an employee or annuitant of the same sex, and the term "domestic partnership" is defined as a committed relationship between two adults, of the same sex, in which the partners—

(i) Are each other's sole domestic partner and intend to remain so indefinitely;

(ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(iii) Are at least 18 years of age and mentally competent to consent to contract;

(iv) Share responsibility for a significant measure of each other's financial obligations;

(v) Are not married or joined in a civil union to anyone else;

(vi) Are not the domestic partner of anyone else;

(vii) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed; and

(viii) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, shall be determined by the agency.

(3) When an insurable interest is not presumed, the employee or Member must submit affidavits from one or more persons with personal knowledge of the named beneficiary's having an insurable interest in the employee or Member. The affidavits must set forth the relationship, if any, between the named beneficiary and the employee or Member, the extent to which the named beneficiary is dependent on the employee or Member, and the reasons why the named beneficiary might reasonably expect to derive financial benefit from the continued life of the employee or Member.

(4) The employee or Member may be required to submit documentary evidence to establish the named beneficiary's date of birth.

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[FR Doc. 2011–4791 Filed 3–2–11; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 299

[CIS No. 2443–08; DHS Docket No. USCIS–2008–0014]

RIN 1615–AB71

Registration Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Aliens Subject to the Numerical Limitations

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is proposing to amend its regulations governing petitions filed on behalf of H–1B alien workers subject to annual numerical limitations or exempt from numerical limitations by virtue of having earned a U.S. master's or higher degree (also referred to as the "65,000 cap" and "20,000 cap" respectively, or the "cap" collectively). This rule proposes to require employers seeking to petition for H–1B workers subject to the cap to first file electronic registrations with U.S. Citizenship and Immigration Services (USCIS) during a designated registration period. Under this proposed rule, if USCIS anticipates that the H–1B cap will not be reached by the first day that H–1B petitions may be filed for a particular fiscal year, USCIS would notify all registered employers that they are eligible to file H–1B petitions on behalf of the beneficiaries named in the selected registrations. USCIS would continue to accept and select registrations until the H–1B cap is reached. On the other hand, if USCIS anticipates that the H–1B cap will be reached by the first day that H–1B petitions may be filed for a particular fiscal year, USCIS would close the registration before such date and randomly select a sufficient number of timely filed registrations to meet the applicable cap. USCIS proposes to allow only those petitioners whose registrations are randomly selected to file H–1B petitions for the cap-subject prospective worker named in the registration. USCIS would create a waitlist containing some or all of the remaining registrations, based on USCIS statistical estimates of how many more registrations may be needed to fill the caps should the initial pool of selected registrations fall short. USCIS would notify the employers of those registrations placed on the waitlist *when* and if they are eligible to file an H–1B petition. Employers whose registrations were neither randomly selected to file petitions nor placed on the waitlist *would receive notification* that they were not selected to file petitions in that fiscal year.

USCIS anticipates that this new process will reduce administrative burdens and associated costs on employers who currently must spend significant time and resources compiling the petition and supporting documentation for each potential beneficiary without certainty that the statutory cap has not been reached. The proposed mandatory registration process also will alleviate administrative burdens on USCIS service centers that process H–1B petitions.

DATES: Written comments must be submitted on or before May 2, 2011.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS–2008–0014 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail:* You may submit comments directly to USCIS by e-mail at *rfs.regs@dhs.gov.* Include DHS Docket No. USCIS–2008–0014 in the subject line of the message.
- *Mail:* Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. To ensure proper handling, please reference DHS Docket No. USCIS–2008–0014 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Contact Telephone Number is (202) 272–8377.

FOR FURTHER INFORMATION CONTACT: Shelly Sweeney, Adjudications Officer, Business Employment Services Team, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529–2060, telephone (202) 272–8410.

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. The Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) also invite comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to DHS and USCIS will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Instructions: All submissions received must include the agency name and DHS Docket No. USCIS–2008–0014. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.* Submitted comments may also be inspected at the Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020.

II. Background

Congress has established limits on the number of alien workers who may be granted H–1B nonimmigrant visas or status each fiscal year (commonly known as the "cap"). *See* Immigration and Nationality Act (INA) section 214(g), 8 U.S.C. 1184(g). With a few exceptions, the total number of aliens who may be accorded H–1B nonimmigrant status during any fiscal year currently may not exceed 65,000. *See* INA sec. 214(g), 8 U.S.C. 1184(g). The ability of employers to fill available U.S. jobs with aliens otherwise eligible for the H–1B nonimmigrant classification generally depends on when the employers filed petitions for such workers and the number of such petitions that USCIS has approved to allow workers to begin employment during the course of the fiscal year (*i.e.,* October 1 through September 30). USCIS, however, may only accord H–1B status in the order in which it receives the H–1B petitions. *See* INA sec. 214(g)(3), 8 U.S.C. 1184(g)(3).

USCIS monitors the requests for H–1B workers and administers the distribution of available H–1B cap numbers in light of these limits. The first day on which petitioners may file H–1B petitions can be as early as six months ahead of the projected employment start date. *See* 8 CFR 214.2(h)(9)(i)(B). During years of high demand for H–1B workers, the H–1B cap has been reached within days of the opening of the H–1B filing period for a new fiscal year. In practical terms, this means that the cap has been reached on or shortly after April 1 (which is six months before the start of a new fiscal year). For example, in FY 2009, USCIS received nearly 163,000 H–1B petitions between April 1 and April 7, 2008. *See e.g.* USCIS Update, "USCIS Releases Preliminary Number of H–1B Cap Filings," *http://www.uscis.gov/files/article/USCIS%20Update_H1B_Preliminary%20Count1_10Apr08.pdf.*

To ensure the fair and orderly distribution of H–1B cap numbers, USCIS employs a random selection process after announcing a final date on which it will receive H–1B petitions. USCIS refers to this day as the "final receipt date." *See* 8 CFR 214.2(h)(8)(ii)(B). In past fiscal years, the final receipt date has been as early as the first day after USCIS began accepting H–1B petitions for the new fiscal year. In Fiscal Year 2010, due to the struggling economy and high unemployment rates, the final receipt date was not reached until December 21, 2009. Petitions submitted properly on the "final receipt date" undergo a random selection process to determine which petitions can be processed to completion and, if otherwise eligible, which beneficiaries are able to receive a new H–1B visa number.

USCIS has found that when it receives a significant number of H–1B petitions (*e.g.,* 100,000 or more) within the first few days of the H–1B filing period, it is difficult to handle the volume of petitions received in advance of the H–1B random selection process. Further, after expending USCIS resources to ensure proper processing of these petitions, USCIS must reject and return to the petitioning employer those petitions and associated fees that are not randomly selected as eligible for an H–1B cap number. U.S. employers are also adversely affected by the current petition process. Preparing and mailing H–1B petitions, with the required filing fee, can be burdensome and costly for employers, if the petition must ultimately be returned because the cap was reached and the petition was not selected in the random selection process.

Requiring U.S. employers to file complete H–1B petitions prior to the random selection process is not the most efficient way to administer the allocation of available H–1B cap numbers. USCIS is proposing an alternate, more streamlined mechanism for allocating H–1B cap numbers and administering the H–1B cap.

A. Current H–1B Petition Process

Before employing an H–1B temporary worker, a U.S. employer must first obtain a certification from the U.S. Department of Labor (DOL) confirming that it has filed a Labor Condition Application (LCA) in the occupational specialty in which the alien will be employed. *See* 8 CFR 214.2(h)(4)(i)(B)(*1*) and 8 CFR 214.2(h)(1)(ii)(B)(*3*). Upon certification of the LCA, the employer may then file an H–1B petition with USCIS on Form I–129, Petition for a Nonimmigrant Worker. Once USCIS accepts a properly filed H–1B petition, it adjudicates the petition. USCIS will notify the petitioner in writing if it requires additional information before rendering a written decision to approve or deny the petition. *See* 8 CFR 103.2(a)(8) and 214.2(h)(9) and (10). An approved H–1B petition is valid for a period of up to three years and may not exceed the validity period of the LCA. *See* 8 CFR 214.2(h)(9)(iii)(A)(*1*).

Prior to the expiration of the initial H–1B status, the petitioning employer may apply for an extension of stay, or a different employer may petition on behalf of the temporary worker. *See* 8 CFR 214.2(h)(2)(i)(D), (h)(15)(ii)(B). An extension of stay generally may only be granted for a period of up to three years, such that the total period of the H–1B temporary worker's admission does not exceed six years. *See* INA 214(g)(4), 8 U.S.C. 1184(g)(4); 8 CFR 214.2(h)(15)(ii)(B)(*1*). As with initial H–1B petitions, the petitioning employer must first obtain a certified LCA from DOL before applying for the extension of stay. At the end of the six-year

period,[1] in most cases, the alien must change to another nonimmigrant status, seek permanent resident status, or depart the United States. The alien may be eligible for a new six-year maximum period of stay in H–1B nonimmigrant status if he or she remains outside the United States for at least one year. *See* 8 CFR 214.2(h)(13)(iii)(A).

B. H–1B Nonimmigrants Subject to H–1B Caps

Most aliens seeking a new H–1B nonimmigrant classification are subject to a numerical cap of 65,000 visas each fiscal year. Exempt from this 65,000 cap are aliens who: (1) Are employed at, or have received an offer of employment from, an institution of higher education, or a related or affiliated nonprofit entity; (2) are employed at, or have received an offer of employment from, a nonprofit research organization or a governmental research organization; or (3) have earned a master's or higher degree from a U.S. institution of higher education. INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5). The exemption for aliens who have attained a U.S. master's degree or higher is capped at 20,000 H–1B petitions per fiscal year ("20,000 cap"). *See* INA sec. 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C).

The spouses and children of H–1B nonimmigrants, classified as H–4 nonimmigrants, do not count toward the 65,000 and 20,000 caps. *See* INA sec. 214(g)(2), 8 U.S.C. 1184(g)(2); 8 CFR 214.2(h)(8)(ii)(A). In addition, USCIS does not apply the 65,000 and 20,000 caps in the following cases:

- Requests for H–1B petition extensions;
- Requests for extensions of stay in the United States; and
- Petitions filed on behalf of aliens who are currently in H–1B nonimmigrant status but seek to change the terms of current employment, change employers,[2] or work concurrently under a second H–1B petition.

These aliens have already been counted towards either the 65,000 or 20,000 cap in previous years. *See* INA sec. 214(g)(7), 8 U.S.C. 1184(g)(7); 8 CFR 214.2(h)(8)(ii)(A).

[1] Certain aliens are exempt from the six-year maximum period of admission under sections 104(c) and 106(a) and (b) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Public Law 106–313, 114 Stat. 1251 (Oct. 17, 2000).

[2] If the alien was previously employed by a cap-exempt petitioner and thus never counted against the cap, the worker must be counted against the cap when switching to an employer that is subject to the cap. *See* INA sec. 214(g)(6), 8 U.S.C. 1184(g)(6).

C. Current Random Selection Process

To manage the 65,000 and 20,000 caps, USCIS monitors the number of H–1B petitions it receives at each service center. The first day on which petitioners may file H–1B petitions can be as early as six months ahead of the projected employment start date. *See* 8 CFR 214.2(h)(9)(i)(B). For example, a U.S. employer seeking an H–1B worker for a job beginning October 1 (the first day of the next fiscal year) can file an H–1B petition no earlier than April 1 of the current fiscal year. Thus, an H–1B employer requesting a worker for the first day of FY 2012, October 1, 2011, would be allowed to file an H–1B petition on April 1, 2011. When USCIS determines, based on the number of H–1B petitions it has received for a cap season, that the 65,000 or 20,000 cap will be reached, it announces to the public the final day on which H–1B petitions can be filed for that cap season.

USCIS then randomly selects the number of petitions needed to reach the H–1B cap. The random selection process includes all petitions received on the final receipt date. USCIS makes projections on the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. *See* 8 CFR 214.2(h)(8)(ii)(B). USCIS then randomly selects approximately 15–20% over the regular cap number of 65,000 and approximately 5–10% over the master's degree cap number of 20,000.

If USCIS receives sufficient H–1B petitions to reach the 65,000 and 20,000 caps for the upcoming fiscal year within the first five business days, USCIS randomly selects from all H–1B petitions filed within the first five business days, beginning first with H–1B petitions subject to the 20,000 cap. *Id.* Once the random selection process for the 20,000 cap is complete, USCIS conducts the random selection process for the 65,000 cap. Once the random selection process for the 65,000 cap is complete, USCIS rejects all remaining H–1B petitions, including those not selected during one of the random selections. USCIS also rejects all H–1B petitions received after the final receipt date. *See* 8 CFR 214.2(h)(8)(ii)(D).

D. Current Allocation Process

This proposed rule is designed to alleviate many of the difficulties and inefficiencies stemming from the current H–1B allocation process and to simplify the allocation of available H–1B cap numbers. The registration requirement also will aid USCIS in the administrative front-end processing of cap-subject H–1B petitions.

For example, during the first five business days of filing for FY 2009, USCIS received approximately 163,000 H–1B petitions, well in excess of the available H–1B cap numbers. Some of the front-end processing activities associated with handling this exceptionally high volume of receipts include, but are not limited to, opening and sorting mail, identifying properly filed petitions, placing petitions through the random selection process, notifying petitioners of selected petitions, receipting fees and entering data for selected petitions, and returning all of the nonselected and improperly filed petitions with associated fees.

Since USCIS first created the random selection process in 2005, it has twice received significant numbers of H–1B petitions that exceeded the 65,000 and 20,000 caps on April 1, the first day the petitions could be filed for a new fiscal year. Petitioning employers rushed to file H–1B petitions for FY 2008, because in the previous fiscal year, USCIS reached the H–1B cap on the second filing day. *See* USCIS Update, "USCIS Updates Count of FY 2008 H–1B Cap Filings," *http://www.uscis.gov/files/pressrelease/H1Bfy08CapUpdate041007.pdf*. Many petitioning employers apparently anticipated a similar shortage of H–1B cap numbers for FY 2009 and, as a result, hurried to file the petitions to ensure USCIS received them at the start of the filing period. In an effort to relieve some of the burdens associated with handling the huge volumes of petitions received on the first filing day, USCIS amended the regulations pertaining to the random selection process on March 24, 2008. *See* 73 FR 15389.

Although the current regulations at 8 CFR 214.2(h)(8)(ii)(B) provide some relief by authorizing USCIS to include in the random selection process all petitions filed during the first five business days, USCIS proposes to take further measures to alleviate administrative burdens and the current uncertainty faced by petitioners who must prepare and submit H–1B petitions for all potential beneficiaries. Petitioning employers often expend significant time and resources to prepare the H–1B petition for submission. These resources and costs are expended for every potential H–1B worker the employer wants to hire, regardless of whether the petition will ultimately be adjudicated by USCIS.

III. Proposed H–1B Registration Program

USCIS proposes to establish a mandatory Internet-based electronic registration process for U.S. employers seeking to file H–1B petitions for alien workers subject to either the 65,000 or 20,000 caps. *See* proposed 8 CFR 214.2(h)(8)(ii). The electronic registration process would be in advance of the start of the period during which actual petitions can be filed for a new fiscal year (*i.e.,* immediately prior to April 1). This process would require U.S. employers to register for consideration of available H–1B cap numbers in advance of having to file and receive a certified LCA from the DOL.

This rule also proposes to establish processes for selecting registrations. Upon notification of selection by USCIS, a registrant would proceed to submit the LCA to DOL for certification and prepare the corresponding H–1B petition on behalf of the desired beneficiary. USCIS would reject any H–1B petition filing that is not based on a selected registration. The proposed registration requirement, which would take approximately 30 minutes to complete, is preferable for petitioners because selected registrations would have a higher probability of receiving an H–1B slot before petitioners would be required to expend the time and expenses necessary to complete H–1B petitions.

The proposed registration process would greatly improve the agency's ability to manage the H–1B cap and reduce the burden on petitioning employers in terms of up-front form preparation and filing fee submission. Below is a more detailed discussion of the proposed registration process and petition filing procedures for H–1B petitions subject to registration.

A. Registration

1. Announcement of the Registration Period

USCIS proposes to establish a mandatory Internet-based electronic registration process for U.S. employers seeking to file H–1B petitions for alien workers subject to either the 65,000 or 20,000 cap. *See* proposed 8 CFR 214.2(h)(8)(ii)(B)(*1*). The entire Internet registration process would commence each year in advance of the filing period for actual petitions.

The proposed rule would clarify USCIS's discretionary authority to temporarily suspend the H–1B registration process for any given fiscal year or to permanently terminate the registration process. USCIS would notify the public of any program suspension or termination via an update on the USCIS public Web site. Proposed 8 CFR 214.2(h)(8)(ii)(A)(*3*). The public frequently turns to the USCIS Web site for information and uses the USCIS Web site for general information on immigration benefits rules and processes, statutes and regulations, downloadable immigration forms, specific case status information, and processing times at the various service centers and district offices. Some members of the public sign up for e-mail alerts that provide the latest information posted on the USCIS Web site regarding particular applications, petitions, or visa classifications. Because of the wide use of the USCIS Web site by the public, the posting of information on the dates of suspension or termination of the registration process on the USCIS Web site would provide a timelier and more efficient method of disseminating such information to the public than publication of the information in the **Federal Register.** For example, USCIS may need to suspend or terminate the availability of the registration process in the event that Congress greatly increases the annual number of H–1B visas that USCIS may allocate each fiscal year. This rule would afford USCIS the flexibility to adapt quickly when various contingencies arise while providing the public with adequate notice of any impact on the registration availability.

Under the proposed registration process, each petitioning employer would be required to file registrations electronically through the USCIS Web site (*http://www.uscis.gov*) in accordance with the instructions provided. *See* proposed 214.2(h)(8)(ii)(B)(*1*). USCIS proposes to establish a registration period that would begin no later than in the month of March each year, for a minimum period of two weeks. USCIS would notify the public of the respective start and end dates for the registration period via the USCIS Web site (*http://www.uscis.gov*). *See* proposed 8 CFR 214.2(h)(8)(ii)(A)(*2*). All registrations would be required to be filed during the timeframes announced by USCIS on its public Web site. USCIS would not accept any registrations filed either before or after the close of the specified registration period. USCIS invites the public to comment on whether the proposed start of the registration period would be sufficient time for prospective petitioners to submit their registrations.

Note that each annual registration period would be treated as separate from any earlier registration period. Therefore, employers from a previous registration period would not be automatically entered into a new registration period.

2. Information Required

This rule proposes that registrations must include basic information regarding the company and beneficiary: (1) The employer's name, employer identification number (EIN), and employer's mailing address; (2) the authorized representative's name, job title, and contact information (telephone number and e-mail address); (3) the beneficiary's full name, date of birth, country of birth, country of citizenship, gender and passport number; and (4) any additional information requested by the registration or USCIS. Proposed 8 CFR 214.2(h)(8)(ii)(B). USCIS seeks public comments on the type of information requested and whether the list should be expanded or in any way changed for U.S. employers.

USCIS has determined that the content noted above is the minimum information that USCIS will need to identify the prospective H–1B petitioner and specific named beneficiary, to eliminate duplicate registrations, and to match approved and selected registrations with subsequently filed H–1B petitions.

3. USCIS Acceptance of Registrations

USCIS proposes to require U.S. employers who choose to participate in the registration process to file a single registration for each prospective H–1B temporary worker they seek to hire. Multiple beneficiaries cannot be listed on a single registration. In addition, petitioners may not file multiple registrations for the same H–1B beneficiary. USCIS recognizes that, because this would be a new system, petitioners or their preparers may accidentally or unintentionally submit more than one registration on behalf of a single beneficiary. Therefore, this rule proposes that if USCIS receives more than one registration for a single H–1B beneficiary by the same petitioner, USCIS will accept the first valid registration and reject any subsequent duplicate requests.

Each U.S. employer who submits a properly completed H–1B Cap Registration request online will receive electronically an automatic notification that the registration request has been accepted by USCIS (note, acceptance is not the same as selection). The notification will be in a printable format and contain a unique identifying number for USCIS tracking and recordkeeping purposes. Registering employers can retain a hard copy of the acceptance notification for their files.

USCIS also proposes to assign a unique identifying number for each registration, which would be included on the electronic notification of registration acceptance.

B. Selection of Registrations

1. If the Number of Registrations Is Less Than the 65,000 or 20,000 Cap by April 1

In the event that the number of registrations is *less* than the number of available cap numbers before the first day that H–1B petition filings may be made (*e.g.,* April 1), USCIS would announce on its Web site that the registration period will remain open until such time as USCIS determines it has enough registrations to reach the cap. If the number of registrations received during the initial registration period is less than what is needed to reach the cap, all registrations accepted during that initial period would be selected. At such time USCIS believes it has enough registrations to meet the cap, it will announce the closing of the registration period on the USCIS Web site and will conduct a random selection of all registrations received on the last day of the registration period (*i.e.,* "final receipt date"). U.S. employers who receive notification that their registrations have been selected will be eligible to file an H–1B petition on behalf of the prospective H–1B worker named in the selected registration in accordance with the normal filing rules.

While the rule proposes to permit USCIS to keep the registration period open in the event that registrations remain low during the fiscal year, this rule would provide USCIS with the authority to close the registration period before the close of the fiscal year to allow petitioners sufficient time to complete and file their petitions and USCIS sufficient time to receive and process petitions. *See* proposed 8 CFR 214.2(h)(8)(ii)(A)(*3*).

2. If the Number of Registrations Is More Than the 65,000 or 20,000 Cap

In the event that USCIS would receive significantly *more* registrations than the H–1B cap, USCIS would conduct a random selection of the registrations timely received in a number sufficient to meet the 65,000 and 20,000 caps. Under such random selection process, USCIS would randomly select approximately 15–20% over the regular cap number of 65,000 and approximately 5–10% over the master's cap number of 20,000. The reason for selecting a percentage of registrations over the cap numbers of 65,000 and 20,000 is based on historical approval, denial and rejection rates, and in order to account for a variety of factors, such as: Randomly selected registrants that ultimately decide not to file an H–1B petition; H–1B petitions that are rejected as improperly filed or that are denied based on ineligibility; petitions that are later found revocable; and beneficiaries who ultimately decide not to seek an H–1B visa or are found ineligible for a visa. The random selection process will be conducted via a method approved by the Office of Immigration Statistics and will be similar to the current random, computer-generated selection process for H–1B petitions outlined at 8 CFR 214.2(h)(8)(ii)(B).

After the random selection process is complete, USCIS would be authorized to create a waitlist of remaining registrations. The waitlist of remaining registrations would be based on USCIS statistical estimates of how many more registrations may be needed to fill the caps should the pool of selected registrants unexpectedly fall short of reaching the caps. Waitlisted registrations would be randomly sorted and given a unique number in sequential order. USCIS would notify employers that their registrations have been placed on the waitlist. As H–1B numbers become available, waitlisted registrations would be selected so that employers can file H–1B petitions in accordance with the normal filing rules.

Employers with registrations that are neither randomly selected to file nor placed on the waitlist would receive notification that their registrations were not selected and that they are ineligible to file a petition for the applicable fiscal year.

C. Filing of H–1B Petition Following Selection

1. Eligibility To File

USCIS proposes to accept only cap-subject H–1B petitions based on selected registrations, and only for the H–1B beneficiary named in the original registration; others will be rejected. *See* proposed 8 CFR 214.2(h)(8)(ii)(D). No substitution of beneficiaries would be permitted. USCIS recognizes that employer needs often change and potential workers may become unavailable for a variety of reasons. However, USCIS is proposing to limit the filing of petitions to the beneficiary named on the original registration request in an effort to guard against the possibility of abuse from the minority of employers who might otherwise attempt to monopolize petition filing "slots" and create an illegitimate secondary market for H–1B beneficiaries. Furthermore, an employer is prohibited from filing more than one H–1B petition in the same fiscal year on behalf of the same alien if the alien is subject to the cap or is exempt from the cap because of having earned a master's degree or higher from a U.S. institution of higher education. However, if an H–1B petition is denied, on a basis other than fraud or misrepresentation, the employer may file a subsequent H–1B petition on behalf of the same alien in the same fiscal year, provided that the numerical limitation has not been reached or if the filing qualifies as exempt from the numerical limitation. *See* 8 CFR 214.2(h)(2)(i)(G).

2. Availability of Cap Numbers

Under the proposed registration and selection process, if an H–1B petition is otherwise approvable, a petitioner likely would be assured, but would not be guaranteed, the availability of an H–1B cap number under the 65,000 or 20,000 cap, whichever is applicable. USCIS notes that, while it takes every conceivable measure to accurately reach and not exceed the cap, and while the registration system is specifically designed to substantially increase the public's assurance that numbers are available for selected registrants, USCIS cannot guarantee every petitioner that an H–1B number will be available for the beneficiary at the time of filing their petition. As USCIS may accept more registrations than the prescribed statutory limit for H–1B petitions (to account for the variety of factors previously referenced, such as drop-outs or unapprovable petitions), there still exists a possibility that the applicable cap may be reached prior to the date that a selected registrant has filed a petition. This is especially true if, for example, a selected registrant does not file its petition until well after the filing period for petitions has begun (April 1st).

Once actual petition filings commence on April 1st of each fiscal year, USCIS monitors petition receipts closely to ensure adherence to the numerical caps. As explained, petitions filed with USCIS are adjudicated in the order they are received and USCIS cannot approve any petition that would cause it knowingly to exceed the statutory caps. However, the over-selection of registrations is necessary due to factors such as selected registrants who do not file Form I–129; petitions that are rejected, denied or withdrawn; approved petitions that are later revoked; and multiple petitions filed for the same individual. By over-selecting registrations, there is a risk of exceeding the statutory caps. Therefore,

the challenge is getting close to the numerical cap without exceeding it. In order to stay within the numerical limits of the cap, only 85,000 registrations (65,000 plus 20,000) would have to be selected from the lottery. However, by selecting only 85,000 registrations, USCIS will likely be under the numerical cap for the reasons stated above. Thus, there is a tradeoff between cap compliance certainty (being under 85,001) and cap utilization risk (getting close to the numerical cap). Nevertheless, the actual number of H–1B petition approvals is generally not known until the end of the fiscal year as a result of petitions being revoked, denied or withdrawn throughout the year. Although it is possible to exceed the numerical cap during the fiscal year in December or January, the actual number of petitions approved usually falls under the numerical cap by August or September as a result of ongoing revocations.

3. Filing Time Period

USCIS proposes that petitioners would have not less than 60 days from the date of notification of selection ("selection notice") to properly file a completed H–1B petition for the named beneficiary. USCIS would state the applicable filing deadline in each selection notice. Proposed 8 CFR 214.2(h)(8)(ii)(D)(*2*). Allowing USCIS to specify the filing period in the selection notice would give USCIS the flexibility to provide filing periods of longer than 60 days if necessary to accommodate processing backlogs.

If the H–1B petition is filed after the filing window closes, USCIS would reject the H–1B petition. In other words, a selected registrant who does not take advantage of the eligibility to file a petition on behalf of the named beneficiary within the timeframe stated on the selection notice would forego eligibility to file and, consequently, any consideration for an available cap number based on that selection notice.

USCIS is proposing to set a minimum 60-day filing window to ensure that the petitioner has adequate time to prepare the H–1B petition package, and, at the same time, that USCIS has adequate time to determine if a sufficient number of petitions have been filed to reach the H–1B annual numerical limitation. The proposed minimum 60-day filing window also would provide USCIS with a minimum time period within which it would be able to determine the number of selected registrants who actually filed a petition and whose petition was approved by USCIS. Calculating the H–1B approval rate during the 60-day filing period would allow USCIS to assess whether there is a need to resort to selecting registrations from the waitlisted pool of registrants, thereby allowing more registrants in the queue to file petitions to reach the cap.

The proposed minimum 60-day filing period in which a selected registrant may opt to file a petition on behalf of the named beneficiary would be read consistently with the existing regulation providing that a petitioner may file no earlier than six months before the date of actual need for the beneficiary's services or training. 8 CFR 214.2 (h)(9)(i)(B). In other words, while the proposed minimum 60-day filing window would provide a cutoff date for filing a petition, selected registrants would still be able to file a petition up to six months prior to the date of stated need. If, for example, an employer's selection notice dated March 31, 2010 contains a 60-day filing period, and the requested start date is October 1, 2010, the petition must be filed no later than May 30, 2010 or USCIS will reject the petition. Another example is if an employer receives the selection notice dated May 1, 2010 with a 60-day filing period, then the petition must be filed no later than June 30, 2010. If the H–1B petition is filed on June 30, 2010, the requested start date may be no later than December 30, 2010, which is six months after the filing date.

4. Submission of Selection Notice With H–1B Petition

The rule also proposes to require that selected registrants submit the selection notice with the actual H–1B petition at the time of filing. *See* proposed 8 CFR 214.2(h)(8)(ii)(D)(*2*). The submission of the selection notice is an anti-fraud measure to ensure the integrity of the H–1B cap number allocation system. Further, each selection notice will contain a unique identifying number and have a machine-readable zone that USCIS can use to verify the petitioner and intended beneficiary. Submission of the selection notice facilitates the proper and timely identification of petitioners and beneficiaries selected during the registration process. Failure to submit the selection notice will result in the rejection of the H–1B petition and the return of the filing fees.

IV. Miscellaneous Amendments

This proposed rule also includes modifications to the current H–1B cap management provisions at 8 CFR 214.2(h)(8)(ii)(B). The proposed amendments do not alter the current H–1B cap management process but instead clarify the provision so it better reflects how USCIS conducts the H–1B random selection process. The current cap management process is modified by running the random lottery on the registrations rather than the actual filed petition. The proposed system will not require the petitions to be returned as the lottery will be done prior to filing the actual petitions. This proposed rule also adds a cross reference to the registration process. *See* proposed 8 CFR 214.2(h)(8)(ii)(B).

V. Regulatory Requirements

A. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

B. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

C. Executive Order 12866

This rule has been designated as significant under Executive Order 12866. Thus, under the Executive Order, USCIS has prepared an assessment of the benefits and costs anticipated to occur as a result of this rule and made it available for review in the rulemaking docket for this rule at *http://www.regulations.gov.* The costs and benefits of this rule are summarized as follows.

1. Summary

We estimate the total net savings to USCIS and H–1B petitioners from this rule is $23,611,393 at a three percent discount rate and $19,150,459 at a seven percent discount rate over the next ten years.

Over the next 10 years, this rule will result in a savings to those businesses that file H–1B petitions of $35,826,852 based on a discount rate of three percent, and $29,499,043 based on a discount rate of seven percent. However, the costs imposed on H–1B petitioners as a result of this rule over

the next 10 years will be $11,942,284 at the three percent discount rate, and $9,833,014 discounted at seven percent. Thus the net savings resulting from this rule for H–1B petitioners over the next 10 years will be $23,884,568 at three percent and $19,666,029 at seven percent.

In the next 10 years, this rule will result in USCIS saving approximately $3,520,244 when discounted at three percent, and $2,898,492 when discounted at seven percent. The total USCIS costs over the next 10 years as a result of the changes proposed in this rule will be $3,793,419 discounted at three percent and $3,414,062 at the seven percent discount rate. The net cost to USCIS over the 10 years following this rule, discounted at three percent, is $273,175, and discounted at seven percent the costs will be $515,570.

The impacts of this rule on employers wanting to hire an H–1B worker and the government are summarized in the following table.

10-Year cost category	Net present value at 3 percent per annum	Net present value at 7 percent per annum
H–1B filer savings	35,826,852	29,499,043
H–1B filer cost	11,942,284	9,833,014
Net H–1B filer savings	23,884,568	19,666,029
Government savings	3,520,244	2,898,492
Government costs	3,793,419	3,414,062
Net Government cost	273,175	515,570
Total Estimated net savings to the government and H–1B filers	$23,611,393	$19,150,459

2. Recent Petition Filing Volume [3]

65,000 cap.[4]

Fiscal year	*2010* [5]	*2009*	*2008*	*2007*	*2006*
Filings	68,000	133,000	120,000	67,000	74,000
Accepted [6]	65,000	74,000	71,000	67,000	74,000
Approved	48,000	60,000	64,000	65,000	63,000
Percent approved [7]	71%	45%	53%	97%	85%

Fiscal year	*2005*	*2004*	*2003*	*2002*	*9-year average* [8]
Filings	81,000	73,000	88,000	89,000	88,000
Accepted	79,000	71,000	86,000	87,000	75,000
Approved	72,000	65,000	78,000	79,000	66,000
Percent approved	89%	89%	89%	89%	75%

20,000 Master's exemption.[9]

Fiscal year	*2010* [10]	*2009*	*2008*	*2007*	*2006*	*5 year average*
Filings	28,000	30,000	21,000	21,000	21,000	24,000
Accepted	27,000	23,000	21,000	21,000	21,000	23,000
Approved	23,000	19,000	19,000	20,000	20,000	20,000
Percent approved	82%	63%	90%	95%	95%	83%

[3] Rounded to nearest thousand, except for average.

[4] The H–1B filing cap was 195,000 in fiscal years 2002 and 2003. In FY 2005, USCIS exceeded the 65,000 cap—*see* full report at *http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_05-49_Sep05.pdf http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_05-49_Sep05.pdf.*

[5] As of 18 December 2009. Additionally, since the 65,000 cap was not met for FY 2010, excess approved petitions for the Master's exemption were rolled into the 65,000 cap.

[6] A small percentage above the 65,000 or 20,000 are processed based on historic denial rates in order to ensure that all 85,000 spots are used by those selected.

[7] Percentage based on number of filings; rounded.

[8] These years are the dates when the current cap numbers were in effect and thus appropriate for comparison.

[9] FY 2006 was the first year the 20,000 Master's exemption (authorized by the 2004 H–1B Visa Reform Act) became operational.

[10] As of 18 December 2009. *See* additional information in footnote five.

3. Problems Being Addressed—Overwhelmed by Paper Petitions

The statutory numerical limits on H–1B visas have created complications for both employers and DHS. On the first two filing days for fiscal year 2008, April 2 and 3, 2007, USCIS received 123,000 H–1B petitions subject to the 65,000 cap or 20,000 Master's cap exemption. This was the first time since the random selection process was instituted that USCIS received more petitions than available cap numbers on the first two days. USCIS randomly selected 71,000 from those received on April 2 and April 3 for processing to fill the 65,000 cap and rejected 52,000 others.[11] In 2007, petitions for the 20,000 U.S. master's degree or higher visas for 2008 were rejected after filings reached approximately 21,000. In 2008 (for fiscal year 2009 workers), approximately 163,000 total petitions were received during the five day filing period. Of those, USCIS accepted 74,000 and 23,000 to process for both cap categories, and rejected 66,000. In 2008, the 20,000 master's degree exempt visas were filled by the final receipt date for the first time. USCIS believes that the master's degree cap exemption numbers will continue to be utilized by employers as quickly as the non-master's allotment. For that reason, it is proposed that they be made subject to registration under this rule.

In the filing periods to request H–1B workers for fiscal years 2008 and 2009, an average of 59,000 petitions per year were completed and mailed, usually by overnight carrier, along with fee payments, without even being accepted by USCIS for processing. Meanwhile, the USCIS service centers involved in the petitioning process were overwhelmed in those years by the quantity of paper petitions received in early April until the receipt date was closed. Much time and effort was spent to open the packages, process the mail, receipt the petition for processing, check the fee payments, and perform the associated tasks. Readying all submissions for the random selection process requires work by many employees. For fiscal years 2008 and 2009, multiple truckloads of petitions were stacked on pallets on loading docks, in offices, and in hallways. Then only around 60 percent of those submitted were processed. The logistical problems caused by the huge volume of filings result in effort wasted on petitions that cannot be processed in those years when the demand for H–1B visas greatly exceeds the available supply.

4. Changes Proposed—Registration

This rule proposes to require employers to register in a system for either the master's exemption or regular cap categories regardless of the anticipated employment start date. Once the registration period is over, 65,000 and 20,000 H–1B registrants, as applicable, will be randomly selected and invited to file an H–1B petition. This rule proposes that entries for the program must be submitted electronically through the USCIS Web site in a time frame as established on the USCIS Web site.

5. Benefits

No Unnecessary Petitions. The main benefit that will result from this rule is that employers that want to hire an H–1B worker will be able to forgo the time, effort, and expense associated with the preparation of a full H–1B petition, the Department of Labor (DOL) Labor Condition Application, and all of the necessary supporting documentation unless USCIS notifies the H–1B employer that space exists under the cap.[12]

This rule would result in savings for the typical H–1B employer from not incurring the expense of preparing an H–1B petition when cap space is not available. In an analysis of recent H–1B filings, USCIS records showed that 93 percent of H–1B petitions were accompanied by a USCIS Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative, indicating that the petitioner is represented. Thus, most H–1B filers pay an attorney to prepare and submit their Forms I–129. To the extent that such expenses are avoided by registering under this rule, these avoided costs represent a benefit to society.

The public reporting burden for Form I–129 that has been approved by OMB under the Paperwork Reduction Act is 2.75 hours per petition, including the time for reviewing instructions, completing, and submitting the form. As previously discussed, a majority of H–1B filers use an attorney to assist with the preparation of the I–129. For the purpose of this analysis, we will assume that the 2.75 hour burden associated with completing the I–129 is split between an attorney and a staff member equivalent to a human resource manager. According to the Bureau of Labor Statistics, the average hourly salary for a lawyer and human resource manager are, respectively, $59.98 and $49.96.[13] For the compensation costs required for this analysis, we used the average of those two wage rates, $54.97, and multiplied it by 1.43 to account for the full cost of employee benefits such as paid leave, insurance, retirement, *etc.*[14] Thus the cost to prepare an H–1B petition is approximately $78.61 per hour, and the total cost to complete a Form I–129 is $216.18 ($78.61 × 2.75). This cost estimate is conservative because many employers actually employ more costly outside counsel rather than "in-house" attorneys and managers to complete H–1B petitions.

By requiring a petitioner to register in order to be eligible to file, filing volume would be capped at around 91,000 petitions.[15] To illustrate the maximum possible savings that could result from this rule, if the same number of filings that were received for FY 2009 workers occurs again in the future, filings would exceed those accepted by 72,000.[16] This would result in a possible opportunity cost savings for unnecessary petition preparation of nearly $15.6 million in any year in which such a large number of filings are received. (72,000 × $216.18). There have been years, however, such as fiscal year 2007, where the number of petitions received did not exceed the number that could be processed under the cap. Taking account of this variation, once this proposed rule is in place, it is expected to reduce paper petition filing volumes by about 19,000 per year.[17] This would

[11] Petition returned and fee refunded.

[12] DOL *Form ETA 9035E,* Labor Condition Application (LCA). The INA directs the Secretary of Labor to certify that there are not sufficient workers who are able, willing, qualified and available and that the employment of an alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. The regulations of the Department of Labor delineate the specific rules to be followed for each program that requires labor certification from the Secretary of Labor. 20 CFR part 655. *http://www.foreignlaborcert.doleta.gov/.*

[13] *See* United States Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2008 National Occupational Employment and Wage Estimates at *http://www.bls.gov/oes/2008/may/oes_nat.htm#b11-0000.*

[14] U.S. Department of Labor, Bureau of Labor Statistics, Economic News Release, 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, March 2009, viewed online at *http://www.bls.gov/news.release/ecec.t01.htm.*

[15] 70,000 + 21,000 (estimated petitions that would need to be accepted, based on historic denial rates, in order to achieve the 65,000 cap and the 20,000 master's exemption cap).

[16] 163,000 − 91,000.

[17] The average volume in the previous nine years for H–1B visa petitions subject to the 65,000 cap was 89,000. Since its inception in 2006, average filing volume for the 20,000 master's exemption H–

Continued

result in average petitioner preparation burden savings of $4.1 million per year.[18] Thus, based on past fiscal years' filing volume, the paperwork burden savings resulting from this rule would range from zero to $15.6 million, with average cost savings of $4.1 million per year based on future volume projections.

Reduced Mailing Expenses. While not required by regulations, in order to ensure receipt of a petition by USCIS, H–1B petitioners typically mail their petitions via overnight couriers. As indicated in the Small Business Impacts section below, USCIS estimates that the average sponsoring employer files three H–1B petitions, and each employer would, logically, mail all of its petitions in one package. Estimating the average mailing cost at $17.50 per mailed package,[19] this rule would result in cost savings for petitioning employers ranging from zero to $420,000, with a projected annual cost savings of about $111,000 per year.[20]

The 10-year savings to H–1B filers, discounted at three and seven percent, is summarized in the following table.

Year	Total yearly savings[21]	Yearly discounted savings 3%	Yearly discounted savings 7%
1	4,200,000	4,077,670	3,925,234
2	4,200,000	3,958,903	3,668,443
3	4,200,000	3,843,595	3,428,451
4	4,200,000	3,731,646	3,204,160
5	4,200,000	3,622,957	2,994,542
6	4,200,000	3,517,434	2,798,637
7	4,200,000	3,414,984	2,615,549
8	4,200,000	3,315,519	2,444,438
9	4,200,000	3,218,950	2,284,522
10	4,200,000	3,125,194	2,135,067
	Total Discounted Savings	$35,826,852	$29,499,043

Government Benefits. This rule would significantly ease the administrative burden on USCIS of managing the random selection lottery. When petitions filed significantly exceed those that can be approved, USCIS expends funds collected for other application types to open the mail and handle H–1B petition filings that do not result in any fee collections. Over the most recent three fiscal years, USCIS received an average of almost 133,000 petitions, accepted 93,000, and approved an average of approximately 78,000. This means that 55,000 more were received than were approved, and 40,000 more than were adjudicated. In addition, for fiscal years 2008 and 2009, about 10,700 petitions were filed for premium processing, all of which had to be acted on within 15 days of the day of the random selection.

This surge diverts resources away from normal duties to receive, unload, stack, and open the mail, verify that the mail contains H–1B petitions, perform minimal data entry, and place a bar-code on each petition for use in the random selection at a later date—all efforts estimated at 40 minutes for each petition.[22] Further time was spent over the following two-week period to complete the initial selection; enter chosen petitions into the tracking system; and return rejected petitions. The typical contract clerk that performs these steps earns on average $23.58 for regular time hours.[23] Therefore, this piece of the H–1B processing procedure needlessly costs USCIS about $298,680 each year.[24]

Additional costs were also incurred to shift 18,000 Form I–130 filings to California from Vermont, so Vermont could concentrate on the cap cases received. In such high demand and volume years, electronic registration would decrease the random selection preparation time, preclude the processing of most fee refunds, and reduce overtime costs and lost production. USCIS can better utilize this time, effort, and other resources to adjudicate other benefits.

Many savings associated with this rule are difficult to quantify; however, we are able to estimate mailing costs for returning unaccepted petitions. We estimate mailing costs for rejected H–1B filings at $6.00 per mailed package.[25] USCIS individually returns unaccepted petitions to petitioners. Again, using forecast approximations, we can calculate shipping savings at $114,000 annually.[26] Combining savings data generates a typical total annual savings for USCIS of about $412,680.

Registration would also add a qualitative benefit for future filers by averting a front log for H–1B petitions and allowing more efficient notification of the petitioners as to whether they will receive a cap number. Petitioners would be able to more efficiently plan employment and staffing levels, and would know whether or not an H–1B visa holder would be an option for a position vacancy.

The 10-year savings to USCIS, discounted at three and seven percent, is summarized in the following table.

1B visas totaled 23,000, resulting in a combined average of 112,000 filings annually. Based on these past results, recent upward trends in filings, and expected demand for H–1B visas in the future, USCIS projects that about 110,000 H–1B petitions would be filed per year in future years.

[18] 19,000 × $216.18 = $4,107,420.

[19] United States Postal Service, Express Mail Flat Rate Envelope, *see http://www.usps.com/prices/express-mail-prices.htm.*

[20] USCIS projects future petition filing volume of approximately 110,000 H–1B petitions annually, exceeding the 91,000 to be accepted for processing by around 19,000. Savings in largest volume year = 72,000/3 × $17.50 = $420,000. Savings in typical year of 110,000 projected filings = 19,000/3 × $17.50 = $110,833.

[21] $4.1 million preparation savings plus $111,000 mailing savings.

[22] 60/40 = 1.5 petitions received/guarded/sorted/stacked/opened/entered/notified per hour.

[23] Per USCIS Service Center Operations—fully burdened average rate for CA and VT.

[24] (19,000/1.5 petitions per hour) × $23.58 per hour average regular time = $298,680 annual regular time savings.

[25] *http://postcalc.usps.gov/Summary.aspx?m=2&p=1&o=0&dz=20529&oz=90210&MailingDate=1/4/2010&MailingTime=7:09%20AM&time=2%20days&mt=11&es=106.*

[26] 19,000 excess petitions × $6.00 per package mailing costs = $114,000 shipping savings per year.

Year	Total yearly savings	Yearly discounted savings-3%	Yearly discounted savings-7%
1	$412,680	$400,660	$385,682
2	412,680	388,990	360,451
3	412,680	377,661	336,870
4	412,680	366,661	314,832
5	412,680	355,981	294,235
6	412,680	345,613	274,986
7	412,680	335,547	256,996
8	412,680	325,773	240,184
9	412,680	316,285	224,471
10	412,680	307,073	209,786
	Total Discounted Savings	3,520,244	2,898,492

6. Costs

Government Implementation Costs. As part of this rule, USCIS is developing an Internet-based system for registration. Initial development is estimated to cost $800,000, including system design, creation of all required supporting documentation, hardware deployment, and testing the system. Initial hardware and equipment costs are estimated to be approximately $1,400,000. In addition, USCIS estimates that initial personnel costs to establish the system would require $150,000 to fund two positions.[27] Total first year cost would be $2,350,000. Continuing costs would be $200,000 per year—$150,000 for the two support personnel per year and maintenance charges of about $50,000 per year to maintain the system.

The cost to the government over the next 10 years, discounted at three and seven percent, is summarized in the following table.

Year	First year cost	Continuing cost	Total yearly cost	Discounted cost 3%	Discounted cost 7%
1	$2,350,000	$0	$2,350,000	$2,281,553	$2,196,262
2	0	200,000	200,000	188,519	174,688
3	0	200,000	200,000	183,028	163,260
4	0	200,000	200,000	177,697	152,579
5	0	200,000	200,000	172,522	142,597
6	0	200,000	200,000	167,497	133,268
7	0	200,000	200,000	162,618	124,550
8	0	200,000	200,000	157,882	116,402
9	0	200,000	200,000	153,283	108,787
10	0	200,000	200,000	148,819	101,670
			Total Discounted 10-year Government Cost	3,793,419	3,414,062

Registration. USCIS estimates that the public reporting burden for H–1B Cap Registration using the electronic system will average 30 minutes per response, including the time for reviewing instructions, completing, and submitting. Petitioners must file a separate registration for each requested beneficiary and each beneficiary must be named. After the closing date, DHS will run a random selection process and notify the lottery winners. Upon selection in the lottery system, a petitioner will be invited to submit a Form I–129 for adjudication of an H–1B visa.

While most employers hire an attorney to prepare Form I–129 for prospective H–1B employees, registrations are straightforward and should require minimal skills, rather than those of an attorney or management-level employee. The hourly cost for an employer would be the compensation costs for the time required for a petitioning firm's employee to complete the registration. USCIS has reviewed the Bureau of Labor Statistics' Occupational Classifications and believes that the job definition for a Human Resource Assistant indicates that a Human Resource Assistant should possess the skills necessary to provide the registration information, as the duties for that position includes compiling information and furnishing information to authorized persons. The average hourly salary for a Human Resource Assistant is $17.70.[28] Using a multiplier of 1.43 to account for the cost of benefits, the costs per hour to prepare an H–1B petition is $25.31. Thus, the

[27] Includes total compensation costs and benefits.

[28] According to BLS, the duties for Human Resource Assistant are to compile and keep personnel records, record data for each employee (such as address, weekly earnings, absences, amount of sales or production, supervisory reports on ability, and date of and reason for termination), compile and type reports from employment records, file employment records, search employee files, and furnish information to authorized persons. USCIS believes H–1B Registration will require a similar level of skill as these tasks. *See http://www.bls.gov/oco/ocos150.htm.* Average wage for 2008 is at: *http://www.bls.gov/oes/2008/may/oes_nat.htm#b11-0000.*

paperwork burden of each registration would cost about $12.66.[29] USCIS understands that some businesses may not have an employee with the title of "Human Resource Assistant." We believe that a fully loaded wage of $25.31 per hour is a reasonable proxy for the wage of the employee that would be required to submit the basic information being requested by the registration.

For the purposes of this analysis, we assume that a sufficient number of petitions would be received each year to approve the 85,000 maximum workers, or 91,000 per year. Thus, the costs added by this rule would range from $1.2 million for 91,000 registrants, to $2.1 million for 163,000 registrants, and average $1.4 million based on the 110,000 H–1B filings that are projected to be filed if registration is not implemented under this rule.

Start-up Costs. We assume that H–1B employers would not need to expend additional funds to procure computer equipment or acquire Internet connections. This assumption is based on the fact that the Employment and Training Administration (ETA) of DOL already requires employers to use Web-based electronic filing of Labor Condition Applications (LCAs), and an approved LCA is a requisite for requesting an H–1B employee.[30] Thus, any establishment that would be registering online as proposed by this rule must already have a computer and access to the Internet.[31] Further, the costs of learning how to apply for registration are considered in the time for reviewing instructions in the paperwork burden above. Therefore, this proposed rule would impose no start-up costs on the public.

The cost to H–1B filers over the next 10 years, discounted at three and seven percent, is summarized in the following table.

Year	Total yearly cost	Yearly discounted cost 3%	Yearly discounted cost 7%
1	$1,400,000	$1,359,223	$1,308,411
2	1,400,000	1,319,634	1,222,814
3	1,400,000	1,281,198	1,142,817
4	1,400,000	1,243,882	1,068,053
5	1,400,000	1,207,652	998,181
6	1,400,000	1,172,478	932,879
7	1,400,000	1,138,328	871,850
8	1,400,000	1,105,173	814,813
9	1,400,000	1,072,983	761,507
10	1,400,000	1,041,731	711,689
	Total Discounted Cost	11,942,284	9,833,014

7. Breakeven Threshold

The cost added by this rule is the cost of the extra step now required before a petition can be filed—registration. Registration would become a fixed cost for all potential and actual filers of an H–1B petition. Because registration is free except for the time required to register, the amount of the added fixed cost is the opportunity cost incurred by registrants to take this new step.

The breakeven threshold is calculated by setting benefits and costs equal and solving for the number of petitions. The benefits portion equals the cost of completing ($216.18) and mailing ($5.83) a Form I–129 (total $222.01) multiplied by the number of petitioners over the cap limit (unnecessary petitions). This amount represents the total amount saved by registrants. The next benefit is the amount saved by USCIS from not having to deal with unnecessary petitions ($412,680).[32]

Next, we include the cost component. Each filer will need to register online at a cost of $12.66 each, multiplied by the total number of registrants. The final component is the additional cost the rule imposes on USCIS which totals $486,086.[33]

Therefore, based on costs and the conservative estimates for aggregate savings for H–1B filers and the Government, the benefits to this rule exceed the added costs imposed on all successful and unsuccessful registrants when total registrations equal 96,854, or exceed the 91,000 to be accepted for processing by 5,854.[34]

D. 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), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules.

Number of small entities to which the proposed rule would apply.

According to USCIS data on the participants in the employment based visa program, and the Small Business Administration (SBA) Small Business Size Regulations at 13 CFR part 121, almost all, or about 88.6 percent, of the petitions requesting an H–1B employee would be filed by firms that the size definitions indicate are small entities.[35] In fiscal year 2009 (the most recent breakdown available), forty-two percent of petitions approved were for workers in computer-related occupations. The second and third most numerous

[29] 60/30 = 0.5 hours × $25.31= $12.66.

[30] 20 CFR 655.705(c)(1); 20 CFR 655.720; 8 CFR 214.2(h)(ii)(B)(*1*).

[31] In the case of a hardship, ETA allows a paper request for an LCA to be filed. ETA received only one request to file in advance in the past few years and it was not filed when the requestor was asked for further information. ETA rejects about five LCAs per month that are filed on paper without approval to file non-electronically. No paper LCA has been approved in three years. Thus 100% computer ownership is assumed for this analysis. E-mail on file with author from Elissa McGovern, ETA, to Phillip Elder, USCIS, July 8, 2009, 11 a.m.

[32] Annual average savings totals $412,680 discounted at seven percent.

[33] $486,086 average annual equivalent costs at seven percent discount.

[34] In solving for x, we rounded to the nearest whole number.

[35] *See* Small Entity Impact Analysis for the 2010 Adjustment of USCIS Fee Schedule (Docket USCIS–2009–0033). While we acknowledge that the analysis provides estimates of size based on entities that file both Form I–129 and Form I–140, we still believe this to be an appropriate estimate for those entities that would be impacted by this proposed rule.

occupation groups were architecture, engineering, and surveying, followed by education (primary and secondary school teachers and college professors).[36]

USCIS records show that the employers who filed H–1B petitions hired an average of 2.24 to 4.16 H–1B employees in fiscal years 2007 and 2008.[37] Thus, USCIS estimates that the average number of H–1B petitions filed per employer is about three. Therefore, based on projected filings of 110,000 per year, it is estimated that around 36,667 firms that file a petition would be affected by this rule, with 32,487 of them being classified as small entities (110,000/3 = 36,667 × 0.886 = 32,487).

New Compliance Costs of the Proposed Rule. The proposed rule would require employers to electronically register their intention to apply for an H–1B worker for the applicable fiscal year. As indicated previously, this new requirement would add a cost of $12.66 per worker in public annual information collection costs. The average added cost per employer for three employees would total $37.98. However, USCIS expects that H–1B employers will save money due to this rule when the overall costs savings are considered, as these H–1B employers will no longer be filing "unnecessary" H–1B petitions.

Significance of Impact and Certification. Guidelines suggested by the SBA Office of Advocacy provide that, in order for the impact to be considered significant, the cost of a proposed regulation would have to exceed one percent of the gross revenues of the entities in a particular sector or 5 percent of the labor costs of the entities in the sector. The median salary for new H–1B workers in the information technology industry is about $50,000, based on USCIS filings. Thus, the costs added by this rule are only 0.0003 percent of the salary costs for the three workers ($150,000/$37.98 x 100). The average total revenue of the typical H–1B employer is unknown. Nonetheless, to exceed one percent of annual revenues, sales would have to be $3,798 per year or less. Firms with sales below $3,798 would be very unlikely to hire three employees and incur the $37.98 in added costs. USCIS believes that the costs of this rulemaking to small entities would not exceed one percent of annual revenues. Therefore, using both average annual labor costs and the percentage of the affected entities' annual revenue stream as guidelines and considering that this rule is expected to generate a net savings to H–1B employers, USCIS concludes that this rule would not have a significant economic impact on a substantial number of small entities. For this reason, DHS certifies that this rule would not have a significant economic impact on a substantial number of small entities.

[36] *See* USCIS Characteristics of H–1B Specialty Occupations Workers for FY 2009 at *http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-09-characteristics.pdf.*

[37] Calculated by dividing the total number of H–1B employees by the total number of unduplicated petitioner Employer Identification Numbers (EIN).

E. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995), all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a regulatory action. This rule introduces a new registration requirement for H–1B petitions subject to numerical limits, a new information collection under the Paperwork Reduction Act. Accordingly, this information collection has been submitted to OMB for review.

During the first 60 days, USCIS is requesting comments on this information collection. USCIS will therefore accept comments on this information collection until May 2, 2011. When submitting comments on this information collection, your comments 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 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 the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* New information collection.

(2) *Title of the Form/Collection:* H–1B Cap Registration.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Form Number. This information collection is via Internet only. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for profit. Petitioners seeking to file H–1B petitions for alien workers who are subject to the numerical limitations must timely submit a registration to USCIS prior to filing such H–1B petitions. By the close of the registration period USCIS will randomly select timely submitted registrations in a number sufficient to meet the numerical limit.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 110,000 respondents at 30 minutes (.50) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 55,000 annual burden hours.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Chief, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign Officials, Health Professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

Accordingly, parts 214 and 299 of chapter I of title 8 of the Code of Federal Regulations are proposed to be amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 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; 8 CFR part 2.

2. Section 214.2 is amended by:

a. Redesignating paragraph (h)(8)(ii) as paragraph (h)(8)(iii); and by

b. Adding new paragraph (h)(8)(ii).

The addition reads as follows:

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

* * * * *

(h) * * *

(8) * * *

(ii) *Registration for H–1B petitions subject to numerical limits*—(A) *General.* (*1*) *Registration requirement.* Employers seeking to file H–1B petitions for alien workers who are subject to the numerical limitations under section 214(g)(1)(A) of the Act or are exempt from those limitations under section 214(g)(5)(C) of the Act must register such aliens electronically during a designated registration period in accordance with this section and the registration instructions unless USCIS temporarily suspends or terminates the registration process, for a particular fiscal year, paragraph (h)(8)(ii)(A)(*3*) of this section. USCIS will notify the employer in writing of the selection of one or more of the employer's registered beneficiaries on whose behalf the employer may file an H–1B petition. An employer may file an H–1B petition on behalf of a registered beneficiary only after being notified that the petitioner's registration for that beneficiary has been selected. Properly filing an H–1B petition following receipt of this notification does not guarantee the availability of an H–1B number, the approval of the petitions, or the issuance of an H–1B visa.

(*2*) *Registration period.* The registration period will commence prior to the earliest date on which petitions may be filed for a particular fiscal year, as specified in paragraph (h)(9)(i)(B) of this section. USCIS will notify the public via the USCIS Web site of the respective start date for the registration period for a particular fiscal year prior to the earliest date for filing H–1B petitions for such fiscal year as specified in paragraph (h)(9)(i)(B) of this section. USCIS will monitor registration receipts and will notify the public via the USCIS Web site at *http://www.uscis.gov* of the end date of the registration period. Registrations submitted after the close of the registration period will not be considered.

(*3*) *Suspension or termination.* USCIS may temporarily suspend the registration process for a given fiscal year or permanently terminate the registration process by notice on the USCIS Web site at *http://www.uscis.gov*. USCIS will provide such notice at least 30 days prior to the earliest date for filing H–1B petitions. Upon suspension or termination of the registration process, USCIS will implement the procedures described in paragraph (h)(8)(iii) of this section for calculating the numerical limitation for that fiscal year.

(B) *Filing*—(*1*) *Electronic registration.* Any registration must be filed electronically with USCIS via its Web site at *http://www.uscis.gov*. No filing fee is required for registration. Employers are required to provide the following information about their business and the prospective alien beneficiary on the registration:

(*i*) The employer's name, employer identification number (EIN), and employer's mailing address;

(*ii*) The authorized representative's name, job title, and contact information (telephone number and e-mail address);

(*iii*) The beneficiary's full name, date of birth, country of birth, country of citizenship, gender and passport number; and

(*iv*) Any additional information requested by the registration or USCIS.

(*2*) *Registering for beneficiaries.* Employers must file a separate registration for each requested beneficiary, and each beneficiary must be named. Multiple beneficiaries cannot be listed in a single registration. Only one registration may be submitted by an employer for each beneficiary. If USCIS receives more than one registration by the same employer for the same H–1B beneficiary, USCIS will accept only the first valid registration submitted and reject any duplicate registration requests. USCIS will accept more than one registration for the same beneficiary so long as each registration relates to a different employer.

(*3*) *Confirmation.* Employers will receive electronic notification that USCIS has accepted the registration for processing.

(C) *Notifications to file H–1B petitions.*

(*1*) *Numerical limitations not reached by earliest date on which H–1B petitions may be filed.* If USCIS determines that it has received fewer registrations than the numerical limitations as of the earliest date on which H–1B petitions may be filed, USCIS will notify all employers that have properly registered their beneficiaries by this date that they are eligible to file H–1B petitions on behalf of such registered beneficiaries. The registration period will remain open until USCIS determines that it has received sufficient registrations to ensure that the numerical limitations will not be exceeded for that fiscal year. USCIS may, in its discretion, close the registration period at an earlier date to allow for a sufficient period of time to receive and process petitions for that fiscal year. USCIS will issue notices of selection to file H–1B petitions in the order that registrations are received. If USCIS anticipates that it will receive more registrations than the numerical limitations, USCIS will announce a final receipt date and the closing of the registration period, and will conduct a random selection of all registrations received on the final receipt date.

(*2*) *Numerical limitations reached before the earliest date on which H–1B petitions may be filed for the new fiscal year.* If USCIS determines that it has received more registrations than the numerical limitations before the earliest date on which H–1B petitions may be filed for the new fiscal year, USCIS will close the registration period and announce such closure via its Web site at *http://www.uscis.gov*. USCIS will randomly select timely submitted registrations in a number sufficient to meet the numerical limit under section 214(g)(1)(A) of the Act and the exemption under section 214(g)(5)(C) of the Act. USCIS will:

(*i*) Notify all selected employers with a selection notice that the employer is eligible to file an H–1B petition on behalf of the beneficiary named in the selection notice.

(*ii*) Maintain, in its discretion, a wait list of some or all accepted registrations that were not initially selected as eligible to file an H–1B petition, but which may be randomly selected should USCIS determine that cap numbers are or will likely remain available for a particular fiscal year.

(*iii*) Notify employers whose registrations are on the wait list;

(*iv*) Notify a wait-listed employer when its registration has been selected that it is eligible to file an H–1B petition on behalf of the beneficiary named in the selection notice.

(*v*) Notify employers whose registrations are not initially chosen or placed on the wait list that they will not be eligible to file an H–1B petition for the applicable fiscal year.

(D) *H–1B petition filing following registration*—(*1*) *General.* USCIS will consider properly filed only those H–1B petitions for beneficiaries subject to a numerical limitation or the exemption under section 214(g)(5)(C) from registered employers notified of selection and only for those alien beneficiaries named in the original registration, in addition to meeting all other filing requirements. Petitions filed by employers whose registrations were not selected by USCIS will be rejected.

(*2*) *Filing.* Selected employers must file the H–1B petition with required supporting documentation and filing fees in accordance with the form instructions and applicable statutes and regulations. H–1B petitions must be filed within the time period stated on the selection notice and must include the selection notice issued under paragraph (h)(8)(ii)(C) of this section. The filing period on the selection notice will not be less than 60 days. Failure to meet these requirements will result in rejection of the H–1B petition and return of the filing fees.

* * * * *

PART 299—IMMIGRATION FORMS

3. The authority citation for part 299 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103; 8 CFR part 2.

4. Section 299.1 is amended by adding the entry "H–1B Cap Registration" at the end of the table, to read as follows:

§ 299.5 Display of control numbers.

* * * * *

Form No.	Form title	Currently assigned OMB control No.
*	*	*
H–1B Cap Registration.		

Janet Napolitano,

Secretary.

[FR Doc. 2011–4731 Filed 3–2–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

14 CFR Chapters I, II, III

23 CFR Chapters I, II, III

46 CFR Chapter II

48 CFR Chapter 12

49 CFR Chapters I, II, III and V, VI, VII, VIII, X, XI

[Docket No. DOT–OST–2011–0025]

Notice of Retrospective Review of DOT Existing Regulations

AGENCY: Office of the Secretary of Transportation (OST), DOT.

ACTION: Notice of public meeting and tentative agenda; opportunities for public participation in review.

SUMMARY: On February 16, 2011, Department of Transportation (DOT) published a notice of regulatory review of existing DOT regulations. This review is in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review." As part of the notice of review, DOT announced it will hold a public meeting to discuss and consider the public's comments. This notice provides information on how to participate in this meeting and opportunities for enhanced public participation in the review and the public meeting. Please note that the deadline for registering to speak at the public meeting has been extended to March 7, 2011.

DATES:

Deadline to register to attend hearing in person/watch Web stream/listen by phone—March 7, 2011.

Deadline to register to speak in person/by phone at the meeting—March 7, 2011.

Agenda released on *http://regs.dot.gov*—March 9, 2011.

Web streaming/call-in info distributed to registrants—March 10, 2011.

Deadline to submit any digital presentation materials—March 10, 2011.

Public Meeting—March 14, 2011—9:30 a.m.–4:30 p.m.

ADDRESSES:

Public Meeting Location: The public meeting will be held in the DOT Conference Center's Media Center, located on the ground floor of 1200 New Jersey Avenue, SE., Washington, DC 20590.

DOT Regulatory Review IdeaScale Web site: http://dotregreview.ideascale.com/.

FOR FURTHER INFORMATION CONTACT: Jennifer Abdul-Wali, Office of Regulation and Enforcement, Department of Transportation, (202) 366–6322; e-mail: *jennifer.abdulwali@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 18, 2011, President Obama issued Executive Order 13563, which outlined a plan to improve regulation and regulatory review (76 FR 3821, January 31, 2011). Executive Order 13563 reaffirms and builds upon governing principles of contemporary regulatory review, including Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), by requiring Federal agencies to design cost-effective, evidence-based regulations that are compatible with economic growth, job creation, and competitiveness. The President's plan recognizes that these principles should not only guide the Federal government's approach to new regulation, but to existing ones as well. To that end, Executive Order 13563 requires agencies to review existing significant rules to determine if they are outmoded, ineffective, insufficient, or excessively burdensome.

On February 16, 2011, DOT published a notice of regulatory review (76 FR 8940) that invited public comment on how to effectively implement Executive Order 13563 and set forth a number of issues and questions. Our notice stated that we would hold a public meeting on March 14, 2011. The following section provides the procedures for participating in the meeting and our IdeaScale Web site that can also be used to submit comments to DOT.

Public Meeting Procedures

1. As stated in our February 16 notice, those who wish to make presentations at the meeting should submit initial comments with sufficient details with