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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 103

[CIS No. 2652-19; DHS Docket No. USCIS-2019-0006]

RIN 1615-AC36

**Registration Fee Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of
Cap Subject Aliens**

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

ACTION: Final rule.

SUMMARY: This final rule amends Department of Homeland Security (DHS) regulations to require petitioners seeking to file H-1B cap-subject petitions to pay a \$10 fee for each registration they submit to U.S. Citizenship and Immigration Services (USCIS) for the H-1B cap selection process.

DATES: This final rule is effective [Insert date 30 days from date of publication in the FEDERAL REGISTER].

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I. Background

A. The H-1B Registration System

On January 31, 2019, DHS published a final rule requiring petitioners seeking to file H-1B cap-subject petitions, including those eligible for the advanced degree exemption, to first electronically register with USCIS during a designated registration period, unless the requirement is suspended (“H-1B registration final rule”).¹ USCIS stated in the H-1B registration final rule that it was suspending the registration requirement for the fiscal year 2020 cap season to complete required user testing of the new H-1B registration system and otherwise ensure the system and process work correctly.

Once USCIS implements the system and requires registration, USCIS will not consider an H-1B cap-subject petition to be properly filed unless it is based on a valid registration selection for the applicable fiscal year. *See* 8 CFR 214.2(h)(8)(iii)(A)(I) and (h)(8)(iii)(D). USCIS will reject or deny H-1B cap-subject petitions that are not properly filed. 8 CFR 214.2(h)(8)(iii)(D).

B. Legal Authority

The Immigration and Nationality Act (INA) authorizes DHS to establish and collect fees for adjudication and naturalization services to “ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants.” INA section 286(m), 8 U.S.C. 1356(m). Through the collection of fees established under that authority, USCIS is primarily funded by immigration and naturalization fees charged to applicants, petitioners, and other requestors. *See* INA sections 286(m) and (n), 8 U.S.C. 1356(m) and (n); 8 CFR 103.7(b)(1)(i)(USCIS fees). Fees collected

¹ *See* 84 FR 888 (Jan. 31, 2019); 8 CFR 214.2(h)(8)(iii)(A)(I).

from individuals and entities filing immigration benefit requests are deposited into the Immigration Examinations Fee Account (IEFA) and used to fund the cost of processing immigration benefit requests.² Consistent with that authority and USCIS' reliance on fees for its funding, DHS is amending its regulations to require a fee for submitting H-1B registrations.

C. Registration Fee

On September 4, 2019, DHS published a notice of proposed rulemaking seeking public comments on its proposal to require a \$10 fee per H-1B registration. *See* 84 FR 46460. DHS is amending its regulations to require a \$10 fee for each registration submitted to register for the H-1B cap selection process. *See* 8 CFR 103.7(b)(1)(i)(NNN). As stated in the proposed rule, USCIS operations are funded by fees collected for adjudication and naturalization services, and USCIS must expend resources to implement and maintain the registration system. Therefore, DHS is requiring a fee for submitting H-1B registrations to recover those costs.

II. Public Comments on the Proposed Rule

A. Summary of Public Comments

In response to the proposed rule, DHS received 22 comments during the 30-day public comment period. There were no duplicate submissions or letters submitted through mass mailing campaigns. DHS considered all of these comment submissions. Commenters consisted of individuals (including U.S. workers), law firms, professional organizations, and advocacy groups. Some commenters expressed support for the rule and/or offered suggestions for improvement. Two commenters expressed general opposition to the rule, suggesting that DHS should not impose a fee for registration. For many of the public comments, DHS could not ascertain whether the commenter supported or opposed the proposed rule. A number of

² *See* 81 FR 26904, 26905 (May 4, 2016).

comments received addressed subjects beyond those covered by the proposed rule, and were deemed out of scope.

DHS has reviewed all of the public comments received in response to the proposed rule and is addressing relevant comments in this final rule. DHS's responses are grouped by subject area, with a focus on the most common issues and suggestions raised by commenters. DHS is not addressing comments seeking changes in U.S. laws, regulations, or agency policies that are out of scope and unrelated to the changes proposed on September 4, 2019, or to the H-1B registration system generally.

B. General Support for the Proposed Rule

Comment: Two commenters stated that they agreed with the proposed fee without providing any additional or substantive rationale. While DHS appreciates the input, a response to these general support comments is not necessary.

C. General Opposition to the Proposed Rule

Comment: Two commenters said the rule would cause an unnecessary financial obstacle to an already tedious and burdensome process for prospective immigrants. One commenter said that the additional fee would oppress minorities and put unnecessary financial barriers on families and extend the time it takes for them to receive clearance. The commenter explained that the process to become a legalized citizen is already an extensive process and extending it further could turn away families from receiving legalization.

Response: The H-1B classification is an employment-based nonimmigrant classification that allows U.S. employers to temporarily employ foreign workers in specialty occupations. DHS notes that this rule is not addressing the process of obtaining an immigrant visa or lawful permanent resident status. Rather, this rule addresses the fee for filing an H-1B registration which is a prerequisite to being able to file a nonimmigrant petition for a foreign worker in the

H-1B nonimmigrant classification. The fee paid for the registration is a responsibility of the petitioning employer, not the foreign worker. DHS believes that a \$10 fee for each registration a U.S. employer chooses to submit would not be overly burdensome for employers, especially when considering the benefits of not having to submit a full, paper-based petition as required for possible selection under the current cap selection process. Moreover, the nominal fee would assist DHS in recovering the cost of administering the electronic registration process. Requiring such a fee would not have any impact on the time to adjudicate an immigration benefit request.

D. Establishment of Registration Fee

1. Fee Payment System

Pay.gov

Comments: A few commenters asked DHS to explain with specificity in the final rule how the payment system and payment mechanics will work. The comments related to pay.gov are as follows:

- Will DHS utilize pay.gov for the payment portal? If an employer is already registered in pay.gov, will that registration control for the H-1B registration fee payment?
- Is submission of the registration fee payment via pay.gov limited to employers, or may attorneys also submit payments via pay.gov on behalf of their U.S. employer clients? The commenter stated that attorneys should be able to submit registration fee payments via the pay.gov portal for their U.S. employer clients.
- A professional association stated that, given the limited familiarity of stakeholders with the pay.gov portal, USCIS should conduct stakeholder outreach and provide guidance and trainings on how to utilize the pay.gov portal well in advance of the initial registration period.

Response: DHS will use pay.gov for the payment portal. DHS is using the pay.gov architecture to process the payment on the back end, however, petitioners do not need to create a pay.gov account to pay the fee. Registrants only have to enter in checking/savings account information to do an ACH (Automated Clearing House) or credit/debit card information to pay via card.³ G-28 Representatives will be able to pay on pay.gov as well, given that there is no need for an account, just basic payment details. USCIS is planning to conduct stakeholder outreach and provide training on how to use the pay.gov portal and will announce these trainings on the USCIS website.

Payment Sources

Comments: The comments on payment sources include the following:

- An advocacy group asked if pay.gov would allow access to payment via computerized access to bank account and ACH payment systems. This commenter also asked if there would be a one-time registration per user of banking and pay.gov information.
- A professional association stated that it appears that the registration fee payment can be paid with either a debit or credit card, or with a withdrawal from a checking or savings account, but USCIS only provides a screen shot in the workflow document for the credit card payment transaction. The commenter urged USCIS to allow for the registration fee to be paid with a withdrawal from a checking or savings account (ACH), as this is a common method of payment and will better accommodate U.S. employers and immigration practitioners submitting registrations on behalf of a high volume registrants.

³ Per 8 CFR 103.7(a)(2), remittances must be drawn on a bank or other institution located in the United States and be payable in United States currency.

- A business association asked if there would be an ACH processing fee associated with using this method of payment. If so, the commenter asked if USCIS incorporated those costs into how it factored the \$10/registration fee such that it would be covered by the \$10 fee or in addition to the \$10 fee. If the processing fee is separate from the \$10 registration fee, the commenter asked how much these processing fees would add onto the \$10 fee.

Response: The registration system will permit payments to be made from a bank account (checking or savings), a credit card, or debit card. No ACH fee will be charged. The registration fee cannot be made using cash, a certified (bank) check, or money order.

Batch Payments

Comments: The comments on batch payments include the following:

- A couple of commenters asked if employers would be able to batch payments for multiple registrations.
- A business association supported the ability of the employer or representative to file registrations for more than one beneficiary under one account, but said the NPRM does not indicate how many registrations a petitioner can file at the same time or exactly how the payment system will operate. Similarly, another commenter asked whether the payment system would limit the amount of beneficiaries that can be batched for simultaneous payment at any given time.
- Another commenter also stated that they support the ability to bundle the H-1B registration fees for multiple registrations into one payment, but said it is unclear whether the pay.gov portal would permit a registrant to make several bundled registration fee payments on multiple occasions over a period of several days, or if

only one bundled registration fee could be submitted during the registration period. Because large U.S. employers will likely submit registrations throughout the registration period, the commenter recommended that the system should allow registrants to make several bundled registration fee payments through the pay.gov portal.

- A business association said the final H-1B Registration Rule stated that employers would not be required to enter their corporate information for each potential beneficiary. The commenter asked if employers would be able to file information regarding the corporation, the authorized employee of the corporation, and the payment method/information used to pay the fees one time throughout this process, and if so, how that would be done.

Response: The registration system will allow for batch payments to pay the fee for multiple registrations submitted simultaneously. For example, one registrant may submit five registrations at one time and make one payment of \$50 for the cost of the five registrations. There is no limit to the number of registrations that can be submitted at one time. Registrants would be able to submit as many registrations in as many batches as they see fit during the registration period. For example, a registrant could submit five registrations and pay a \$50 fee on March 2, a batch of five registrations on March 5 and pay another \$50 fee, and a batch of eight registrations with an \$80 fee on March 15.

Registrants will not be required to enter their corporate information for each potential beneficiary. Corporate and payment information will only need to be entered one time for each batch of registrations and associated payments. However, the corporate and payment information will not carry over between subsequent batches of registrations and fees.

Other Comments/ Questions on Fee Payment Processing

Comments: Additional comments on fee payment processing are as follows:

- A business association stated that they were concerned about the lack of specificity regarding how the \$10 fee will be collected. The commenter wrote that, as USCIS moves to finalize this proposal, the agency should clearly lay out how employers will have to use the H-1B registration's system payment mechanism.
- An advocacy group asked how far in advance of the registration period would registration be permitted for the payment portal.

Response: DHS will use pay.gov for the payment portal, however, there is no need to register with pay.gov in order to pay for an H-1B registration. The pay.gov architecture is used only to process the payments. USCIS will advise registrants of the location of the H-1B registration portal, and any deadlines or other restrictions that will apply. The H-1B registration system will contain clear instructions for completing and submitting registrations and fees.

2. Fee amount (\$10 per registration)

Comment: Two commenters wrote that the proposed fee was too low without providing an alternative amount. One commenter noted that they were in favor of requiring a fee for H-1B petitions, but that it should be a larger fee. This commenter wrote that a fee free H-1B application and the lower wages paid to those granted H-1B status provides incentive to hire non-U.S. citizens for U.S. based careers. One commenter suggested a \$500 fee, while another suggested a \$1,000 fee. One commenter said that based upon the assertion that the registration would be a 7-minute additional time burden, the \$10 registration fee is appropriate and can be considered a nominal expense for most petitioners.

Response: First, DHS notes that the \$10 registration fee is separate from and in addition to the H-1B petition filing fee.⁴ The registration fee will be charged regardless of whether the potential petitioner's registration is selected; i.e. even if the petitioner may not ultimately file an H-1B petition. As stated in the NPRM, USCIS lacks sufficient data to precisely estimate the costs of the registration process. DHS proposed a \$10 fee to provide an initial stream of revenue to mitigate potential fiscal effects on USCIS. Following implementation of the registration fee provided for in this rule, USCIS will gather data on the costs and burdens of administering the registration process in its next biennial fee review to determine whether a fee adjustment is necessary to ensure full cost recovery.

3. Fraud Deterrent

Comment: One commenter asked how the nominal fee will prevent large outsourcing companies from gaming the H-1B system, when their revenue is in the billions. A professional association stated that the addition of a \$10 registration fee will not sufficiently deter speculative and/or fraudulent filings. Another commenter noted that requiring employers to pay a more substantial fee may protect employees from predatory employers and that we should include a provision barring employers from passing the fee on to their employees or garnishing it from their wages.

Response: As stated in the proposed rule, the purpose of the registration fee is to recover the costs of the registration system and process; however, the fee may have an added benefit of

⁴ As stated in the proposed rule, H-1B petitioners currently pay a \$460 filing fee per petition. In addition to the filing fee, certain H-1B petitions may have to pay up to \$6,000 in statutory fees. DHS does not have the authority to adjust the amount of these statutory fees. USCIS does not retain most of the revenue. CBP receives 50 percent of the \$4,000 9-11 Response and Biometric Entry-Exit fee and the remaining 50 percent is deposited into the General Fund of the Treasury. USCIS retains 5 percent of the \$1,500 or \$750 American Competitiveness and Workforce Improvement Act (ACWIA) fee. The remainder goes to the Department of Labor and the National Science Foundation. USCIS retains one third of the \$500 Fraud Detection and Prevention fee, while the remainder is split between the Department of State and the Department of Labor. See 84 FR 46462-46463.

detering frivolous registrations. USCIS will monitor the system for potential fraud and abuse (e.g. monitoring the system to determine if employers are submitting many registrations but filing petitions based on selected registrations at a significantly lower rate, which could reflect gaming of the system to unfairly improve their odds of being selected). Further, DHS will require registrants to attest that they intend to file an H-1B petition for the beneficiary in the position for which the registration is filed. This attestation is intended to ensure that each registration is connected with a bona fide job offer and, if selected, will result in the filing of an H-1B petition.

In response to a commenter's proposal to bar employers from passing the fee on to the beneficiary (foreign worker), DHS is not adopting this suggestion because it is unnecessary and already prohibited by DOL regulations as an unauthorized deduction. See 20 CFR 655.731(b)(9)(ii) ("... except that the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition); ..."). DHS notes that this prohibition encompasses the costs of an H-1B registration.

Comment: A professional association recommended that, in its calculations for how many registrations will be selected in the registration lottery, USCIS take into consideration that there may be a significantly higher rate of selected registrations resulting in unfiled, denied, or revoked petitions. This commenter also recommended that USCIS reserve enough unselected registrations that could be invited to file in the situation where the H-1B petition approval rate will not result in meeting the H-1B numerical limitations for FY 2021.

Response: When registration is not required, USCIS randomly selects a certain number of H-1B cap-subject petitions projected as needed to meet the numerical allocations. USCIS makes projections on the number of H-1B cap-subject petitions necessary to meet the numerical limits, taking into account historical data related to approvals, denials, revocations, and other relevant factors.⁵ USCIS uses these projections to determine the number of petitions to select to meet, but not exceed, the 65,000 regular cap and 20,000 advanced degree exemption, although the exact percentage and number of petitions may vary depending on the applicable projections for a particular fiscal year. Similarly, in years when USCIS will use the registration system, it will project how many registrations need to be selected in order to meet, but not exceed the numerical limitations. Unselected registrations will remain on reserve for the applicable fiscal year. If USCIS determines that it needs to increase the number of registrations projected to meet the regular cap or advanced degree exemption, and select additional registrations, USCIS would select from among the registrations that are on reserve a sufficient number to meet the cap or advanced degree exemption, or re-open the registration period if additional registrations are needed to meet the new projected amount.

4. Equity of Registration Fee

Comment: A commenter stated that H-1B petitioners have established willingness and ability to pay the nominal H-1B registration fee. The commenter stated a \$10 fee is justifiable because the employers are the ones who pay existing H-1B related filing fees rather than investing this money to cultivate the knowledge of existing employees to better their business.

⁵ See 8 CFR 214.2(h)(8)(ii)(B).

Response: DHS agrees that a \$10 fee for each registration will not be overly burdensome for employers and will assist DHS in recovering the cost of administering the registration process.

E. Impact on Small Entities

Comment: Two commenters addressed the proposal's impact on small entities. A business association said USCIS stated that the \$10 registration fee might minimize the possibility that larger employers could flood the system crowding out smaller, compliant firms. The commenter said it remains concerned about how the overall H-1B registration system will impact small businesses and urged USCIS to monitor and report on the filings. One commenter said that they were concerned there were not enough safeguards in place to prevent unscrupulous petitioners from flooding the H-1B system. This commenter wrote that DHS should conduct additional outreach consistent with the Regulatory Flexibility Act (RFA), especially to small business entities, so that concerns about potential flooding of the registration system can be addressed prior to implementation.

Response: DHS has already put several safeguards in place to prevent employers from flooding the H-1B registration system, and will monitor the system throughout the registration process. As noted in the H-1B registration final rule, DHS believes it is too speculative to conclude that the H-1B registration system would result in large entities crowding out smaller entities for H-1B prospective employees. With the registration system, and the lower nominal fee, the barrier to entry associated with the registration system could result in increased participation by small entities in the competition for H-1B cap-subject nonimmigrant visas. As noted in the proposed rule, the new fee will impose a nominal compliance cost for any entity,

including small entities, that choose to compete for an H-1B cap-subject visa. DHS maintains that the proposed fee will not impose a significant impact on small entities.

F. Paperwork Reduction Act

Comment: A professional association stated that USCIS' estimate of a 7-minute additional time burden for reading the instructions and completing the electronic fee payment was "extremely low" and appears to assume that stakeholders are familiar with the pay.gov portal, rather than first time users. However, the commenter stated that many U.S. employers and attorneys have little or no experience using the pay.gov portal. The commenter wrote that USCIS should recalculate the total public burden (in time) to take into consideration that in many, if not most cases, registrants will be accessing and navigating the pay.gov portal for the very first time when submitting initial H-1B registrations.

Response: The pay.gov screen will be seamlessly linked to the registration platform and will not require a separate log in, password, or navigation to a separate website. Paying the \$10 fee will be very similar to paying for events or airline tickets, merchandise, and other orders placed online, and USCIS anticipates it will be a straightforward process for the public. In addition and as noted above, USCIS intends to conduct outreach and training on how to use the registration system, including making payments on the pay.gov portal, and will announce these trainings on the USCIS website. USCIS has received approval from OMB-OIRA to discontinue the approval of this collection of information as guidance found at the website pra.digital.gov stated that such payment transactions are not subject to the PRA.

G. Implementation Timeframe

Comment: Two commenters addressed the implementation timeframe for the proposed fee or the H-1B registration process more generally and expressed concern about the lack of a definitive decision from USCIS to implement the new H-1B registration requirement to which

the \$10 registration fee will be attached. These commenters asked that USCIS notify the public as soon as possible with a final decision on whether usability testing supports proceeding with the registration tool. One commenter stated that, without a final decision and proper notice being provided to stakeholders at this point in time, many business have already begun expending resources in the preparation of various supporting documents for the cap-subject H-1B petitions as they normally would, thus negating the cost savings intended by the rule. One commenter noted that if USCIS does not announce that it will proceed with registration until shortly before the FY2021 cap season begins in April 2020, it will likely be most harmful to the interests of smaller employers who have less overall resources to deal with new regulatory requirements in a short period of time. A few commenters stated that, no later than November 1, 2019, USCIS should publicly announce its decision to implement the registration system in the Spring of 2020 for FY 2021 cap-subject H-1B cases. An advocacy group stated that this notice could be posted on the agency's website or could come with the publication of the H-1B registration fee final rule, so it can be announced in the Federal Register months before any registration period would be opened. This commenter also said USCIS should indicate as early as possible the dates when the specific registration period will occur and should consider a registration period longer than the 2-week minimum registration period identified in the final rule.

Response: USCIS intends to implement the registration process for FY 2021, subject to continued testing of the system. DHS will publish a notice in the Federal Register to announce the initial implementation of the H-1B registration process in advance of the cap season in which it will first implement the requirement. USCIS will notify the public about the implementation timeframe of the registration system and the initial registration period as soon as possible, and

will provide stakeholders with plenty of notice prior to implementing the registration requirement.

Comment: One commenter asked that as DHS moves to finalize and implement the H-1B registration fee, it continue public outreach on usability testing as a means to further assess the technical details of the registration mechanics. A business association said USCIS should (1) engage stakeholders and fully vet the new platform before instituting the electronic registration system and (2) extend the registration period to at least 30 days to account for any system outages, difficulties in entering data, or other unforeseen problems.

Response: USCIS intends to continue stakeholder outreach and training prior to the initial implementation of the registration system to allow stakeholders the opportunity to familiarize themselves with the electronic registration process. USCIS will provide guidance on how to use the registration system and edit registrations prior to opening the registration system for the initial registration period. DHS will announce the duration of the initial registration period in the Federal Register notice.

H. Out of Scope

DHS received many comments that were unrelated to the proposed revisions regarding the registration fee. Many of these comments would require Congressional action or additional regulatory action by DHS unrelated to the H-1B registration fee requirement. Although DHS has summarized the comments it received below, DHS is not providing substantive responses to those comments as they are beyond the scope of this rulemaking. To the extent that comments are seeking further revisions to the H-1B program, DHS recognizes that additional regulatory changes could improve the H-1B program and intends to propose a separate rule to strengthen the H-1B visa classification. As stated in the Unified Agenda of Proposed Regulatory Actions,

83 FR 57803, DHS plans to propose to revise the definition of specialty occupation to increase focus on obtaining the best and the brightest foreign nationals via the H-1B program, and revise the definition of employment and employer-employee relationship to better protect U.S. workers and wages. In addition, DHS will propose additional requirements designed to ensure employers pay appropriate wages to H-1B nonimmigrant workers.

Comments from the public outside the scope of this rulemaking concerned the following issues:

- Some commenters provided suggestions for improvement of the H-1B program in general, including to raise the H-1B salary minimum.
- Some commenters said DHS should review the B-1, [Optional Practical Training] OPT, EB-1, H-4, [Employment Authorization Document] EAD, and L-1/L-2 visa programs to address unfairness, reduce fraud and abuse within the programs, address specific companies known for abuses, and protect wages of American workers.
- One commenter expressed safety concerns that H-1B workers are managing critical infrastructure at state government facilities due to an influx of H-1B workers in the fields of IT, human resources, and contracting.
- Another commenter said H-1B is a “legalized scam.”

Response: DHS appreciates these suggestions, however, DHS did not propose to address these issues in the proposed rule, therefore these suggestions fall outside of the scope of this rulemaking.

As discussed previously, DHS is finalizing this rule as proposed.

IV. Statutory and Regulatory Requirements

A. Executive Orders 12866 and 13563

Executive Orders 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Information and Regulatory Affairs (OIRA) has not designated this rule a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, OIRA has not reviewed this rule. As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. See OMB’s Memorandum “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

1. Summary

DHS will amend its regulations to require a fee for each registration submitted to register for the H-1B cap selection process. DHS will require a fee of \$10 per registration to recover some of the costs that are associated with implementing and maintaining the H-1B cap registration system. USCIS suspended the registration requirement for the FY 2020 H-1B cap selection process. DHS recognizes that the registration requirement was established to provide efficiency savings to both USCIS and H-1B cap-subject petitioners associated with the current paper-based cap selection process. In the H-1B registration final rule, DHS estimated significant cost savings for both USCIS and those H-1B petitioners. DHS stands by that analysis and believes that USCIS will still reap significant efficiency and cost savings when comparing an electronic registration process relative to the current paper filing and cap selection process. DHS

acknowledges that the \$10 registration fee will reduce some of the estimated cost savings for unselected H-1B cap-subject petitioners as described in the H-1B registration final rule. As discussed in the Regulatory Review section, DHS does not believe that the proposed registration fee will significantly factor into the decision-making of potential H-1B petitioners, nor does DHS believe that the fee will be perceived as being cost-prohibitive by these potential H-1B petitioners. After the registration requirement is implemented and reviewed over the coming years, DHS will consider the costs associated with the system as required during biennial fee reviews and adjust the registration fee accordingly via notice-and-comment rulemaking.

2. Analysis of Costs and Benefits

When registration is required, all petitioners seeking to file an H-1B cap-subject petition, including those eligible for the advanced degree exemption, must first electronically register with USCIS during a designated registration period. A separate registration must be submitted for each worker on whose behalf a petitioner seeks to file an H-1B cap-subject petition. Only those petitioners whose registrations are selected will be eligible to file an H-1B cap-subject petition during an associated filing period for the applicable fiscal year. By means of this rule, DHS will require payment of a \$10 registration fee for each registration, which will be due and payable at the time of registration submission. A registration will not be considered as properly submitted until the fee is paid.⁶ In the analysis accompanying the H-1B registration final rule, DHS estimated that 192,918 H-1B cap-subject registrations will be submitted annually based on 5-year historical average Form I-129 petition filings.⁷ That estimate will form the baseline for the analysis of costs associated with the \$10 registration fee. As DHS acknowledged in the H-1B registration final rule, the use of this historical average to form the baseline estimate does not

⁶ See 8 CFR 103.2(a)(1) and 8 CFR 214.2(h)(8)(iii)(A)(I).

⁷ See 84 FR at 925.

factor in the possibility that the registration’s lower barrier to entry could result in increasing the number of registrations that USCIS receives.⁸ To account for this possibility, this analysis will present a range analysis of annual costs up through an escalator of 30 percent increase over the baseline estimate.

Table 1 presents the annual, undiscounted, aggregate costs associated with the \$10 registration fee using a range of escalations over the baseline estimate of registrations.

Table 1. Undiscounted Aggregate Cost Estimates by Projected Registrations		
	Number of Registrations	Annual Cost – Undiscounted
Baseline	192,918	\$1,929,180
Baseline Plus 10%	212,210	\$2,122,100
Baseline Plus 20%	231,502	\$2,315,020
Baseline Plus 30%	250,793	\$2,507,930

USCIS is required to review the cost of its operations on a biennial basis and recommend fee adjustments as necessary. USCIS may adjust the filing fees for immigration benefits and services through notice-and-comment rulemaking. DHS used a 5-year period of analysis to account for a potential time lag of the fee review and the actual adjustment that occurs during the rulemaking cycle. Therefore, it is reasonable to conclude that a 5-year period is a sufficient period for DHS to base the analysis of the estimated impact of the registration fee.

In addition to the \$10 registration fee, USCIS projects there will be an additional 7-minute time burden associated with reading the instructions and completing the electronic fee payment. In the H-1B registration final rule, DHS monetized time burdens based on who is expected to submit the registration: a human resources (HR) specialist; an in-house lawyer; or

⁸ *Id.*

an outsourced lawyer.⁹ The relevant wage is currently \$32.11¹⁰ per hour for an HR specialist and \$69.34¹¹ per hour for an in-house lawyer. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the Department of Labor, BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.46 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement.¹² DHS multiplied the average hourly U.S. wage rate for HR specialists and lawyers by 1.46 to account for the full cost of employee benefits and overhead, for a total of \$46.88¹³ per hour for an HR specialist and \$101.24¹⁴ per hour for an in-house lawyer. DHS recognizes that a firm may choose, but is not required, to outsource the preparation of these registrations and, therefore, has presented two wage rates for lawyers. To determine the full opportunity costs if a firm hired an outsourced lawyer, DHS multiplied the average hourly U.S. wage rate for lawyers by 2.5 for a total of \$173.35¹⁵ to approximate an hourly billing rate for an outsourced lawyer.¹⁶ The monetized equivalent time burden for 7 minutes (0.12 hours) is

⁹ See 84 FR at 929.

¹⁰ Bureau of Labor Statistics, U.S. Department of Labor, “Occupational Employment Statistics, May 2018, Human Resources Specialist”: <https://www.bls.gov/oes/2018/may/oes131071.htm>. Visited October 2, 2019.

¹¹ Bureau of Labor Statistics, U.S. Department of Labor, “Occupational Employment Statistics, May 2017, Lawyers”: <https://www.bls.gov/oes/2018/may/oes231011.htm>. Visited October 2, 2019.

¹² The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) / (Wages and Salaries per hour). See Economic News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (June 2019), available at https://www.bls.gov/news.release/archives/ecec_09172019.pdf (viewed October 2, 2019). The ECEC measures the average cost to employers for wages and salaries and benefits per employee hour worked.

¹³ Calculation: $\$32.11 * 1.46 = \46.88 total wage rate for HR specialist.

¹⁴ Calculation: $\$69.34 * 1.46 = \101.24 total wage rate for in-house lawyer.

¹⁵ Calculation: $\$69.34 * 2.5 = \173.35 total wage rate for an outsourced lawyer.

¹⁶ See 83 FR at 24914 (May 31, 2018). 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” used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages. DHS believes the

\$5.63,¹⁷ \$12.15,¹⁸ and \$20.80¹⁹ for an HR specialist, in-house lawyer, and outsourced lawyer, respectively.

Based on a review of historical filings, USCIS determined that approximately 75 percent of H-1B cap-subject petitions are filed by an attorney or accredited representative.²⁰ This analysis will carry that finding forward to estimate the time burden costs for complying with the registration fee requirement. In other words, the analysis of time burden costs presented assumes that 25 percent of the registrations will be completed by an HR specialist or representative, and 75 percent of the registrations will be completed by an attorney, either in-house or outsourced. Table 2 presents the annual, undiscounted, time burden or opportunity costs associated with paying the registration fee electronically, assuming 7 minutes of time burden, over a range of estimated numbers of registrations and according to who submits the H-1B registration.

	Number of Registrations	HR Specialist ²¹	In-House Lawyer ²²	Outsourced Lawyer ²³
Baseline	192,918	\$271,532	\$1,757,965	\$3,009,521
Baseline Plus 10%	212,210	\$298,686	\$1,933,764	\$3,310,476
Baseline Plus 20%	231,502	\$325,839	\$2,109,562	\$3,611,431
Baseline Plus	250,793	\$352,991	\$2,285,351	\$3,912,371

methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule.

¹⁷ Calculation: \$46.88 hourly wage rate for HR specialist * 0.12 hours = \$5.63

¹⁸ Calculation: \$101.24 hourly wage rate for in-house lawyer * 0.12 hours = \$12.15

¹⁹ Calculation: \$173.35 hourly wage rate for outsourced lawyer * 0.12 hours = \$20.80

²⁰ See 84 FR at 925.

²¹ Calculation: Number of Registrations * 25 percent * \$5.63 (figures presented in the table are rounded to the nearest dollar)

²² Calculation: Number of Registrations * 75 percent * \$12.15 (figures presented in the table are rounded to the nearest dollar)

²³ Calculation: Number of Registrations * 75 percent * \$20.80 (figures presented in the table are rounded to the nearest dollar)

30%				
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Note that the cost estimates in Table 2 are overstated because they do not account for the scenario of fewer unique entities submitting registrations for multiple workers. DHS assumes that in those cases, the registration submissions would be done at the same time so the fee payment could be bundled, thus reducing the overall time burden associated with submitting separate payments. The DHS analysis in the H-1B registration final rule found that, on average, each employer submitted five petitions.²⁴ Thus, the estimate of undiscounted costs in Table 2, which is based on the assumption of one petitioning employer filing one petition, is likely overstated by approximately 80 percent. Estimates that are more likely to reflect the current business behavior of five petitions per employer, are presented in Table 3.

Table 3. Annual Time Burden Cost (undiscounted) by Projected Registrations & Type of Submitter, Less 80%				
	Number of Registrations	HR Specialist	In-House Lawyer	Outsourced Lawyer
Baseline	192,918	\$54,306	\$351,593	\$601,904
Baseline Plus 10%	212,210	\$59,737	\$386,753	\$662,095
Baseline Plus 20%	231,502	\$65,168	\$421,912	\$722,286
Baseline Plus 30%	250,793	\$70,598	\$457,070	\$782,474

Therefore, the total, undiscounted, aggregate annual costs of both the registration fee and time burden costs are presented in Table 4. The figures in Table 4 are found by adding the proportional costs presented in Table 1 (in other words, assume 25 percent of registrations are

²⁴ See 84 FR at 948 (January 31, 2019) for the FY 2016 cohort of H-1B cap-subject petitions selected. Of the 95,839 petitions selected, there were only 20,046 unique entities that filed those petitions. Calculation: $95,839/20,046 = 4.78$.

completed by HR specialist and 75 percent of registrations are completed by lawyers either in-house or outsourced) with the estimated costs for entities submitting registrations in Table 3.

	Number of Registrations	HR Specialist (Table 3 + 25% of Table 1)	In-House Lawyer (Table 3 + 75% of Table 1)	Outsourced Lawyer (Table 3 + 75% of Table 1)
Baseline	192,918	\$536,601	\$1,798,478	\$2,048,789
Baseline Plus 10%	212,210	\$590,262	\$1,978,328	\$2,253,670
Baseline Plus 20%	231,502	\$643,923	\$2,158,177	\$2,458,551
Baseline Plus 30%	250,793	\$697,581	\$2,338,018	\$2,663,422

The lower bound aggregate cost estimate of complying with the registration fee requirement is found by summing the estimated cost of using an HR specialist with the cost estimate of using in-house lawyers to complete the registration. The upper bound aggregate cost estimate is found by summing the estimated cost of using an HR specialist with the cost estimate of using outsourced lawyers to complete the registration. Table 5 presents the lower bound and upper bound aggregate cost estimates over the projected number of registrations for a 5-year period, discounted at 3 and 7 percent.

	Number of Registrations	5-Year Discounted Costs, 3%, (\$ Millions)		5-year Discounted Costs, 7%, (\$ Millions)	
		Lower Bound	Upper Bound	Lower Bound	Upper Bound
Baseline	192,918	\$10.7	\$11.8	\$9.6	\$10.6
Baseline Plus	212,210	\$11.8	\$13.0	\$105.0	\$11.7

10%					
Baseline Plus 20%	231,502	\$12.8	\$14.2	\$11.5	\$12.7
Baseline Plus 30%	250,793	\$13.9	\$15.4	\$12.4	\$13.8

As discussed previously, while this initial registration fee of \$10 per registration may not recover the full costs associated with implementing and maintaining the H-1B registration system, it would allow for USCIS to recover some of the costs, thus lessening the fiscal impact to USCIS. DHS does not anticipate the required registration fee to represent a significant business expense for those employers that seek to employ cap-subject H-1B workers. The total costs for each registration would range from \$15.63 to \$30.80 for a registration, depending on who the petitioner uses to submit the registration. Even with the addition of the registration fee requirement, as discussed previously in the preamble, the registration process is still anticipated to result in a net benefit relative to the paper-based cap selection process.

The registration fee may also provide some unquantified benefits to the extent that the fee may help to deter frivolous registrations. DHS makes no conclusions on the impact that a \$10 fee would have on the number of registrations and has no way to estimate such an impact. As stated in the H-1B registration final rule, however, commenters on the H-1B registration proposed rule expressed various concerns about potential “flooding” of the registration system. While there is no way to estimate if a small fee would further deter such acts, beyond the measures identified in the H-1B registration final rule (e.g., the attestation requirement), DHS believes that it is reasonable to conclude that the existence of a \$10 fee could reduce the likelihood that frivolous registrations would be submitted to flood or otherwise game the registration system. In any event, such a benefit would only be tangential to the fee’s primary purpose of recovering USCIS costs.

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, Public Law 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. The term “small entities” comprises of 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 defined by the RFA as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered as costs for RFA purposes.

In the proposed rule, DHS provided a factual basis in certifying the registration fee requirement would not pose a significant impact on small entities for public comment. DHS received no challenges to the certification statement under the RFA, nor to the factual basis presented in support of said certification. DHS is reproducing the factual basis, with updates to correct costs estimates due to calculation errors, in certifying this final rule will not pose a significant impact on small entities.

This final rule will directly impact those entities that petition on behalf of H-1B cap-subject workers. Generally, H-1B petitions are filed by a sponsoring employer; by proxy, once the online registration requirement is implemented, registrations would likewise be submitted by a sponsoring employer or their authorized representative. The employer intending to petition for an H-1B cap-subject worker will incur the registration fee costs of \$10 per registration.

Therefore, DHS examines the direct impact of this final rule on small entities in the analysis that follows.

In the H-1B registration final rule, DHS estimated that approximately 78 percent of selected H-1B petitioners were small entities after conducting an analysis of a statistically significant sample.²⁵ DHS believes it is reasonable to carry this finding through and assume that approximately 78 percent, a majority, of H-1B registrations would be submitted by small entities. Thus, for purposes of the RFA, this final rule is expected to impact a “substantial” number of small entities.

To determine whether the impact of the required registration filing fee would be “significant,” DHS must consider the estimated fee impacts of individual petitioning small entities. In the H-1B registration final rule, DHS found that the majority of petitioning employers tended to submit petitions for multiple employees. Based on a review of filings received in 2016, DHS determined that for every one unique petitioning employer, there were an average of 4.78 petitions submitted.²⁶ For purposes of this analysis, DHS is rounding that figure up to form a baseline assumption that for every one petitioning employer, a total of five H-1B cap-subject workers are requested. Therefore, it is reasonable to conclude that on average each petitioning employer that is a small entity will face a total fee impact of \$50, plus a one-time monetized time burden impact ranging from \$5.63 to \$20.80, as a result of the required H-1B registration fee.²⁷

²⁵ See 84 FR at 948-49.

²⁶ See 84 FR at 948, explaining that, for the FY 2016 cohort, 20,046 unique entities filed the 95,839 H-1B cap-subject petitions that were selected. Calculation: $95,839/20,046 = 4.78$.

²⁷ Calculation: \$10 (registration fee) x 5 registrations (one for each H-1B worker being entered into the registration) = \$50 total fee impact for employers

In that same statistically valid sample study, DHS was able to determine the top 10 industries that petitioned for cap-subject H-1B workers.²⁸ The industry data, using the North American Industry Classification System (NAICS), is self-reported on USCIS Form I-129, Petition for Nonimmigrant Worker, which petitioning employers use to petition for H-1B workers. Table 6 shows a list of the top 10 NAICS industries that submitted H-1B cap-subject petitions in the sample study, and the corresponding size standard according to the SBA.

Table 6: Top 10 NAICS Industries Submitting Form I-129, Small Entity Analysis Results.				
Rank	NAICS Code	NAICS U.S. Industry Title	Size Standards in millions of dollars	Size Standards in number of employees
1	541511	Custom Computer Programming Services	\$27.5	-
2	541512	Computer Systems Design Services	\$27.5	-
3	561499	All Other Business Support Services	\$15.0	-
4	541330	Engineering Services	\$15.0	-
5	511210	Software Publishers	\$38.5	-
6	541611	Administrative Management and General Management Consulting Services	\$15.0	-
7	334413	Semiconductor and Related Device Manufacturing	-	1,250
8	541618	Other Management Consulting Services	\$15.0	-
9	541690	Other Scientific and Technical Consulting Services	\$15.0	-
10	325412	Pharmaceutical Preparation Manufacturing		1,250
Source: USCIS analysis based on small business size standards. <i>Note:</i> The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 C.F.R., section 121.201.				

²⁸ See 84 FR at 950.

SBA’s monetary size standard is based on the average annual receipts of the business entity. As discussed previously, DHS has determined that the majority of H-1B petitioning employers would be classified as “small” for purposes of the RFA. However, comparing the expected total fee impact of \$55.63 on the low-end for every small entity (assuming each entity submits approximately five registrations) results in a negligible cost impact relative to average annual receipts. In fact, for a cost of \$55.63, a company would need to have annual receipts of only \$5,563 for the cost of the registration fee for five registrations to equal 1 percent of the annual receipts. If a company used an outsourced lawyer to petition for a visa at a cost of \$70.80 (assuming each entity uses an outsourced attorney to submit five registrations) the company would need to have annual receipts of only \$7,080 for the cost of the fee to equal 1 percent of the annual receipts.

SBA guidance on additional measures to determine whether a rule would have a significant impact suggest comparing the compliance cost to the labor costs.²⁹ In that guidance, SBA states that an impact could be significant if the compliance cost “exceeds 5 percent of the labor costs of the entities in that sector.”³⁰ In the annual report to Congress on the characteristics of H-1B workers for fiscal year 2017, USCIS determined the median annual compensation for initial employment across all occupations was \$75,000.³¹ Furthermore, the median annual compensation for initial employment across known occupations ranged from a low of \$42,000 to

²⁹ See U.S. Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, The RFA threshold analysis: Can we certify? at Pg. 19, <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>. Visited Apr. 16, 2019.

³⁰ *Id.*

³¹ See U.S. Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2017 Annual Report to Congress*, at Table 11, <https://www.uscis.gov/sites/default/files/reports-studies/Characteristics-of-Specialty-Occupation-Workers-H-1B-Fiscal-Year-2017.pdf>. Visited Apr. 16, 2019.

a high of \$160,000.³² This final rule is estimated to result in compliance costs that represent much less than 5 percent of the H-1B labor costs.

Based on these findings, DHS certifies that while this final rule could impact a substantial number of small entities, the impact that would arise from the \$10 registration fee would not result in a significant impact. Therefore, the Secretary certifies that this final rule will not cause a significant impact to a substantial number of small entities.

C. Other Regulatory Requirements

This final rule is not a “major rule” as defined by the Congressional Review Act, 5 U.S.C. 804(2), and thus is not subject to a 60-day delay in the rule becoming effective. This action is not subject to the written statement requirements of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require prior consultation with State, local, and tribal government officials as specified by Executive Order 13132 or 13175. This final rule also does not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii) and 1508.4. This action would not affect the quality of the human environment and fits within Categorical Exclusion number A3(d) in Dir. 023-01 Rev. 01, Appendix A, Table 1, for rules that interpret or amend an existing regulation without changing its environmental effect.

D. Paperwork Reduction Act

DHS is submitting the information collection requirements in this rule to OMB for review and approval in accordance with requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3512. DHS and USCIS are revising this information collection to report a change in the estimated annual cost to the Federal government as a result of this final rule.

³² *Id.*

Additionally, the information collection instrument has been revised to include language about the new registration fee. The notice of proposed rulemaking stated that DHS proposed a revision to the USCIS Electronic Fee Payment Processing information collection, former OMB Control Number 1651-0131. DHS and USCIS have determined that the collection of information related to fee payment processing is exempt from the Paperwork Reduction Act and that collection of information is not required to be included in this rulemaking.³³ DHS is revising the following USCIS information collection:

H-1B Registration Tool

DHS and USCIS are revising this information collection to report a change in the estimated annual cost to the Federal government as a result of this rule. Additionally, the information collection instrument has been revised to include language about the new registration fee.

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: No Agency Form Number; USCIS.
- (4) Affected public who will be asked or required to respond, as well as a brief abstract:
Primary: Business or other for-profit. USCIS uses the data collected on this form to determine which employers will be informed that they are eligible to submit a USCIS Form I-129, Petition for a Nonimmigrant Worker, to petition for a cap-subject beneficiary in the H-1B classification.

³³ See <https://pra.digital.gov/do-i-need-clearance/> Stating, “Doesn’t need PRA Clearance: Information for voluntary commercial transactions, like payment and delivery details.”)

(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 192,918 and the estimated hour burden per response is 0.5 hours. Any additional time burden for fee payment processing is captured in the information collection USCIS Electronic Fee Payment Processing (OMB 1615-0131).

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 96,459 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total cost burden for purchases of equipment or services to achieve compliance with the information collection requirements of this rule (not including providing information to or keeping records for the government, or kept as part of customary and usual business or private practices), are \$0.³⁴ There are no capital, start-up, operational or maintenance costs to respondents associated with this collection of information.

List of Subjects in 8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Immigration, Privacy, Reporting and recordkeeping requirements.

Accordingly, DHS is amending chapter I of title 8 of the Code of Federal Regulations as follows:

PART 103—IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS;

AVAILABILITY OF RECORDS

1. The authority citation for part 103 continues to read as follows:

³⁴ As stated elsewhere in this rule, the annual transfer for registrants associated with the proposed \$10 fee is \$1,929,180.

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1356b, 1372; 31 U.S.C. 9701; Pub. L.107-296, 116 Stat. 2135 (6 U.S.C. 1 et seq.); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2; Pub. L. 112-54, 125 Stat 550.

2. Section 103.7 is amended by adding paragraph (b)(1)(i)(NNN) to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(NNN) Registration requirement for petitioners seeking to file H-1B petitions on behalf of cap-subject aliens. For each registration submitted to register for the H-1B cap or advanced degree exemption selection process: \$10. This fee will not be refunded if the registration is not selected or is withdrawn.

* * * * *

Kevin K. McAleenan,
Acting Secretary.

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