively higher wages. In the analysis that follows, DHS presents its best estimate for how H-1B petitioners would be affected by and would respond to the increased probability of selection of petitioners proffering the highest wages for a given occupation and area of employment. Because of the uncertainty and difficulty of quantifying the aggregate costs that each employer may incur as a result of the provisions of the proposed rule discussed in the sections that follow, OMB has designated the proposed rule as “economically significant.” DHS estimates the net costs that would result from this proposed rule compared to the baseline of the H-1B visa program. For the 10-year implementation period of the rule, DHS estimates the annualized costs to the public would be \$15,970,315 annualized at 3-percent, and \$16,091,293 annualized at 7-percent.

Table 1 provides a more detailed summary of the proposed rule provisions and their impacts.

<b>Table 1. Summary of Provisions and Economic Impacts of the Proposed Rule.</b>			
<b>Provision</b>	<b>Description of Changes to Provision</b>	<b>Estimated Costs of Provisions</b>	<b>Estimated Benefits of Provisions</b>
Currently USCIS randomly selects H-1B registrations or cap-subject petitions, as applicable. USCIS proposes to change the selection process to prioritize selection of registrations or cap-subject petitions, as applicable, based on	USCIS proposes to rank and select H-1B registrations (or H-1B petitions if the registration requirement were suspended) generally based on the highest OES wage level that the proffered wage were to equal or exceed for the relevant SOC code and	<b>Quantitative: Petitioners-</b> <ul style="list-style-type: none"> <li>• \$3,457,401 costs annually for petitioners completing and filing Form I-129H1 petitions with an additional time burden of 15 minutes.</li> <li>• \$11,797,520 costs annually for prospective</li> </ul>	<b>Quantitative: Petitioners -</b> <ul style="list-style-type: none"> <li>• None</li> </ul> <b>DHS/USCIS-</b> <ul style="list-style-type: none"> <li>• None</li> </ul>

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<p>corresponding OES wage level.</p> <p>DHS regulations currently address H-1B cap allocation in various contexts:</p> <ol style="list-style-type: none"> <li>1. Fewer registrations than needed to meet the H-1B regular cap</li> <li>2. Sufficient registrations to meet the H-1B regular cap during the initial registration period</li> <li>3. Fewer registrations than needed to meet the H-1B advanced degree exemption numerical limitation</li> <li>4. Sufficient registrations to meet the H-1B advanced degree exemption numerical limitation during the initial registration period</li> <li>5. Increase to the number of registrations projected to meet the H-1B regular cap or advanced degree exemption allocations in a FY</li> <li>6. H-1B cap-subject petition filing following registration—</li> <li>(1) Filing procedures</li> <li>7. Petition-based cap-subject selections in</li> </ol>	<p>area(s) of intended employment. This proposed rule would add instructions and a question to the registration form to select the appropriate wage level. This proposed rule also would add instructions and questions to the H-1B petition seeking the same wage level information and other information concerning the proffered position to assess the prevailing wage level. This proposed rule would not affect the order of selection as between the regular cap and the advanced degree exemption.</p> <p>If USCIS were to receive and rank more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS would randomly select from all registrations within that particular wage level a sufficient number of registrations needed to reach the numerical limitation.</p> <p>USCIS would be authorized to deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the</p>	<p>petitioners submitting electronic registrations with an additional time burden of 20 minutes.</p> <p><b>DHS/USCIS –</b></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Qualitative: Petitioners –</b></p> <ul style="list-style-type: none"> <li>• Petitioners may incur costs to seek out and train other workers, or to induce workers with similar qualifications to consider changing industry or occupation.</li> <li>• Petitioners that would have hired relatively low-paid H-1B workers, but were unable to do so because of non-selection (and ineligibility to file petitions), may incur reduced labor productivity and revenue.</li> <li>• Petitioners may incur costs from offering beneficiaries higher wages for the same work to achieve greater chances of selection.</li> </ul> <p><b>DHS/USCIS –</b></p> <ul style="list-style-type: none"> <li>• None</li> </ul>	<p><b>Qualitative: U.S. Workers –</b></p> <ul style="list-style-type: none"> <li>• A possible increase in employment opportunities for lower-skilled unemployed or underemployed U.S. workers seeking employment in positions otherwise offered to H-1B cap-subject beneficiaries at wage levels corresponding to lower wage positions.</li> </ul> <p><b>H-1B Workers –</b></p> <ul style="list-style-type: none"> <li>• A possible increase in productivity, measured in increased H-1B wages, resulting from the reallocation of a fixed number of visas from positions classified as lower-level work to employers able to pay the highest wages for the most</li> </ul>
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<p>event of suspended registration process</p> <p>8. Denial of petition</p> <p>9. Revocation of approval of petition</p>	<p>same beneficiary for a lower wage level if USCIS were to determine that the new or amended petition was filed to reduce the wage level listed on the original petition to unfairly increase the odds of selection during the registration selection process.</p> <p>In any year in which USCIS were to suspend the H-1B registration process for cap-subject petitions, USCIS would, instead, allow for the submission of H-1B cap-subject petitions. After USCIS were to receive a sufficient number of petitions to meet the H-1B regular cap and were to complete the selection process of petitions for the H-1B regular cap following the same method of ranking and selection based on corresponding OES wage level, USCIS would determine whether there was a sufficient number of remaining petitions to meet the H-1B advanced degree exemption numerical limitation.</p>		<p>highly skilled workers.</p> <ul style="list-style-type: none"> <li>• A possible increase in wages for positions offered to H-1B cap-subject beneficiaries for the same work to improve the prospective petitioner's chance of selection.</li> </ul> <p><b>Petitioners –</b></p> <ul style="list-style-type: none"> <li>• Level I and level II beneficiaries may see increased wages. Companies who have historically paid level I wages may be incentivized to offer their H-1B employees higher wages, so that they could have a greater chance of selection at a level II or higher</li> <li>• Employers who offer H-1B workers wages that corresponds with level III or level IV OES wages may have higher chances of selection.</li> </ul> <p><b>DHS/USCIS –</b></p> <ul style="list-style-type: none"> <li>• Submitting additional wage level information on</li> </ul>
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			<p>both an electronic registration and on Form I-129H1 would allow USCIS to maintain the integrity of the H-1B cap selection and adjudication processes.</p> <ul style="list-style-type: none"> <li>• Registrations or petitions, as applicable, would be more likely to be selected under the numerical allocations for the highest paid, and presumably highest skilled or highest-valued, beneficiaries.</li> </ul>
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<p><b>Familiarization Cost</b></p>	<p>Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule to fully comply with the new regulation(s).</p>	<p><b>Quantitative: Petitioners-</b></p> <ul style="list-style-type: none"> <li>• One-time cost of \$6,285,527 in FY2022</li> </ul> <p><b>DHS/USCIS-</b></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Qualitative: Petitioners –</b></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>DHS/USCIS –</b></p> <ul style="list-style-type: none"> <li>• None</li> </ul>	<p><b>Quantitative: Petitioners –</b></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>DHS/USCIS –</b></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Qualitative: Petitioners –</b></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>DHS/USCIS –</b></p> <ul style="list-style-type: none"> <li>• None</li> </ul>
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In addition to the impacts summarized here, Table 2 presents the accounting statement as required by OMB Circular A-4.<sup>54</sup>

<b>Table 2. OMB A-4 Accounting Statement (\$, 2019 for FY 2022–FY 2032)</b>				
<b>Category</b>	<b>Primary Estimate</b>	<b>Minimum Estimate</b>	<b>Maximum Estimate</b>	<b>Source Citation</b>
<b>BENEFITS</b>				
Annualized Monetized Benefits over 10 years (discount rate in parenthesis)	N/A	N/A	N/A	
	N/A	N/A	N/A	
Annualized quantified, but un-monetized, benefits	0	0	0	
Unquantified Benefits	<p>This proposed rule would benefit petitioners agreeing to pay H-1B workers a proffered wage corresponding to OES wage level III or IV, by increasing their chance of selection in the H-1B cap selection process. These proposed changes align with the Administration’s goals of improving policies such that the H-1B classification would more likely be awarded to the highest paid or highest skilled beneficiaries.</p> <p>This proposed rule may provide increased opportunities for lower-skilled U.S. workers in the labor market to compete for work as there would be</p>			RIA

<sup>54</sup> White House, Office of Management and Budget, *Circular A-4* (Sept. 17, 2003), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> (last visited Aug. 11, 2020).

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	<p>fewer H-1B workers paid at the lower wage levels to compete with U.S. workers.<sup>55</sup></p> <p>Further, assuming demand outpaces the 85,000 visas currently available for annual allocation, DHS believes that the potential reallocation of visas to favor those petitioners able to offer the highest wages to recruit the most highly skilled workers would result in increased marginal productivity of all H-1B workers.</p> <p>This proposed rule may provide increased wages for positions offered to H-1B cap-subject beneficiaries.</p>			
<b>COSTS</b>				
Annualized monetized costs over 10 years (discount rate in parenthesis)	(3 percent) \$15,970,315	N/A	N/A	RIA
	(7 percent) \$16,091,293	N/A	N/A	
Annualized quantified, but unmonetized, costs	N/A			
Qualitative (unquantified) costs	<p>This proposed rule is expected to reduce the number of petitions for lower wage H-1B workers. This may result in increased recruitment or training costs for petitioners that seek new pools of talent. Additionally, petitioners' labor costs or training costs for substitute workers may increase. DHS also acknowledges that some petitioners might be impacted in terms of the employment, productivity loss, search and hire cost per employer of \$4,398, and profits resulting from labor turnover. In cases where companies cannot find reasonable substitutions for the labor the H-1B beneficiary would have provided, affected petitioners would also lose profits from the lost productivity. In such cases, employers would incur opportunity costs by having to choose the next best alternative to</p>			RIA

<sup>55</sup> DHS acknowledges, however, that some employers may increase the wages of existing H-1B workers without changing job requirements or requiring higher levels of education, skills, training, and experience. In those cases, there may not be anticipated vacancies at wage levels I and II for U.S. workers to fill.

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	<p>immediately filling the job the prospective H-1B worker would have filled. There may be additional opportunity costs to employers such as search costs and training.</p> <p>Such possible disruptions to companies would depend on the interaction of a number of complex variables that are constantly in flux, including national, state, and local labor market conditions, economic and business factors, the type of occupations and skills involved, and the substitutability between H-1B workers and U.S. workers.</p> <p>Petitioners that would have hired relatively lower-paid H-1B workers, but were unable to do so because of non-selection (and ineligibility to file a petition), may incur reduced labor productivity and revenue.</p>		
<b>TRANSFERS</b>			
Annualized monetized transfers: “on budget”	N/A	N/A	N/A
From whom to whom?			
Annualized monetized transfers: “off-budget”	N/A	N/A	N/A
From whom to whom?	N/A	N/A	N/A
<b><i>Miscellaneous Analyses/Category</i></b>	<b><i>Effects</i></b>		<b><i>Source Citation</i></b>
Effects on state, local, and/or tribal governments	N/A		RFA
Effects on small businesses	N/A		RFA
Effects on wages	N/A		None
Effects on growth	N/A		None



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## **2. Background and Purpose of the Proposed Rule**

The H-1B visa program allows U.S. employers to temporarily hire foreign workers to perform services in a specialty occupation, services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, or services of distinguished merit and ability in the field of fashion modeling. *See* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); Public Law 101-649, section 222(a)(2), 104 Stat. 4978 (Nov. 29, 1990); 8 CFR 214.2(h). A specialty occupation is defined as an occupation that requires the (1) theoretical and practical application of a body of highly specialized knowledge and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum qualification for entry into the occupation in the United States. *See* INA section 214(i)(1), 8 U.S.C. 1184(i)(1).

The number of aliens who may be issued initial H-1B visas or otherwise provided initial H-1B nonimmigrant status during any FY has been capped at various levels by Congress over time, with the current numerical limit generally being 65,000 per FY. *See* INA section 214(g)(1)(A); 8 U.S.C. 1184(g)(1)(A). Congress has also provided for various exemptions from the annual numerical allocations, including an exemption for 20,000 aliens who have earned a master's or higher degree from a U.S. institution of higher education. *See* INA section 214(g)(5) and (7); 8 U.S.C. 1184(g)(5) and (7).

Under the current regulation, all petitioners seeking to file an H-1B cap-subject petition must first electronically submit a registration for each beneficiary on whose behalf they seek to file an H-1B cap-subject petition, unless USCIS suspends the registration requirement.<sup>56</sup> USCIS

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<sup>56</sup> *See* 8 CFR 214.2(h)(8)(iii)(A).

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monitors the number of H-1B registrations submitted during the announced registration period of at least 14 days and, at the conclusion of that period, if more registrations are submitted than projected as needed to reach the numerical allocations, randomly selects from among properly submitted registrations the number of registrations projected as needed to reach the H-1B numerical allocations.<sup>57</sup> Under this random H-1B registration selection process, USCIS first selects registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption. USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption. A prospective petitioner whose registration is selected is notified of the selection and instructed that the petitioner is eligible to file an H-1B cap-subject petition for the beneficiary named in the selected registration within a filing period that is at least 90 days in duration and begins no earlier than 6 months ahead of the actual date of need (commonly referred to as the employment start date).<sup>58</sup> When registration is required, a petitioner seeking to file an H-1B cap-subject petition is not eligible to file the petition unless the petition is based on a valid, selected registration for the beneficiary named in the petition.<sup>59</sup>

Prior to filing an H-1B petition, the employer is required to obtain a certified Labor Condition Application (LCA) from the Department of Labor (DOL).<sup>60</sup> The LCA form collects information about the employer and the occupation for the H-1B worker(s). The LCA requires certain attestations from the employer, including, among others, that the employer will pay the

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<sup>57</sup> See *id.* at (5)–(6).

<sup>58</sup> See 8 CFR 214.2(h)(8)(iii)(D)(2).

<sup>59</sup> See *id.* at (A)(1).

<sup>60</sup> See 8 CFR 214.2(h)(4)(i)(B).

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H-1B worker(s) at least the required wage.<sup>61</sup> This proposed rule amends DHS regulations concerning the selection of registrations submitted by or on behalf of prospective petitioners seeking to file H-1B cap-subject petitions (or the selection of petitions, if the registration process is suspended), which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to allow for ranking and selection based on OES wage levels. When applicable, USCIS would rank and select the registrations received generally on the basis of the highest OES wage level that the proffered wage were to equal or exceed for the relevant SOC code and in the area(s) of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I.<sup>62</sup> For registrants relying on a private wage survey, if the proffered wage were less than the corresponding level I OES wage, the registrant would select the “Wage Level I and below” box on the registration form.<sup>63</sup> If USCIS were to receive and rank more registrations at a particular wage level than the projected number needed to meet the applicable numerical allocation, USCIS would randomly select from all registrations within that wage level a sufficient number of registrations needed to reach the applicable numerical limitation.<sup>64</sup>

### **3. Historic Population**

The historic population consists of petitioners who file on behalf of H-1B cap-subject beneficiaries (in other words, beneficiaries who are subject to the annual numerical limitation, including those eligible for the advanced degree exemption). DHS uses the 5-year average of H-

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<sup>61</sup> See 20 CFR 655.731–735.

<sup>62</sup> See new 8 CFR 214.2(h)(8)(iii)(A)(1)(i).

<sup>63</sup> *Id.*

<sup>64</sup> See 8 CFR 214.2(h)(8)(iii)(A)(5)–(6).

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1B cap-subject petitions received for FYs 2016 to 2020 (211,797) as the historic estimate of H-1B cap-subject petitions that were submitted annually.<sup>65</sup> Prior to publication of *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements* (Fee Schedule Final Rule),<sup>66</sup> H-1B petitioners submit Form I-129 with applicable supplements for H-1B petitions. Through the Fee Schedule Final Rule, DHS created a new Form I-129H1 for H-1B petitioners.<sup>67</sup> Form I-129H1 does not include separate supplements as relevant data collection fields have been incorporated into Form I-129H1. DHS assumes that the number of petitioners who previously filled out the Form I-129 and H-1B supplements is the same as the number of petitioners who would complete the new Form I-129H1.

**Table 3. H-1B Cap-Subject Petitions Submitted to USCIS for FY 2016 – FY 2020.**

<b>Fiscal Year</b>	<b>Total Number of H-1B Cap-Subject Petitions Submitted</b>	<b>Total Number of H-1B Petitions Selected</b>	<b>Number of Petitions Filed with Form G-28</b>
2016	232,973	97,711	72,292
2017	236,444	95,818	68,743
2018	198,460	95,923	78,900

<sup>65</sup> In FY 2018, 198,460 H-1B petitions were submitted in the first five days that cap-subject petitions could be submitted, a 16 percent decline in H-1B cap-subject petitions from FY 2017. Though the receipt of H-1B cap-subject petitions fell in FY 2018, the petitions received still far exceeded the numerical limitations, continuing a trend of excess demand since FY 2011. For H-1B filing petitions data prior to FY 2014, see U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Reports and Studies*, <https://www.uscis.gov/tools/reports-studies/reports-and-studies> (last visited Sept. 2, 2020).

<sup>66</sup> DHS estimates the costs and benefits of this proposed rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, final rule (Fee Schedule Final Rule), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. See, *Immigrant Legal Resource Center v. Wolf*, No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). In addition, on October 8, 2020, DHS was also preliminarily enjoined from implementing and enforcing the Fee Schedule Final Rule by the U.S. District Court for the District of Columbia, including by adopting any form changes associated with the rule. See, *Northwest Immigrant Rights Project v. U.S. Citizenship and Immigration Servs.*, 1:19-cv-03283-RDM (D.D.C. Oct. 8, 2020). DHS intends to vigorously defend these lawsuits and is not changing the baseline for this proposed rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this proposed rule may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I-129.

<sup>67</sup> See Fee Schedule Final Rule, *supra* note 66.

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2019	190,098	110,376	93,495
2020	201,011	109,283	92,396
<b>Total</b>	<b>1,058,986</b>	<b>509,111</b>	<b>405,826</b>
<b>5-year average</b>	<b>211,797</b>	<b>101,822</b>	<b>81,165</b>
Source: Total Number of H-1B Cap-Subject Petitions Submitted FYs 2016–2020, USCIS Service Center Operations (SCOPS), June 2019. Total Number of Selected Petitions data, USCIS Office of Performance and Qualify (OPQ), Performance Analysis and External Reporting (PAER), July 2020.			

Table 3 also shows historical Form G-28 filings by attorneys or accredited representatives accompanying selected H-1B cap-subject petitions. DHS notes that these forms are not mutually exclusive. Based on the 5-year average, DHS estimates 79.7 percent<sup>68</sup> of selected petitions will be filed with a Form G-28. Table 3 does not include data for FY 2021 as the registration requirement was first implemented for the FY 2021 H-1B cap selection process, and petition submission remains ongoing as of the publication of this proposed rule.

The H-1B selection process changed significantly after the publication of the H-1B Registration Final Rule.<sup>69</sup> That rule established a mandatory electronic registration requirement that requires petitioners seeking to file cap-subject H-1B petitions, including those eligible for the advanced degree exemption, to first electronically register with USCIS during a designated registration period. That rule also reversed the order by which USCIS counts H-1B registrations (or petitions, for any year in which the registration requirement is suspended) toward the number projected to meet the H-1B numerical allocations, such that USCIS first selects registrations submitted on behalf of all beneficiaries, including those eligible for the advanced degree exemption. USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption. The registration requirement was first

<sup>68</sup> Calculation: 81,165 Forms G-28 / 101,822 Form I-129 petitions = 79.7 percent

<sup>69</sup> See Registration Final Rule, *supra* note 7.

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implemented for the FY 2021 H-1B cap. During the initial registration period for the FY 2021 H-1B cap selection process, DHS received 274,273 registrations.

#### **4. Cost-Benefit Analysis**

Through these proposed changes, petitioners would incur costs associated with additional time burden in completing the registration process and, if selected for filing, the petition process. In this analysis, DHS estimates the opportunity cost of time for these occupations using average hourly wage rates of \$32.58 for HR specialists and \$69.86 for lawyers.<sup>70</sup> However, average hourly wage rates do not account for worker benefits such as paid leave, insurance, and retirement. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the most recent DOL, BLS report detailing average compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.46.<sup>71</sup> For purposes of this proposed rule, DHS calculates the average total rate of compensation as \$47.57 per hour for an HR specialist, where the average hourly wage is \$32.58 per hour worked and average benefits are \$14.99 per hour.<sup>72</sup> Additionally, DHS calculates the average total rate of compensation as \$102.00 per hour for an in-house lawyer, where the average hourly wage is \$69.86 per hour worked and average benefits are

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<sup>70</sup> See U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2019 National Occupational Employment and Wage Estimates-National, *SOC 13-1071 – Human Resources Specialist* and *SOC 23-1011 – Lawyers*, [https://www.bls.gov/oes/2019/may/oes\\_nat.htm](https://www.bls.gov/oes/2019/may/oes_nat.htm) (last visited Sept. 2, 2020).

<sup>71</sup> The benefits-to-wage multiplier is calculated as follows:  $(\$37.10 \text{ Total Employee Compensation per hour}) \div (\$25.47 \text{ Wages and Salaries per hour}) = 1.457 = 1.46$  (rounded). See U.S. Department of Labor, Bureau of Labor Statistics, Economic News Release, *Employer Cost for Employee Compensation (December 2019)*, Table 1. *Employer Costs for Employee Compensation by ownership* (Dec. 2019), [https://www.bls.gov/news.release/archives/ecec\\_03192020.pdf](https://www.bls.gov/news.release/archives/ecec_03192020.pdf) (last visited Sept. 2, 2020).

<sup>72</sup> Calculation of the weighted mean hourly wage for HR specialists:  $\$32.58 \text{ per hour} \times 1.46 = \$47.5668 = \$47.57$  (rounded) per hour.

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\$32.14 per hour.<sup>73</sup> Moreover, DHS recognizes that a firm may choose, but is not required, to outsource the preparation and submission of registrations and filing of H-1B petitions to outsourced lawyers<sup>74</sup>. Therefore, DHS calculates the average total rate of compensation as \$174.65, which is the average hourly U.S. wage rate for lawyers multiplied by 2.5 to approximate an hourly billing rate for an outsourced lawyer.<sup>75</sup> Table 4 summarizes the compensation rates used in this analysis.

<b>Table 4. Summary of Estimated Wages for Form I-129H1 Filers by Type of Filer</b>	
	<b>Hourly Compensation Rate</b>
Human Resources (HR) Specialist	\$47.57
In-house lawyer	\$102.00
Outsourced lawyer	\$174.65
Source: USCIS analysis	

**i. Costs and Cost Savings of Regulatory Changes to Petitioners**

**a. Methodology based on Historic FYs 2019–2020**

This proposed rule primarily would change the manner in which USCIS selects H-1B registrations (or H-1B petitions for any year in which the registration requirement were suspended), by first selecting registrations generally based on the highest OES wage level that the proffered wage were to equal or exceed for the relevant SOC code and area(s) of intended

<sup>73</sup> Calculation of weighted mean hourly wage for in-house lawyers: \$102.00 average hourly total rate of compensation for in-house lawyer = \$69.86 average hourly wage rate for lawyer (in-house) × 1.46 benefits-to-wage multiplier.

<sup>74</sup> DHS uses the terms “in-house lawyer” and “outsourced lawyer” to differentiate between the types of lawyers that may file Form I-129H1 on behalf of an employer petitioning for an H-1B beneficiary.

<sup>75</sup> Calculation of weighted mean hourly wage for outside counsel: \$174.65 average hourly total rate of compensation for outsourced lawyer= \$69.86 average hourly wage rate for lawyer (in-house) × 2.5 conversion multiplier. DHS uses a conversion multiplier of 2.5 to estimate the average hourly wage rate for outsourced lawyer based on the hourly wage rate for an in-house lawyer. DHS has used this conversion multiplier in various previous rulemakings. 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), used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages.

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employment. In April 2019, DHS added a registration requirement for petitioners seeking to file H-1B petitions on behalf of cap-subject aliens.<sup>76</sup> Under the current regulation, all petitioners seeking to file an H-1B cap-subject petition must first electronically submit a registration for each beneficiary on whose behalf they seek to file an H-1B cap-subject petition, unless the registration requirement is suspended. If the registration is selected, the petitioner is eligible to file an H-1B cap-subject petition for the beneficiary named in the selected registration during the associated filing period. The registration requirement was suspended for the FY 2020 H-1B cap and first implemented for the FY 2021 H-1B cap. The initial H-1B registration period for the FY 2021 H-1B cap was March 1, 2020, through March 20, 2020. A total of 274,273 registrations were submitted during the initial registration period, of which 123,244<sup>77</sup> registrations were for beneficiaries eligible for the advanced degree exemption and 145,950 were for beneficiaries under the regular cap.<sup>78</sup>

Prior to implementing the registration requirement, USCIS administered the H-1B cap by projecting the number of petitions needed to reach the numerical allocations. H-1B cap-subject petitions were randomly selected when the number of petitions received on the final receipt date exceeded the number projected as needed to reach the numerical allocations. All petitions eligible for the advanced degree exemption had an equal chance of being selected toward the advanced degree exemption, and all remaining petitions had an equal chance of being selected toward the regular cap. In FY 2019, USCIS first selected petitions toward the number of

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<sup>76</sup> See Registration Final Rule, *supra* note 7.

<sup>77</sup> The total number of registrations for the advanced degree exemption and the regular cap do not equal the total 274,273 submitted registrations because the remaining 5,043 submitted registrations were invalid (e.g., as prohibited duplicate registrations).

<sup>78</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3, Aug. 31, 2020, USCIS Analysis.



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petitions projected as needed to reach advanced degree exemption. If the petition was not selected under the advanced degree exemption, those cases were then added back to the pool and had a second chance for selection under the regular cap. In FY 2020, the selection order was reversed, such that USCIS first selected petitions toward the number projected as needed to reach the regular cap from among all petitions received. USCIS then selected toward the number of petitions projected as needed to reach the advanced degree exemption from among those petitions eligible for the advanced degree exemption, but that were not selected under the regular cap.

Table 5 shows the number of petitions submitted and selected in FYs 2019 and 2020. It also displays the approximated 2-year averages of the petitions that were submitted and selected for the H-1B regular cap or advanced degree exemption. On average, DHS selected 56 percent<sup>79</sup> of the H-1B cap-subject petitions submitted, with 82,900 toward the regular cap and 26,930 toward the advanced degree exemption.

<b>Table 5. H-1B Cap-Subject Petitions Submitted to USCIS, –FY 2019 – FY 2020.</b>				
<b>Fiscal Year</b>	<b>Total Number of H-1B Cap-Subject Petitions Submitted</b>	<b>Total Petitions Selected</b>	<b>Regular Cap</b>	<b>Advanced Degree Exemption</b>
2019	190,098	110,376	82,956	27,420
2020	201,011	109,283	82,843	26,440
<b>Total</b>	<b>391,109</b>	<b>219,659</b>	<b>165,799</b>	<b>53,860</b>
<b>2-Year Average</b>	<b>195,555</b>	<b>109,830</b>	<b>82,900</b>	<b>26,930</b>
Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. July 21, 2020 & USCIS Analysis				

<sup>79</sup> Calculation: 109,830 2-year average of Petitions Randomly Selected in FYs 2019–2020 / 195,555 2- year average of Total Number of H-1B Cap-Subject Petitions Filed in FYs 2019–2020 = 56%.

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DHS does not have data on the OES wage levels for selected petitions prior to FY 2019.<sup>80</sup> While there are some challenges to using OES wage data as a timeseries, DHS uses the wage data to provide some insight.<sup>81</sup> Table 6 shows the petitions that were selected for FYs 2019 and 2020, categorized by OES wage level. The main difference between the FY 2019 and FY 2020 data sets is that there are more petitions classified as not applicable (N/A) in the FY 2019 data compared to the FY 2020 data. Since DOL's Standard Occupational Classification (SOC)<sup>82</sup> structure was modified in 2018, some petitions were categorized as N/A in FY 2019. In 2019, DOL started to use a hybrid OES<sup>83</sup> occupational structure for classifying the petitions for FY 2020.

Another data limitation was that some of the FY 2020 data was incomplete with missing fields, and could not be classified into the specific wage levels; therefore, the petitions were categorized as N/A. DHS expects each registrant that is classified as N/A would be able to identify the appropriate SOC code for the proffered position because all petitioners are required to identify the appropriate SOC code for the proffered position on the LCA, even when there is no applicable wage level on the LCA. Using the SOC code and the above-mentioned DOL

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<sup>80</sup> USCIS created the tool to link USCIS H-1B data to the DOL data for FY 2019.

<sup>81</sup> U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *Frequently Asked Questions*, [https://www.bls.gov/oes/oes\\_ques.htm](https://www.bls.gov/oes/oes_ques.htm) (last visited Sept. 2, 2020) (Can OES data be used to compare changes in employment or wages over time? Although the OES survey methodology is designed to create detailed cross-sectional employment and wage estimates for the U.S., States, metropolitan and nonmetropolitan areas, across industry and by industry, it is less useful for comparisons of two or more points in time. Challenges in using OES data as a time series include changes in the occupational, industrial, and geographical classification systems, changes in the way data are collected, changes in the survey reference period, and changes in mean wage estimation methodology, as well as permanent features of the methodology).

<sup>82</sup> U.S. Department of Labor, Bureau of Labor Statistics, Standard Occupational Classification <https://www.bls.gov/soc/2018/home.htm> (last visited Oct. 27, 2020).

<sup>83</sup> U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *Implementing the 2018 SOC in the OES program – May 2019 and May 2020 Hybrid Occupations*, [https://www.bls.gov/oes/soc\\_2018.htm](https://www.bls.gov/oes/soc_2018.htm) (last visited Sept. 2, 2020).

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guidance, all registrants would be able to determine the appropriate OES wage level for purposes of completing the registration, regardless of whether they were to specify an OES wage level or utilize the OES program as the prevailing wage source on an LCA. While there are limitations to the data used, DHS believes that the estimates are helpful to see the current wage levels and estimate the future populations in each wage level.

	<b>Level I</b>	<b>Level II</b>	<b>Level III</b>	<b>Level IV</b>	<b>N/A</b>	<b>Total</b>
<b>Advanced Degree Exemption</b>						
FY 2019	7,363	13,895	2,016	553	3,593	27,420
FY 2020	7,453	14,467	2,311	694	1,515	26,440
<b>Total</b>	<b>14,816</b>	<b>28,362</b>	<b>4,327</b>	<b>1,247</b>	<b>5,108</b>	<b>53,860</b>
<b>2-Year Average</b>	<b>7,408</b>	<b>14,181</b>	<b>2,164</b>	<b>623</b>	<b>2,554</b>	<b>26,930</b>
<b>Regular Cap</b>						
FY 2019	18,557	42,621	8,447	3,540	9,791	82,956
FY 2020	19,232	46,439	8,796	3,677	4,699	82,843
<b>Total</b>	<b>37,789</b>	<b>89,060</b>	<b>17,243</b>	<b>7,217</b>	<b>14,490</b>	<b>165,799</b>
<b>2-Year Average</b>	<b>18,895</b>	<b>44,530</b>	<b>8,622</b>	<b>3,608</b>	<b>7,245</b>	<b>82,900</b>
Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. July 21, 2020 & USCIS Analysis						

DHS only has OES wage level data on the petitions that were selected toward the numerical allocations and does not have the wage level break down for the 85,725<sup>84</sup> (44 percent) of petitions that were not selected since those petitions were returned to petitioners without entering data into DHS databases. Due to data limitations, DHS estimated the wage level break down for the 44 percent of petitions that were not selected because wage levels vary significantly between occupations and localities. Table 7 shows the 2-year approximated average of H-1B cap-subject petitions that were selected, separated by OES wage level, and percentages of

<sup>84</sup> Calculation: 195,555 2-year average of Total Number of H-1B Cap-Subject Petitions received in FYs 2019–2020 -109,830 2-year average of Petitions Randomly Selected in FYs 2019–2020= 85,725.

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accepted petitions by each wage category. The wage category with the most petitions as estimated is OES wage level II.

Level	Regular Cap		Advanced Degree Exemption	
	Selected	% of Total	Selected	% of Total
Level I & N/A	26,140	31.50%	9,962	36.99%
Level II	44,530	53.70%	14,181	52.66%
Level III	8,622	10.40%	2,164	8.04%
Level IV	3,608	4.40%	623	2.31%
<b>Total</b>	<b>82,900</b>	<b>100%</b>	<b>26,930</b>	<b>100%</b>

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. July 21, 2020 & USCIS Analysis

**b. FY 2021 Data<sup>85</sup>**

The population affected by this proposed rule consists of prospective petitioners seeking to file H-1B cap-subject petitions, including those eligible for the advanced degree exemption. DHS regulations require all petitioners seeking to file H-1B cap-subject petitions to first electronically submit a registration for each beneficiary on whose behalf they seek to file an H-1B cap-subject petition, unless USCIS suspends the registration requirement.<sup>86</sup> A prospective petitioner whose registration is selected is eligible to file an H-1B cap-subject petition for the beneficiary named in the selected registration during the associated filing period.<sup>87</sup> Under the current H-1B registration selection process, USCIS first randomly selects registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption.<sup>88</sup>

<sup>85</sup> FY 2021 data pertains to the registrations received during FY 2020 for the FY 2021 H-1B cap season.

<sup>86</sup> See 8 CFR 214.2(h)(8)(iii)(A).

<sup>87</sup> See *id.* at (D).

<sup>88</sup> See *id.* at (A)(5).

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USCIS then randomly selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption.<sup>89</sup> Prior to the implementation of the H-1B registration requirement for the FY 2021 H-1B cap selection process, petitioners submitted an annual average of 211,797 cap-subject H-1B petitions over FYs 2016 through 2020. The number of registrations submitted for the FY 2021 H-1B cap selection process, however, was 274,273. Because the number of registrations submitted for the FY 2021 H-1B cap selection process was significantly higher than the number of petitions submitted in prior years, DHS will use the total number of registrations submitted for the FY 2021 H-1B cap selection process as the population to estimate certain costs for this proposed rule.<sup>90</sup>

For the FY 2021 H-1B cap selection process, initially 106,100 registrations were selected to submit a petition. Prospective petitioners with selected registrations only were eligible to file H-1B petitions based on the selected registrations during a 90-day filing window. USCIS did not receive enough Form I-129 petitions during the initial filing period to meet the number of petitions projected as needed to reach the H-1B numerical allocations, so the selection process was run again in August 2020. An additional 18,315 registrations were selected in August 2020 for a total of 124,415 selected registrations for FY 2021. While the current number of registrations selected toward the FY 2021 numerical allocations is 124,415, DHS estimates certain costs for this proposed rule using the number of registrations initially selected (106,100) as the best estimate of the number of petitions needed to reach the numerical allocations.

<b>Table 8. H-1B Cap-Subject Registrations Submitted for FY 2021</b>
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<sup>89</sup> See *id.* at (A)(6).

<sup>90</sup> DHS uses FY 2021 H-1B cap selection data as the population to estimate certain costs for this proposed rule because FY 2021 is the first year that registration was required. As explained above, DHS added the registration requirement on April 19, 2019, but the registration requirement was suspended for the FY 2020 H-1B cap.

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<b>Fiscal Year</b>	<b>Total Number of H-1B Registrations Submitted</b>	<b>Round 1 Number of H-1B Registrations Selected</b>	<b>Round 2 Number of H-1B Registrations Selected</b>	<b>Total Number of H-1B Registrations Selected*</b>	<b>Number of Registrations Submitted with Form G-28**</b>
2021	274,273	106,100	18,315	124,415	N/A
<b>Total</b>	<b>274,273</b>	<b>106,100</b>	<b>18,315</b>	<b>124,415</b>	<b>N/A</b>

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 31, 2020 USCIS Analysis

\*Note: USCIS administered the selection process twice because an insufficient number of petitions were filed following initial registration selection to reach the number of petitions projected as needed to reach the numerical allocations. USCIS has not finished receiving H-1B cap-subject petitions for FY 2021. Additional registrations may be selected if the number of petitions filed after the second round of registration selection does not reach the number projected as needed to reach the numerical allocations.

\*\*Note: Data is still unavailable for FY 2021. USCIS used FYs 2019–2020 from Table 3 to estimate the percentage of submitted G-28s below.

Table 3 shows historical Form G-28 filings by attorneys or accredited representatives accompanying selected H-1B cap-subject petitions. DHS notes that these forms are not mutually exclusive. Based on the historical 5-year average from earlier in this analysis, DHS estimates 79.7 percent<sup>91</sup> of selected registrations will include Form G-28. DHS applies those percentages to the number of total registrations and estimates 219,418<sup>92</sup> Form G-28 were submitted with total registrations received. DHS uses the total registrations received for the FY 2021 H-1B cap selection process (274,273) as the estimate of registrations that will be received annually.

Additionally, DHS assumes that petitioners may use human resources (HR) specialists (or entities that provide equivalent services) (hereafter HR specialist) or use lawyers or accredited representatives<sup>93</sup> to complete and file H-1B petitions. A lawyer or accredited representative

<sup>91</sup> Calculation: 81,165 Forms G-28 / 101,822 Form I-129 petitions = 79.7 percent = 80 percent (rounded)

<sup>92</sup> Calculation: 274,273 \* 79.7 percent = 219,418 Form G-28.

<sup>93</sup> 8 CFR 292.1(a)(4) (defining an accredited representative as “a person representing an organization described in §292.2 of this chapter who has been accredited by the Board”).

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appearing before DHS must file Form G-28 to establish their eligibility and authorization to represent a client (applicant, petitioner, requestor, beneficiary or derivative, or respondent) in an immigration matter before DHS. DHS estimates that about 80 percent<sup>94</sup> of H-1B petitions typically would be completed and filed by a lawyer or other accredited representative (hereafter lawyer). DHS assumes the remaining 20 percent of H-1B petitions would be completed and filed by HR specialists.

Petitioners who use lawyers to complete and file H-1B petitions may either use an in-house lawyer or hire an outsourced lawyer. Of the total number of H-1B petitions filed in FY 2021, DHS estimates that 26 percent were filed by in-house lawyers while the remaining 54 percent were filed by outsourced lawyers.<sup>95</sup>

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<sup>94</sup> Calculation: 81,165 petitions filed with Form G-28 / 101,822 average petitions selected = 79.7 percent petitions completed and filed by a lawyer or other accredited representative (hereafter lawyer).

<sup>95</sup> DHS uses data from the longitudinal study conducted in 2003 and 2007 on legal career and placement of lawyers, which found that 18.6, 55, and 26.2 percent of lawyers practice law at government (federal and local) institutions, private law firms, and private businesses (as inside counsel), respectively. See Dinovitzer et al, *After the JD II: Second Results from a National Study of Legal Careers* (2009), The American Bar Foundation and the National Association for Law Placemen (NALP) Foundation for Law Career Research and Education, Table 3.1, p. 27, <https://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf>. Among those working in private law firms and private businesses (54 and 26 percent, respectively), DHS estimates that, while 67.7 percent of lawyers practice law in private law firms, the remaining 32.3 percent practice in private businesses (54 percent + 25.7percent = 79.7percent, 67.7 percent = 54/79.7\*100, 32.2 percent = 25.7/79.7\*100). Because 79.7 percent of the H-1B petitions are filed by lawyers or accredited representatives, DHS multiplies 79.7percent by 32.3 and 67.7 percent to estimate the proportion of petitions filed by in-house lawyers (working in private businesses) and outsourced lawyer (working in private law firms), respectively.

26 (rounded) percent of petitions filed by in-house lawyers = 80 percent of petitions filed by lawyers or accredited representatives × 32.3 percent of lawyers work in private businesses.

54 (rounded) percent of petitions filed by outsourced lawyer = 80 percent of petitions filed by lawyers or accredited representatives × 67.7 percent of lawyers work in private law firms.

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<b>Affected Population</b>	<b>Estimated Average Population Affected</b> <b>A</b>	<b>Number of Petitions/ Registrations Submitted by HR Specialists</b> <b>B = A × 20%</b>	<b>Number of Petitions/ Registrations Submitted by In-house Lawyers</b> <b>C = A × 26%</b>	<b>Number of Petitions/ Registrations Submitted by Outsourced Lawyers</b> <b>D = A × 54%</b>
Estimated number of H-1B registrations submitted annually	274,273	54,855	71,311	148,107
Estimated number of H-1B registrations selected to file H-1B cap petitions annually	106,100	21,220	27,586	57,294

Source: USCIS analysis

Based on the total estimated number of affected populations shown in Table 9, DHS further estimates the number of entities that would be affected by each requirement of this proposed rule to estimate the costs arising from the regulatory changes in the cost-benefit analysis section. Additionally, DHS uses the same proportion of HR specialists, in-house lawyers, and outsourced lawyers (20, 26, and 54 percent, respectively) to estimate the population that would be affected by the various requirements of this proposed rule.

**c. Unquantified Costs & Benefits**

Given that the demand for H-1B cap-subject visas, including those filed for the advanced degree exemption, has frequently exceeded the annual H-1B numerical allocations, this proposed rule would increase the chance of selection for registrations (or petitions, if registration were suspended) seeking to employ beneficiaries at level IV or level III wages. DHS believes this incentive for petitioners to offer wages that maximize their probability of selection is necessary



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to address the risk that greater numbers of U.S. employers could rely on the program to access relatively lower-cost labor, precluding other employers from benefitting from the H-1B program's intended purpose of providing high-skilled nonimmigrant labor to supplement domestic labor. The proposed rule could result in higher proffered wages or a reduction in the downward pressure on wages in industries and occupations with concentrations of relatively lower-paid H-1B workers. Additionally, this proposed rule may lead to an increase in employment opportunities for unemployed or underemployed U.S. workers seeking employment in positions otherwise offered to H-1B cap-subject beneficiaries at wage levels corresponding to lower wage positions. Employers which were to offer H-1B workers wages that correspond with level IV or level III OES wages would have higher chances of selection.

For the FY 2021 H-1B cap selection process, USCIS initially selected 106,100 (39 percent)<sup>96</sup> of H-1B registrations submitted toward the numerical allocations; of those 80,600 were selected toward the number projected as needed to reach the regular cap, and 25,500 were selected toward the number projected as needed to reach the advanced degree exemption. The total number of H-1B registrations submitted was 274,237, however 5,043 were invalid. Of the 269,194 valid registrations, 145,950 were submitted toward the regular cap and 123,244 were eligible for selection under the advanced degree exemption.

<b>Table 10. H-1B Cap-Subject Registrations Submitted for FY 2021.</b>			
<b>Fiscal Year</b>	<b>Total Number of Valid H-1B Registrations Submitted</b>	<b>Regular Cap</b>	<b>Advanced Degree Exemption</b>
2021	269,194	145,950	123,244
<b>Total</b>	<b>269,194</b>	<b>145,950</b>	<b>123,244</b>

<sup>96</sup> Calculation: 106,100 Registrations Randomly Selected / 274,273 Total Number of H-1B Cap-Subject registrations Filed in 2020 = 39%.

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Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 31, 2020 & USCIS & Analysis

\*Note: The total number of registrations in this table does not equal 274,273 because 5,043 of the registrations were invalid.

DHS estimated the wage level distribution for FY 2021 based on the average distribution observed in FYs 2019 and 2020. As of September 2020, the wage level data is unavailable for FY 2021 because the petition filing process is ongoing. Table 11 displays the historic 2-year (FY 2019 and FY 2020) approximated average of H-1B cap-subject petitions that were selected, separated by OES wage level, and percentages of selected petitions by each wage category.

Level	Regular Cap		Advanced Degree Exemption	
	Selected	% of Total	Selected	% of Total
Level I & Below	26,140	31.50%	9,962	36.99%
Level II	44,530	53.70%	14,181	52.66%
Level III	8,622	10.40%	2,164	8.04%
Level IV	3,608	4.40%	623	2.31%
<b>Total</b>	<b>82,900</b>	<b>100%</b>	<b>26,930</b>	<b>100%</b>

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. July 21, 2020 & USCIS Analysis  
 \*Note: Totals are based on 2-year averages of petitions randomly selected in FYs 2019–2020, Table 11 is replicated from Table 7.

DHS assumes that FY 2021 wage level distribution of registrations would equal the wage level distribution observed in FYs 2019 through 2020 data. DHS multiplied the percentage of selected petitions by level from Table 11 to estimate the breakdown of registrations by wage level. For example, DHS multiplied 145,950 by 4.4 percent to estimate that a total of 6,422 registrations would have been categorized as wage level IV under the regular cap.

Level	Regular Cap		Advanced Degree Exemption	
	Estimated Registrations	% of Registrations	Estimated Registrations	% of Registrations

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Level I & Below	45,974	31.50%	45,588	36.99%
Level II	78,375	53.70%	64,900	52.66%
Level III	15,179	10.40%	9,909	8.04%
Level IV	6,422	4.40%	2,847	2.31%
<b>Total</b>	<b>145,950</b>	<b>100%</b>	<b>123,244</b>	<b>100%</b>
Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 31, 2020 & USCIS Analysis				
*Note: Totals are based on 2021 data				

This proposed rule would change the H-1B cap selection process. USCIS now would rank and select the registrations received (or petitions, as applicable) generally on the basis of the highest OES wage level that the proffered wage were to equal or exceed for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. As a result of the approximated 2-year average from above, DHS displays the projected selection percentages for registrations under the regular cap and advanced degree exemption in Table 13. With the revised selection method based on corresponding OES wage level and ranking, the approximated average indicates that all registrations with a proffered wage that corresponds to OES wage level IV or level III would be selected and 58,999, or 75 percent, of the registrations with a proffered wage that corresponds to OES wage level II would be selected toward the regular cap projections. None of the registrations with a proffered wage that corresponds to OES wage level I or below would be selected toward the regular cap projections. For the advanced degree exemption, DHS estimates all registrations with a proffered wage that corresponds to OES wage levels IV and III would be selected and 12,744, or 20 percent, of the registrations with a proffered wage that corresponds to OES wage level II would be selected. DHS estimates that none of the registrations with a proffered wage that corresponds to OES wage level I or below would be selected.

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DHS is using the approximated 2-year average from above to illustrate the expected distribution of future selected registration percentages by corresponding wage level. However, DHS is unable to quantify the actual outcome because DHS cannot predict the actual number of registrations that would be received at each wage level because employers may change the number of registrations they choose to submit and the wages they offer in response to the changes proposed in this rule.

Level	Regular Cap			Advanced Degree Exemption		
	Total Registrations	Selected Registrations	% Selected	Total Registrations	Selected Registrations	% Selected
Level I & Below	45,974	0	0%	45,588	0	0%
Level II	78,375	58,999	75%	64,900	12,744	20%
Level III	15,179	15,179	100%	9,909	9,909	100%
Level IV	6,422	6,422	100%	2,847	2,847	100%
<b>Total</b>	<b>145,950</b>	<b>80,600</b>		<b>123,244</b>	<b>25,500</b>	

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 31, 2020 & USCIS Analysis  
 \*Note: Totals are based on FY 2021 data

This proposed rule may primarily affect prospective petitioners seeking to file H-1B cap-subject petitions with a proffered wage that corresponds to OES wage level I and level II.<sup>97</sup> As Table 13 shows, this proposed rule is expected to result in a reduced likelihood that registrations

<sup>97</sup> DOL uses wage levels to determine the prevailing wage based on the level of education, experience (including special skills and other requirements), or supervisory duties required for a position; however, USCIS would use wage levels to rank and select registrations (or petitions, as applicable) based on the rate of pay for the wage level that the proffered wage were to equal or exceed. More information about DOL wage level determinations can be found *supra* notes 26 and 38. DHS acknowledges that varying wage levels correspond to varying skill levels. In analyzing the economic effects of this proposed rule, DHS recognizes that prospective petitioners may offer wages exceeding the wage levels associated with the skills required for given positions to increase their chances of selection under the ranked selection process.

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for level II would be selected, as well as the likelihood that registrations for level I and below wages would not be selected. A prospective petitioner, however, could choose to increase the proffered wage so that it corresponds to a higher wage level. Another possible effect is that employers would not fill vacant positions that would have been filled by H-1B workers. These employers may be unable to find qualified U.S. workers, or may leave those positions vacant because they cannot justify raising the wage to stand greater chances of selection in the H-1B cap selection process. That, in turn, could result in fewer registrations and H-1B cap-subject petitions with a proffered wage that corresponds to OES wage level II and below.

DHS acknowledges that this proposed rule might result in more registrations (or petitions, if registration is suspended) with a proffered wage that would correspond to level IV and level III OES wages for H-1B cap-subject beneficiaries. DHS believes a benefit of this proposed rule may be that some petitioners may choose to increase proffered wages for H-1B cap-subject beneficiaries, so that the petitioner may have a greater chance of selection. This change would in turn benefit H-1B beneficiaries who ultimately would receive a higher rate of pay that they otherwise would have in the absence of this rule. However, DHS is not able to estimate the magnitude of such benefits. DHS acknowledges the change in the selection procedure resulting from this proposed rule would create distributional effects and costs. DHS is unable to quantify the extent or determine the probability of H-1B petitioner behavioral changes. Therefore, DHS does not know the portion of overall impacts of this rule that would be benefits or costs.

As a result of this proposed rule, costs would be borne by prospective petitioners that would have hired lower wage level H-1B cap-subject beneficiaries, but were unable to do so

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because of a reduced chance of selection in the H-1B selection process. Such employers may also incur additional costs to find available replacement workers. DHS estimates costs incurred associated with loss of productivity from not being able to hire H-1B workers, or the need to search for and hire U.S. workers to replace the H-1B workers. Although DHS does not have data to estimate the costs resulting from productivity loss for these employers, DHS provides an estimate of the search and hiring costs for the replacement workers. Accordingly, based on the result of the study conducted by the Society for Human Resource Management (SHRM) in 2016, DHS assumes that an entity whose H-1B petition was denied would incur an average cost of \$4,398 per worker (in 2019 dollars)<sup>98</sup> to search for and hire a U.S. worker in place of an H-1B nonimmigrant worker during the period of this economic analysis. If petitioners cannot find suitable replacements for the labor H-1B cap-subject beneficiaries would have provided if selected and ultimately granted H-1B status, this proposed rule would primarily be a cost to these petitioners through lost productivity and profits.

DHS also acknowledges that some petitioners might be impacted in terms of the employment, productivity loss, search and hire costs, and profits resulting from labor turnover. In cases where companies cannot find reasonable substitutes for the labor the H-1B beneficiaries would have provided, affected petitioners also would lose profits from the lost productivity. In such cases, employers would incur opportunity costs by having to choose the next best

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<sup>98</sup> Society for Human Resource Management (SHRM), *2016 Human Capital Benchmarking Report*, at 16, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2016-Human-Capital-Report.pdf> (last visited Oct. 21, 2020). The study was based on data collected from 2,048 randomly selected human resource professionals who participated in the 2016 SHRM Human Capital Benchmarking Survey. The hiring cost is reported as \$4,129 per worker in 2016 dollars and converted to 2019 dollars in this analysis. The hiring cost includes third-party agency fees, advertising agency fees, job fairs, online job board fees, employee referrals, travel costs of applicants and staff, relocation costs, recruiter pay and benefits, and talent acquisition system costs.

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alternative to immediately fill the job the prospective H-1B worker would have filled. There may be additional opportunity of costs to employers such as search costs and training.

Such possible disruptions to companies would depend on the interaction of a number of complex variables that are constantly in flux, including national, state, and local labor market conditions, economic and business factors, the type of occupations and skills involved, and the substitutability between H-1B workers and U.S. workers. These costs to petitioners are expected to be offset by increased productivity and reduced costs to find available workers for petitioners of higher wage level H-1B beneficiaries.

DHS uses the compensation to H-1B employees as a measure of the overall impact of the provisions. While DHS would expect wages paid to H-1B beneficiaries to be higher if the rule is finalized as proposed, DHS is unable to quantify the benefit of increased compensation because not all of the wage increases would correspond with productivity increases. This proposed rule may indirectly benefit prospective petitioners submitting registrations with a proffered wage that corresponds to OES wage Level I and II registrations. The indirect benefit would be present during the COVID-19 pandemic and the ensuing economic recovery if the prospective petitioners were able to find replacement workers accepting a lower wage and factoring in the replacement cost of \$4,398 per worker in the United States. Similarly, prospective petitioners that would be submitting registrations with a proffered wage that would correspond to OES wage level I and II and that substitute toward unemployed or underemployed individuals in the U.S. labor force would create an additional indirect benefit from this rule. This would benefit those in the U.S. labor force if petitioners were to decide to select a U.S. worker rather than a prevailing wage level I or II H-1B worker. DHS notes that, although the pandemic is widespread, the

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severity of its impacts varies by locality and industry, and there may be structural impediments to the national and local labor market. Accordingly, DHS cannot quantify with confidence, the net benefit of the redistribution of H-1B cap selections detailed in this analysis.

DHS also proposes to change the filing procedures to allow USCIS to deny or revoke approval of a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS were to determine that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that would be equivalent to a lower wage level, after listing a higher wage level on the registration (or petition, if registration is suspended) to increase the odds of selection. DHS is unable to quantify the cost of these proposed changes to petitioners. DHS seeks public comments on any anticipated costs and data relevant for estimation of the impacts of the changes proposed by this rule.

#### **d. Costs of Filing Form I-129H1 Petitions**

DHS is proposing to amend Form I-129H1, which must be filed by petitioners on behalf of H-1B beneficiaries, to align with the regulatory changes DHS would make in this proposed rule. The changes to Form I-129H1 would result in an increased time burden to complete and submit the form.

Absent the changes implemented through this proposed rule, the current estimated time burden to complete and file Form I-129H1 is 4.0 hours per petition.<sup>99</sup> As a result of the changes

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<sup>99</sup> DHS estimates the costs and benefits of this rule using the newly published Fee Schedule Final Rule, and related form changes, as the baseline. *See supra* note 66. The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center v. Wolf*, No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). In addition, on October 8, 2020, DHS was



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in this proposed rule, DHS estimates the total time burden to complete and file Form I-129H1 would be 4.25 hours per petition, to account for the additional time petitioners would spend reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary documentation, and submitting the petition. DHS estimates the time burden would increase by a total of 15 minutes (0.25 hours) per petition for completing a Form I-129H1 petition.<sup>100</sup>

To estimate the additional cost of filing Form I-129H1, DHS applies the additional estimated time burden to complete and file Form I-129H1 (0.25 hours) to the respective total population and compensation rate of who may file, including an HR specialist, in-house lawyer, or outsourced lawyer. As shown in Table 14, DHS estimates, the total additional annual opportunity cost of time to petitioners completing and filing Form I-129H1 petitions would be approximately \$3,457,401. DHS requests public comments on the estimate of additional time petitioners will spend reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary documentation, and submitting the petition.

**Table 14. Additional Opportunity Costs of Time to Petitioners for Filing Form I-129H1 Petitions from an Increase in Time Burden**

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also preliminarily enjoined from implementing and enforcing the Fee Schedule Final Rule by the U.S. District Court for the District of Columbia, including by adopting any form changes associated with the rule. See, *Northwest Immigrant Rights Project v. U.S. Citizenship and Immigration Servs.*, 1:19-cv-03283-RDM (D.D.C. Oct. 8, 2020). While DHS intends to vigorously defend these lawsuits and is not changing the economic baseline for this rule as a result of the litigation, it is using the currently approved Form I-129, and not the form version associated with the enjoined Fee Schedule Final Rule for the purpose of seeking OMB approval of form changes associated with this rule. Should DHS prevail in the Fee Schedule Final Rule litigation and be able to implement the form changes associated with that rule, DHS will comply with the Paperwork Reduction Act and seek approval of the information collection changes associated with this rule, based on the version of the Form I-129 that is in effect at that time.

<sup>100</sup> 0.25 hours additional time to complete and file Form I-129H1 = (4.25 hours to complete and file the new Form I-129H1) – (4 hours to complete and file the current Form I-129 and its supplements).

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<b>Cost Items</b>	<b>Total Affected Population</b>	<b>Additional Time Burden to Complete Form I-129H1 (Hours)</b>	<b>Compensation Rate</b>	<b>Total Cost</b>
	A	B	C	D = A×B×C
Opportunity cost of time to complete Form I-129H1 for H-1B petitions by:				
HR specialist	21,220	0.25	\$47.57	\$252,359
In-house lawyer	27,586	0.25	\$102.00	\$703,443
Outsourced lawyer	57,294	0.25	\$174.65	\$2,501,599
<b>Total</b>	<b>106,100</b>			<b>\$3,457,401</b>
Source: USCIS analysis				

**e. Costs of Submitting Registrations as Modified by this Proposed Rule**

DHS is proposing to amend the required information on the H-1B Registration Tool. In addition to the information required on the current registration tool, a registrant would be required to provide the highest OES wage level that the proffered wage would equal or exceed for the relevant SOC code in the area of intended employment, if such data is available. The proffered wage is the wage that the employer intends to pay the beneficiary. The SOC code and area of intended employment would be indicated on the LCA filed with the petition. For registrants relying on a private wage survey, if the proffered wage were less than the corresponding level I OES wage, the registrant would select the “Wage Level I and below” box on the registration tool. If the registration indicates that the H-1B beneficiary would work in multiple locations, or in multiple positions if the prospective petitioner is an agent, USCIS would rank and select the registration based on the lowest corresponding OES wage level that the proffered wage would equal or exceed. In the limited instance where there is no current OES prevailing wage

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information for the proffered position, the registrant would follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration and USCIS would rank and select based on the highest OES wage level. The proposed change to this registration requirement would impose increased opportunity costs of time to registrants, by adding additional information to their registration.

The current estimated time burden to complete and file an electronic registration is 30 minutes (0.5 hours) per registration.<sup>101</sup> DHS estimates the total time burden to complete and file a registration, if this rule is finalized as proposed, would be 50 minutes (0.83 hours) per registration, which amounts to an additional time burden of 20 minutes (0.33 hours) per registration. The additional time burden accounts for the additional time a registrant would spend reviewing instructions, completing the registration, and submitting the registration.

To estimate the additional cost of submitting a registration, DHS applies the additional estimated time burden to complete and submit the registration (0.33 hours) to the respective total population and total rate of compensation of who may file, including HR specialists, in-house lawyers, or outsourced lawyers. As shown in Table 15, DHS estimates the total additional annual opportunity cost of time to the prospective petitioners of completing and submitting registrations would be approximately \$11,797,520. DHS requests public comments on the estimate of additional time petitioners will spend reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary documentation, and submitting a registration.

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<sup>101</sup> *Agency Information Collection Activities; Revision of a Currently Approved Collection: H-1B Registration Tool*, 84 FR 54159 (Oct. 9, 2019).

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<b>Table 15. Additional Cost of Submitting Registrations</b>				
<b>Cost Items</b>	<b>Total Affected Population A</b>	<b>Additional Time Burden to Submit Registrations (Hours) B</b>	<b>Compensation Rate C</b>	<b>Total Cost D = A×B×C</b>
Opportunity cost of time to complete registrations by:				
HR specialist	54,855	0.33	\$47.57	\$861,119
In-house lawyer	71,311	0.33	\$102.00	\$2,400,328
Outsourced lawyer	148,107	0.33	\$174.65	\$8,536,073
<b>Total</b>	<b>274,273</b>			<b>\$11,797,520</b>
Source: USCIS analysis				

While the expectation is that the registration process will be run on an annual basis, USCIS may suspend the H-1B registration requirement, in its discretion, if it determines that the registration process is inoperable for any reason. The selection process also allows for selection based solely on the submission of petitions in any year in which the registration process is suspended due to technical or other issues. In years when registration is suspended, DHS estimates, based on the 5-year average of H-1B cap-subject petitions received for FYs 2016 to 2020, that 211,797 H-1B cap-subject petitions would be submitted annually. In the event registration is suspended and 211,797 H-1B cap-subject petitions are submitted, DHS estimates that 106,100 petitions would be selected for adjudication to meet the numerical allocations and 105,697 petitions would be rejected. For FY 2021, DHS selected 124,415 registrations to generate the 106,100 petitions projected to meet the numerical allocations. Therefore, DHS estimates that the additional cost to petitioners for preparing and submitting H-1B cap-subject

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petitions, if this rule is finalized as proposed, would be higher in the event registration were suspended because more petitions would be prepared and submitted in this scenario. However, if registration were suspended there would be no costs associated with registration so the overall additional cost of this proposed rule to petitioners would be less (stated another way, the estimated added cost for submitting approximately 212,000 petitions if registration were suspended would be less than the added costs based on approximately 274,000 registrations and 106,000 petitions for those with selected registrations). Since the expectation is that registration will be run on an annual basis and because the estimated additional costs resulting from this proposed rule would be less if registration were suspended, DHS is not separately estimating the costs for years when registration would be suspended and is instead relying on the additional costs created by this proposed rule when registration would be required to estimate total costs of this proposed rule to petitioners seeking to file H-1B cap-subject petitions.

**f. Familiarization Cost**

Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule in order to fully comply with the new regulation(s). To the extent that an individual or entity directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule. The entities directly regulated by this rule are the employers who file H-1B petitions. Using FY 2020 internal data on actual filings of Form I-129 H-1B petitions, DHS identified 24,111<sup>102</sup> unique entities. DHS assumes that the petitioners require approximately two hours to familiarize themselves with the rule. Using the average total rate of compensation of HR specialists, In-house lawyer, and Outsourced lawyer from Table 4

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<sup>102</sup> Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 18, 2020 & USCIS Analysis.

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and assuming one person at each entity familiarizes his or herself with the rule, DHS estimates a one-time total familiarization cost of \$6,285,527 in FY2022.

<b>Table 16. Familiarization Costs to the Petitioners</b>				
<b>Cost Items</b>	<b>Total Affected Population</b>	<b>Additional Time Burden to Familiarize (Hours)</b>	<b>Compensation Rate</b>	<b>Total Cost</b>
	A	B	C	D = A×B×C
Opportunity cost of time to familiarize the rule by:				
HR specialist	4,822	2	\$47.57	\$458,765
In-house lawyer	6,269	2	\$102.00	\$1,278,876
Outsourced lawyer	13,020	2	\$174.65	\$4,547,886
<b>Total</b>	<b>24,111</b>			<b>\$6,285,527</b>
Source: USCIS analysis				

**ii. Total Estimated Costs of Regulatory Changes**

In this section, DHS presents the total annual costs annualized over a 10-year implementation period if the regulatory changes in the proposed rule are finalized as proposed.

Table 17 details the total annual costs of the proposed rule to petitioners would be \$21,540,448 in FY 2022 and \$15,254,921 in FY 2023–2032.

<b>Table 17. Summary of Estimated Annual Costs to Petitioners in the Proposed Rule</b>	
<b>Costs</b>	<b>Total Estimated Annual Cost</b>
Petitioners' additional opportunity cost of time in filing Form I-129H1 petitions	<b>\$3,457,401</b>
Petitioners' additional opportunity cost of time in submitting information on the registration	<b>\$11,797,520</b>
Familiarization Cost (Year 1 only FY 2022)	<b>\$6,285,527</b>
<b>Total Annual Costs (undiscounted) = FY 2022</b>	<b>\$21,540,448</b>
<b>Total Annual Cost (undiscounted) = FY 2023 –FY 2032</b>	<b>\$15,254,921</b>

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Table 18 shows costs over the 10-year implementation period of this proposed rule. DHS estimates the 10-year total net cost of the rule to petitioners to be approximately \$158,834,737 undiscounted, \$136,230,024 discounted at 3-percent, and \$113,018,506 discounted at 7-percent. Over the 10-year implementation period of the rule, DHS estimates the annualized costs of the rule to be \$15,970,315 annualized at 3-percent, \$16,091,293 annualized at 7-percent.

<b>Table 18. Total Costs of this Proposed Rule</b>		
<b>Year</b>	<b>Total Estimated Costs</b>	
	\$21,540,448 (Year 1); \$15,254,921 (Year 2-10)	
	Discounted at 3-percent	Discounted at 7- percent
<b>1</b>	\$20,913,056	\$20,131,260
<b>2</b>	\$14,379,226	\$13,324,239
<b>3</b>	\$13,960,414	\$12,452,560
<b>4</b>	\$13,553,800	\$11,637,906
<b>5</b>	\$13,159,029	\$10,876,548
<b>6</b>	\$12,775,756	\$10,164,998
<b>7</b>	\$12,403,647	\$9,499,998
<b>8</b>	\$12,042,376	\$8,878,503
<b>9</b>	\$11,691,627	\$8,297,666
<b>10</b>	\$11,351,094	\$7,754,828
<b>Total</b>	<b>\$136,230,024</b>	<b>\$113,018,506</b>
<b>Annualized</b>	<b>\$15,970,315</b>	<b>\$16,091,293</b>

E.O. 13771 directs agencies to reduced regulation and control regulatory costs. This proposed rule is expected to be an E.O. 13771 regulatory action. DHS estimates the total cost of this rule would be \$10,515,740 annualized using a 7- percent discount rate over a perpetual time horizon, in 2016 dollars, and discounted back to 2016.

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### **iii. Costs to the Federal Government**

DHS proposes to revise the process and system by which H-1B registrations or petitions, as applicable, would be selected toward the annual numerical allocations. This proposed rule would require updates to USCIS information technology (IT) systems and additional time spent by USCIS on H-1B registrations or petitions.

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services by DHS, including administrative costs and services provided without charge to certain applicants and petitioners.<sup>103</sup> DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs such as salaries and benefits of clerical staff, officers, and managers, plus an amount to recover unassigned overhead (such as facility rent, IT equipment and systems, or other expenses) and immigration services provided without charge. Consequently, since USCIS immigration fees are based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS notes the time necessary for USCIS to review the information submitted with the forms relevant to this proposed rule includes the time to adjudicate the benefit request. These costs are captured in the fees collected for the benefit request from petitioners.

## **5. Regulatory Alternatives**

DHS considered various regulatory alternatives to a number of the provisions of the proposed rule. Recognizing that a rote or indiscriminate interpretation of the statute would

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<sup>103</sup> See INA section 286(m), 8 U.S.C. 1356(m).



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create an absurd or impossible result, DHS requests comments on, including potential alternatives to, the proposed ranking and selection of registrations based on the OES prevailing wage level that corresponds to the requirements of the proffered position in situations where there is no current OES prevailing wage information. More generally, DHS requests comments and seeks alternatives for selecting from among all H-1B registrations or petitions to ensure that H-1B visas are given to workers who will provide the highest valued use to the U.S. economy, such as ranking and selecting all registrations or petitions according to the actual OES prevailing wage level that the position would be rated at rather than the wage level that the proffered wage equals or exceeds.

Another alternative for which DHS seeks public comment is a process where all registrations or petitions, while still randomly selected, would be weighted according to their OES prevailing wage level, such that, for example, a level IV position would have four times greater chance of selection than a level I position, a level III position would have three times greater chance of selection than a level I position, and a level II position would have two times greater chance of selection than a level I position.

## **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. “Small entities” are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An “individual” is not considered a small entity and costs to an

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individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform an initial regulatory flexibility analysis (IRFA) of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered as costs for RFA purposes.

Although individuals, rather than small entities, submit the majority of immigration and naturalization benefit applications and petitions, this proposed rule would affect entities that file and pay fees for H-1B immigration benefit requests. The USCIS forms that are subject to an RFA analysis for this proposed rule are Form I-129H1, Petition for a Nonimmigrant Worker and the Registration H-1B Tool.

DHS does not believe that the changes in this proposed rule would have a significant economic impact on a substantial number of small entities that would file Form I-129H1 for H-1B petitions.

## **1. Initial Regulatory Flexibility Analysis**

### **i. A Description of the Reasons Why the Action by the Agency is Being Considered**

DHS is proposing to amend its regulations governing H-1B specialty occupation workers. The purpose of the proposed changes is to better ensure that H-1B classification is more likely to be awarded to petitioners seeking to employ higher-skilled and higher-paid beneficiaries. DHS believes these changes would disincentivize use of the H-1B program to fill relatively lower-paid, lower-skilled positions.

### **ii. 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.

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**iii. 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 online 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<sup>104</sup>, revenue, and employee count for each entity in the sample. To determine whether an entity is small for purposes of RFA, DHS first classified the entity by its NAICS code and then used SBA size standards guidelines<sup>105</sup> to classify the revenue or employee count threshold for each entity. Based on the NAICS codes, some entities were classified as small based on their annual revenue, and some by their numbers of employees. Once as many entities as possible were matched, those that had relevant data were compared to the size standards provided by the SBA to determine whether they were small or not. Those that could not be matched or compared were assumed to be small under the presumption that non-small entities would have been identified by one of the databases at some point in their existence.

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<sup>104</sup> U.S. Census Bureau, North American Industry Classification System, <http://www.census.gov/eos/www/naics/> (last visited Oct. 21, 2020).

<sup>105</sup> DHS utilized a subscription-based online 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. Guidelines suggested by the SBA Office of Advocacy indicate that the impact of a rule could be significant if the cost of the regulation exceeds 5 percent of the labor costs of the entities in the sector. Office of Advocacy, Small Business Administration, “A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act”, at 19, <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf> (last visited Oct. 21, 2020).

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Using FY 2020 internal data on actual filings of Form I-129 H-1B petitions, DHS identified 24,111<sup>106</sup> 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 473 entities from the population of 24,111 entities that filed Form I-129 for H-1B petitions in FY 2020. Of the 473 entities, 406 entities returned a successful match of a filing entity in the ReferenceUSA, Manta, Cortera, and Guidestar databases; 67 entities did not return a match. Using these databases' revenue or employee count and their assigned North American Industry Classification System (NAICS) code, DHS determined 312 of the 406 matches to be small entities, 94 to be non-small entities. Based on previous experience conducting regulatory flexibility analyses, 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 rule would affect, DHS conservatively considers all the non-matched and missing entities as small entities for the purpose of this analysis. Therefore, DHS conservatively classifies 379 of 473 entities as small entities, including combined non-matches (67), and small entity matches (312). Thus,

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<sup>106</sup> Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. Aug. 18, 2020, & USCIS Analysis.

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DHS estimates that 80.1% (379 of 473) 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-129H1. Thus, DHS estimates the number of small entities to be 80.1% of the population of 24,111 entities that filed Form I-129 under the H-1B classification, as summarized in Table 18 below. The annual numeric estimate of the small entities impacted by this proposed rule is 19,319 entities.<sup>107</sup>

<b>Population</b>	<b>Number of Small Entities</b>	<b>Proportion of Population (Percent)</b>
24,111	19,319	80.1%

Following the distributional assumptions above, DHS uses the set of 312 small entities with matched revenue data to estimate the economic impact of the proposed rule on each small entity. The economic impact, in percent, for each small entity is the sum of the impacts of the proposed changes divided by the entity's sales revenue.<sup>108</sup> DHS constructed the distribution of economic impact of the proposed rule based on the sample of 312 small entities. Across all 312 small entities, the proposed increase in cost to a small entity would range from 0.00000026 percent to 2.5 percent of that entity's FY 2020 revenue. Of the 312 small entities, 0 percent (0

<sup>107</sup> The annual numeric estimate of the small entities (19,319) = Population (24,111) \* Percentage of small entities (80.1%).

<sup>108</sup> The economic impact, in percent, for each small entity  $i$  = (Cost of one petition for entity  $i$  x Number of petitions for entity  $i$ ) x 100. The cost of one petition for entity  $i$  (\$75.60) is estimated by adding the two cost components per petition of the proposed rule (\$75.60 = \$32.59 + \$43.01). The first component (\$32.59) is the weighted average additional cost of filing a petition, and is calculated by dividing total cost by the number of petitions (\$32.59 = \$3,457,401 / 106,100) from Table 14. The second component (\$43.01) is the weighted average cost of submitting information on the registration and is calculated by dividing total cost by the number of baseline petitions (\$43.01 = \$11,797,520 / 274,273) from Table 15. The number of petitions for entity  $i$  is taken from USCIS internal data on actual filings of I-129 H-1B petition. The entity's sales revenue is taken from ReferenceUSA, Manta, Cortera, and Guidestar databases.

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small entities) would experience a cost increase that is greater than 5 percent of revenues.

Extrapolating to the population of 19,319 small entities and assuming an economic impact significance threshold of 5 percent of annual revenues, DHS estimates no small entities would be significantly affected by the proposed rule.

Based on this analysis, DHS does not believe that the proposed changes in this proposed rule would have a significant economic impact on a substantial number of small entities that file I-129H1.

**iv. 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.**

As stated above in the preamble, the proposed rule would impose additional reporting, recordkeeping, or other compliance requirements on entities that could be small entities.

**v. 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.

**vi. 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.**

DHS requests comments on, including potential alternatives to, the proposed ranking and selection of registrations based on the OES prevailing wage level that corresponds to the requirements of the proffered position in situations where there is no current OES prevailing wage information. In the RFA context, DHS seeks comments on alternatives that would accomplish the objectives of this proposed rule without unduly burdening small entities. DHS

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also welcomes any public comments or data on the number of small entities that would be petitioning for an H-1B employee and any direct impacts on those small entities.

### **C. Unfunded Mandates Reform Act**

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 the UMRA requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule 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. Based on the Consumer Price Index for All Urban Consumers (CPI-U), the value equivalent of \$100 million in 1995 adjusted for inflation to 2019 levels is approximately \$168 million.<sup>109</sup>

Given the uncertainties discussed previously, DHS acknowledges the possibility that this proposed rule could result in private sector expenditures exceeding \$100 million, adjusted for inflation to \$168 million in 2019 dollars, in any 1 year. While DHS has explored opportunities to minimize these potential costs as directed by Title II of the Act, the agency invites input from the public on reducing these potential costs in the final rule. Congressional Review Act

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<sup>109</sup> See U.S. Department of Labor, Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month*, <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf> (last visited Sept. 2, 2020).

Calculation of inflation: 1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2019); 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 2019 – Average monthly CPI-U for 1995) / (Average monthly CPI-U for 1995)] \* 100 = [(255.657 – 152.383) / 152.383] \* 100 = (103.274 / 152.383) \* 100 = 0.6777 \* 100 = 67.77 percent = 68 percent (rounded).

Calculation of inflation-adjusted value: \$100 million in 1995 dollars \* 1.68 = \$168 million in 2019 dollars.

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For reasons described in the Summary of Economic Effects, this proposed rule is a major rule as defined by 5 U.S.C. 804, also known as the “Congressional Review Act,” as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104– 121, 110 Stat. 847, 868 *et seq.*, and thus a final rule resulting from this proposed rule would not be subject to a 60-day delay in the rule becoming effective. If this proposed rule is finalized, DHS will send it to Congress and to the Comptroller General under the Congressional Review Act, 5 U.S.C. 801 *et seq.*

**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, DHS 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 meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

**F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)**

This proposed rule does not have “tribal implications” because it does 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.



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#### **G. National Environmental Policy Act**

DHS analyzes actions to determine whether the National Environmental Policy Act, Public Law 91–190, 42 U.S.C. 4321 through 4347 (NEPA), 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, *Implementation of the National Environmental Policy Act* (Instruction Manual) establish the policies and procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR Parts 1500–1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) that experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii), 1508.4. Categorical exclusions established by DHS are set forth in Appendix A of the Instruction Manual. 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 of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c).

As discussed in more detail throughout this proposed rule, DHS is proposing to amend regulations governing the selection of registrations or petitions, as applicable, toward the annual H-1B numerical allocations. This proposed rule establishes that, if more registrations were to be received during the annual initial registration period (or petition filing period, if applicable) than

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necessary to reach the applicable numerical allocation, USCIS would rank and select the registrations (or petitions, if the registration process were suspended) received on the basis of the highest OES wage levels that the proffered wages were to equal or exceed for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. If a proffered wage were to fall below an OES wage level I, because the proffered wage were based on a prevailing wage from another legitimate source (other than OES) or an independent authoritative source, USCIS would rank the registration in the same category as OES wage level I.<sup>110</sup>

Generally, DHS believes NEPA does not apply to a rule intended to change a discrete aspect of a visa program because any attempt to analyze its potential impacts would be largely speculative, if not completely so. This rule does not propose to alter the statutory limitations on the numbers of nonimmigrants who: may be issued initial H-1B visas or granted initial H-1B nonimmigrant status, will consequently be admitted into the United States as H-1B nonimmigrants, will be allowed to change their status to H-1B, or will extend their stay in H-1B status. DHS cannot reasonably estimate whether the wage level-based ranking approach to select H-1B registrations (or petitions in any year in which the registration requirement were suspended) that DHS proposes would affect how many petitions would be filed for workers to be employed in specialty occupations or whether the regulatory amendments herein would result in an overall change in the number of H-1B petitions that would ultimately be approved, and the number of H-1B workers who would be employed in the United States in any FY. DHS has no

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<sup>110</sup> If the proffered wage is expressed as a range, USCIS would make the comparison using the lowest wage in the range.

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reason to believe that these proposed amendments to H-1B regulations would change the environmental effect, if any, of the existing regulations. Therefore, DHS has determined that even if NEPA were to apply to this action, this proposed rule clearly fits within categorical exclusion A3(d) in the Instruction Manual, which provides an exclusion for “promulgation of rules . . . that amend an existing regulation without changing its environmental effect.” This proposed rule would maintain the current human environment by proposing improvements to the H-1B program that would take effect during the economic crisis caused by COVID-19 in a way that would more effectively prevent an adverse impact from the employment of H-1B workers on the wages and working conditions of U.S. workers who would be similarly employed. This proposed rule is not a part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

## **H. Paperwork Reduction Act**

### **1. USCIS H-1B Registration Tool**

Under the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. DHS and USCIS invite comments on the impact to the 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 [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. All submissions received must include the agency name and OMB Control Number 1615-0144 in the body of the submission.

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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.

Overview of information collection:

(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 the 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 will use the data collected through the H-1B Registration Tool to select a sufficient number of registrations projected as needed to meet the applicable H-1B cap allocations and to notify registrants whether their registrations were selected.

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(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 is 275,000 and the estimated hour burden per response is 0.833 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 229,075 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.

## **2. USCIS Form I-129<sup>111</sup>**

Under the PRA all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. DHS and USCIS invite comments on the impact to the 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.

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<sup>111</sup> As indicated elsewhere in this rule, DHS estimates the costs and benefits of this proposed rule using the newly published Fee Schedule Final Rule, and related form changes, as the baseline. *See supra* note 66. The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center v. Wolf*, No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). In addition, on October 8, 2020, DHS was also preliminarily enjoined from implementing and enforcing the Fee Schedule Final Rule by the U.S. District Court for the District of Columbia, including by adopting any form changes associated with the rule. *See, Northwest Immigrant Rights Project v. U.S. Citizenship and Immigration Servs.*, 1:19-cv-03283-RDM (D.D. C. Oct. 8, 2020). While DHS intends to vigorously defend these lawsuits and is not changing the economic baseline for this proposed rule as a result of the litigation, it is using the currently approved Form I-129, and not the form version associated with the enjoined Fee Schedule Final Rule for the purpose of seeking OMB approval of form changes associated with this proposed rule. Should DHS prevail in the Fee Schedule Final Rule litigation and be able to implement the form changes associated with that rule, DHS will comply with the Paperwork Reduction Act and seek approval of the information collection changes associated with this proposed rule, based on the version of the Form I-129 that is in effect at that time.

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Comments are encouraged and will be accepted until [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. All submissions received must include the agency name and OMB Control Number 1615-0009 in the body of the submission. 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, for example, permitting electronic submission of responses.

Overview of information collection:

- (1) Type of Information Collection: Revision of a Currently Approved Collection.
- (2) Title of the Form/Collection: Petition for a Nonimmigrant Worker.
- (3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-129; 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

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eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for an alien to temporarily enter as a nonimmigrant. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the alien worker. The form serves the purpose of standardizing requests for nonimmigrant workers and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

USCIS also uses the data to determine continued eligibility. For example, the data collected is used in compliance reviews and other inspections to ensure that all program requirements are being met.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: I-129 is 294,751 and the estimated hour burden per response is 3.09 hours; the estimated total number of respondents for the information collection E-1/E-2 Classification Supplement to Form I-129 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 to Form I-129 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 Supplement to Form I-129 is 96,291 and the estimated hour burden per response is 2 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

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burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I-129 is 37,831 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I-129 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 to Form I-129 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 to Form I-129 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 1,293,873 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.

#### **I. Signature**

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the Federal Register.

#### **List of Subjects in 8 CFR Part 214**



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Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

Accordingly, DHS proposes to amend part 214 of chapter I of title 8 of the Code of Federal Regulations as follows:

#### **PART 214—NONIMMIGRANT CLASSES**

1. The authority citation for part 214 would continue 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 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.

2. Section 214.2 would be amended by:

a. Revising the first sentence of paragraph (h)(8)(iii)(A)(I) and adding a new paragraph (h)(8)(iii)(A)(I)(i);

b. Revising paragraph (h)(8)(iii)(A)(5)(i) to replace the last two sentences starting with “When necessary to ensure the fair and orderly allocation[;]”

c. Revising paragraph (h)(8)(iii)(A)(5)(ii) to replace the last two sentences starting with “USCIS will randomly select from among[;]”

d. Revising paragraph (h)(8)(iii)(A)(6)(i) to replace the last two sentences starting with “When necessary to ensure the fair and orderly allocation[;]”

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e. Revising paragraph (h)(8)(iii)(A)(6)(ii) to replace the last two sentences starting with “USCIS will randomly select the number[;]”

f. Revising paragraph (h)(8)(iii)(A)(7);

g. Revising paragraph (h)(8)(iii)(D)(1) and adding new paragraphs (h)(8)(iii)(D)(1)(i), (h)(8)(iii)(D)(1)(ii) and (h)(8)(iii)(D)(1)(iii);

h. Revising paragraph (h)(8)(iv)(B)(1) by replacing the last three complete sentences starting with “When necessary to ensure the fair and orderly allocation[;]”

i. Revising paragraph (h)(8)(iv)(B)(2);

k. Revising paragraph (h)(8)(v) and re-designating it as paragraph (h)(24)(i);

l. Revising paragraph (h)(10)(ii) to replace the second sentence starting with “The petition will be denied if[;]”

m. Revising paragraph (h)(11)(iii)(A)(2); and

n. Adding a new paragraph (h)(11)(iii)(A)(3), and re-numbering existing paragraphs (h)(11)(iii)(A)(3) through (5) as (h)(11)(iii)(A)(4) through (6).

The proposed amendments read as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

\* \* \* \* \*

(h) \* \* \*

(8) \* \* \*

(iii) \* \* \*

(A)

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(I) Except as provided in paragraph (h)(8)(iv) of this section, before a petitioner is eligible to 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 prospective petitioner or its attorney or accredited representative must register to file a petition on behalf of an alien beneficiary electronically through the USCIS website ([www.uscis.gov](http://www.uscis.gov)). \* \* \*

(i) *Ranking by wage levels.* USCIS will rank and select registrations as set forth in paragraphs (h)(8)(iii)(A)(5) and (h)(8)(iii)(A)(6). For purposes of the ranking and selection process, USCIS will use the highest corresponding Occupational Employment Statistics (OES) wage level that the proffered wage will equal or exceed for the relevant Standard Occupational Classification (SOC) code and area(s) of intended employment. If the proffered wage is lower than the OES wage level I, because it is based on a prevailing wage from another legitimate source (other than OES) or an independent authoritative source, USCIS will rank the registration in the same category as OES wage level I. If the H-1B beneficiary will work in multiple locations, or in multiple positions if the registrant is an agent, USCIS will rank and select the registration based on the lowest corresponding OES wage level that the proffered wage will equal or exceed. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select the registration based on the OES wage level that corresponds to the requirements of the proffered position.

\* \* \* \* \*

(5) \* \* \*

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(i) \* \* \* If USCIS has received more registrations on the final registration date than necessary to meet the H-1B regular cap under Section 214(g)(1)(A) of the Act, USCIS will rank and select from among all registrations properly submitted on the final registration date on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations needed to reach the numerical limitation.

(ii) \* \* \* If USCIS has received more than a sufficient number of registrations to meet the H-1B regular cap under Section 214(g)(1)(A) of the Act, USCIS will rank and select from among all registrations properly submitted during the initial registration period on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that

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particular wage level a sufficient number of registrations needed to reach the numerical limitation.

(6) \* \* \*

(i) \* \* \* If on the final registration date, USCIS has received more registrations than necessary to meet the H-1B advanced degree exemption limitation under Section 214(g)(5)(C) of the Act, USCIS will rank and select, from among the registrations properly submitted on the final registration date that may be counted against the advanced degree exemption, the number of registrations necessary to reach the H-1B advanced degree exemption on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations necessary to reach the H-1B advanced degree exemption.

(ii) \* \* \* USCIS will rank and select, from among the remaining registrations properly submitted during the initial registration period that may be counted against the advanced degree exemption numerical limitation, the number of registrations necessary to reach the H-1B advanced degree exemption on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, beginning

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with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I.

Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations necessary to reach the H-1B advanced degree exemption.

(7) Unselected registrations will remain on reserve for the applicable fiscal year. If USCIS determines that it needs to select additional registrations to receive the number of petitions projected to meet the numerical limitations, 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 reach 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 projected 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 selecting additional registrations under this paragraph, USCIS will rank and select properly submitted registrations in accordance with paragraphs (h)(8)(iii)(A)(1), (h)(8)(iii)(A)(5)

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and (h)(8)(iii)(A)(6). 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](http://www.uscis.gov).

(B) \* \* \*

(C) \* \* \*

(D)

(I) In addition to any other applicable requirements, a petitioner may file an H-1B petition for a beneficiary that 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 submitted by the petitioner, or its designated representative, on behalf of the beneficiary that was selected beforehand by USCIS. The petition must be filed within the filing period indicated in the selection notice. A petitioner may not substitute the beneficiary named in the original registration or transfer the registration to another petitioner.

(i) If a petitioner files an H-1B cap-subject petition based on a registration that was not selected beforehand by USCIS, based on a registration for a different beneficiary than the beneficiary named in the petition, or based on a registration considered by USCIS to be invalid, the H-1B cap-subject petition will be rejected or denied. USCIS will consider a registration to be invalid if the registration fee associated with the registration is declined, rejected, or canceled after submission as the registration fee is non-refundable and due at the time the registration is submitted.

(ii) If USCIS determines that the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct, USCIS may

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reject or deny the petition or, if approved, may revoke the approval of a petition that was filed based on that registration.

(iii) USCIS also may deny or revoke approval of a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that would be equivalent to a lower wage level, after listing a higher wage level on the registration to increase the odds of selection. USCIS will not deny or revoke approval of such an amended or new petition solely on the basis of a different proffered wage if that wage does not correspond to a lower OES wage level than the wage level on which the registration selection was based.

\* \* \* \* \*

(iv) \* \* \*

(A) \* \* \*

(B) \* \* \*

(I) \* \* \* If the final receipt date is any of the first five business days on which petitions subject to the H-1B regular cap may be received, USCIS will select from among all the petitions properly submitted during the first five business days the number of petitions deemed necessary to meet the H-1B regular cap. If USCIS has received more petitions than necessary to meet the numerical limitation for the H-1B regular cap, USCIS will rank and select the petitions received on the basis of the highest Occupational Employment Statistics (OES) wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with OES wage level IV and proceeding in



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descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If the wage falls below an OES wage level I, USCIS will rank the petition in the same category as OES wage level I. USCIS will rank the petition in the same manner even if, instead of obtaining an OES prevailing wage, a petitioner elects to obtain a prevailing wage using another legitimate source (other than OES) or an independent authoritative source. If USCIS receives and ranks more petitions at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from among all eligible petitions within that particular wage level a sufficient number of petitions needed to reach the numerical limitation.

(2) After USCIS has received a sufficient number of petitions to meet the H-1B regular cap and, as applicable, completed the selection process of petitions for the H-1B regular cap, USCIS will determine whether there is a sufficient number of remaining petitions to meet the H-1B advanced degree exemption numerical limitation. When calculating the number of petitions needed to meet the H-1B advanced degree exemption numerical limitation USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received and will announce on its website the date that it receives the number of petitions projected as needed to meet the H-1B advanced degree exemption numerical limitation (the “final receipt date”). The date the announcement is posted will not control the final receipt date. If the final receipt date is any of the first five business days on which petitions subject to the H-1B advanced degree exemption may be received (in other words, if the numerical limitation is reached on any one of the first five business days that

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filings can be made), USCIS will select from among all the petitions properly submitted during the first five business days the number of petitions deemed necessary to meet the H-1B advanced degree exemption numerical limitation. If USCIS has received more petitions than necessary to meet the numerical limitation for the H-1B advanced degree exemption, USCIS will rank and select the petitions received on the basis of the highest Occupational Employment Statistics (OES) wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with OES wage level IV and proceeding with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If the proffered wage is below an OES wage level I, USCIS will rank the petition in the same category as OES wage level I. USCIS will rank the petition in the same manner even if, instead of obtaining an OES prevailing wage, a petitioner elects to obtain a prevailing wage using another legitimate source (other than OES) or an independent authoritative source. If USCIS receives and ranks more petitions at a particular wage level than necessary to meet the numerical limitation for the H-1B advanced degree exemption, USCIS will randomly select from among all eligible petitions within that particular wage level a sufficient number of petitions needed to reach the numerical limitation.

\* \* \* \* \*

(10)

(i) \* \* \*

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(ii) \* \* \* The petition may be denied if it is determined that the statements on the registration or petition were inaccurate. The petition will be denied if it is determined that the statements on the registration or petition were fraudulent or misrepresented a material fact. A petition also may 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 in the petition. A valid registration must represent a legitimate job offer. USCIS also may deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the original petition. USCIS will not deny such an amended or new petition solely on the basis of a different proffered wage if that wage does not correspond to a lower OES wage level than the wage level on which the registration or petition selection, as applicable, was based.\* \* \*

(11)

\* \* \* \* \*

(iii) \* \* \*

(A) \* \* \*

(I) \* \* \*

(2) The statement of facts contained in the petition; the registration, if applicable; or on the temporary labor certification or labor condition application; was not true and correct, inaccurate, fraudulent, or misrepresented a material fact;

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(3) The petitioner, or a related entity, filed a new or amended petition on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the registration, or the original petition if the registration process was suspended. USCIS will not revoke approval of such an amended or new petition solely on the basis of a different proffered wage if that wage does not correspond to a lower OES wage level than the wage level on which the registration or petition selection, as applicable, was based; or

\* \* \* \* \*

(24) \* \* \*

(i) The requirement to submit a registration for an H-1B cap-subject petition and the selection process based on properly submitted registrations under paragraph (h)(8)(iii) of this section are intended to be severable from paragraph (h)(8)(iv) of this section. In the event paragraph (h)(8)(iii) is not implemented, or in the event that paragraph (h)(8)(iv) is not implemented, DHS intends that either of those provisions be implemented as an independent rule, without prejudice to petitioners in the United States under this regulation, as consistent with law.

\* \* \* \* \*

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Chad R. Mizelle,  
Senior Official Performing the Duties of the General Counsel,  
U.S. Department of Homeland Security.