

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 214

[CIS No. 2658–20 DHS Docket No. USCIS–2020–0018]

RIN 1615–AC13

### Strengthening the H–1B Nonimmigrant Visa Classification Program

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

**ACTION:** Interim final rule (IFR) with request for comments.

**SUMMARY:** The Department of Homeland Security (DHS or the Department), is amending certain DHS regulations governing the H–1B nonimmigrant visa program. Specifically, DHS is: Revising the regulatory definition of and standards for a “specialty occupation” to better align with the statutory definition of the term; adding definitions for “worksite” and “third-party worksite”; revising the definition of “United States employer”; clarifying how U.S. Citizenship and Immigration Services (USCIS) will determine whether there is an “employer-employee relationship” between the petitioner and the beneficiary; requiring corroborating evidence of work in a specialty occupation; limiting the validity period for third-party placement petitions to a maximum of 1 year; providing a written explanation when the petition is approved with an earlier validity period end date than requested; amending the general itinerary provision to clarify it does not apply to H–1B petitions; and codifying USCIS’ H–1B site visit authority, including the potential consequences of refusing a site visit. The primary purpose of these changes is to better ensure that each H–1B nonimmigrant worker (H–1B worker) will be working for a qualified employer in a job that meets the statutory definition of a “specialty occupation.” These changes are urgently necessary to strengthen the integrity of the H–1B program during the economic crisis caused by the COVID–19 public health emergency to more effectively ensure that the employment of H–1B workers will not have an adverse impact on the wages and working conditions of similarly employed U.S. workers. In addition, in strengthening the integrity of the H–1B program, these changes will aid the program in functioning more effectively and efficiently.

**DATES:** This interim final rule is effective on December 7, 2020. Written

comments must be submitted on this interim final rule on or before December 7, 2020. Comments on the collection of information (see Paperwork Reduction Act section) must be received on or before November 9, 2020. Comments on both the interim final rule and the collection of information received on or before November 9, 2020 will be considered by DHS and USCIS. Only comments on the interim final rule received between November 9, 2020 and December 7, 2020 will be considered by DHS and USCIS. Note: Comments received after November 9, 2020 only on the information collection will not be considered by DHS and USCIS.

**ADDRESSES:** You may submit comments on the entirety of this interim final rule package, identified by DHS Docket No. USCIS–2020–0018, through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the website instructions for submitting comments. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the interim final rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. Due to COVID–19, USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using <http://www.regulations.gov>, please contact Samantha Deshombres, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at 202–272–8377 for alternate instructions.

**FOR FURTHER INFORMATION CONTACT:** Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave. NW, Suite 1100, Washington, DC 20529–2120. Telephone Number (202) 272–8377 (not a toll-free call). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

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## II. Public Participation

DHS invites all interested parties to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this interim final rule. DHS also invites comments that relate to the economic, environmental, or federalism effects that might result from this interim final rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to DHS in implementing these changes will: Reference a specific portion of the interim final rule; explain the reason for any recommended change; and include data, information, or authority that supports such a recommended change. Comments submitted in a manner other than those listed in the **ADDRESSES** section, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the interim final rule. Please note that DHS and USCIS cannot accept any comments that are hand delivered or couriered. In addition, USCIS cannot accept mailed comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives.

**Instructions:** If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS-2020-0018 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore,

submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at <http://www.regulations.gov>.

**Docket:** For access to the docket and to read background documents or comments received, go to <http://www.regulations.gov>, referencing DHS Docket No. USCIS-2020-0018. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

## III. Executive Summary

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

Congressional intent behind creating the H-1B program was, in part, to help U.S. employers fill labor shortages in positions requiring highly skilled or educated workers using temporary workers.<sup>1</sup> A key goal of the program at its inception was to help U.S. employers obtain the temporary employees they need to meet their business needs.<sup>2</sup> To address legitimate countervailing concerns of the adverse impact foreign workers could have on U.S. workers, Congress put in place a number of measures intended to protect U.S. workers to ensure that H-1B workers would not adversely affect them. Immigration and Nationality Act (INA) section 212(n) and (p); 8 U.S.C. 1182(n) and (p). However, over time, legitimate concerns have emerged that indicate that the H-1B program is not functioning as originally envisioned and

<sup>1</sup> See H.R. Rep. 101-723(I) (1990), as reprinted in 1990 U.S.C.A.N. 6710, 6721 (stating “The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages.”).

<sup>2</sup> Bipartisan Policy Council, *Immigration in Two Acts*, Nov. 2015, at 7, <https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-Immigration-Legislation-Brief.pdf>, citing 1990 U.S.C.A.N. supra at 6721 (stating “At the time [1990], members of Congress were also concerned about U.S. competitiveness in the global economy and sought to use legal immigration as a tool in a larger economic plan, stating that “it is unlikely that enough U.S. workers will be trained quickly enough to meet legitimate employment needs, and immigration can and should be incorporated into an overall strategy that promotes the creation of the type of workforce needed in an increasingly global economy.”).

that U.S. workers are being adversely affected. On April 18, 2017, the President of the United States issued Executive Order (E.O.) 13788, *Buy American and Hire American*, instructing DHS to “propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of U.S. workers in the administration of our immigration system.”<sup>3</sup> E.O. 13788 specifically directed DHS and other agencies to “suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”<sup>4</sup>

In response to the directives of E.O. 13788, DHS undertook a comprehensive review of all rules and policies regarding nonimmigrant visa classifications for temporary foreign workers, including the H-1B visa program. Although the H-1B program was intended to allow employers to fill gaps in their workforce and remain competitive in the global economy, it has expanded far beyond that, often to the detriment of U.S. workers. Data shows that the H-1B program has been used to displace U.S. workers and has led to reduced wages in a number of industries in the U.S. labor market.<sup>5</sup> The economic crisis caused by the COVID-19 public health emergency has compounded those detrimental effects.

The President of the United States addressed those harms in *Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak* and directed DHS to pursue rulemaking that ensures that U.S. workers are not disadvantaged by H-1B workers.<sup>6</sup> This interim final rule is consistent not only with that directive, but also with the aims of the Presidential Proclamation *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*.<sup>7</sup> Section 5

<sup>3</sup> See Executive Order 13788, *Buy American and Hire American*, 82 FR 18837, sec. 5 (Apr. 18, 2017).

<sup>4</sup> See *id.* at sec. 5(b).

<sup>5</sup> See e.g., Ron Hira and Bharath Gopalswamy, Atlantic Council, *Reforming US' High-Skilled Guestworker Program* (2019), available at <https://www.atlanticcouncil.org/in-depth-research-reports/report/reforming-us-high-skilled-immigration-program/>.

<sup>6</sup> Proclamation 10014 of April 22, 2020, *Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 FR 23441 (Apr. 27, 2020).

<sup>7</sup> Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery*

of Proclamation 10052 directs the Secretary of DHS to, “as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action . . . ensuring that the presence in the United States of H–1B nonimmigrants does not disadvantage United States workers.” In addition, this rule will further the policy objective of E.O. 13927, *Accelerating the Nation’s Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities*.<sup>8</sup>

Consistent with Congressional intent of the H–1B program, the *Buy American and Hire American* E.O. 13788, Presidential Proclamations 10014 and 10052, and to ensure that U.S. workers are protected under U.S. immigration laws, DHS is proposing a number of revisions and clarifications, which are detailed below. As noted above, these changes are urgently needed to strengthen the H–1B program during the economic crisis caused by the COVID–19 public health emergency to more effectively ensure that the employment of H–1B workers will not negatively affect the wages and working conditions of similarly employed U.S. workers.

By reforming key aspects of the H–1B nonimmigrant visa program, this rule will improve program integrity and better ensure that only petitioners who meet the statutory criteria for the H–1B classification are able to employ H–1B workers who are qualified for the classification. This, in turn, will protect jobs of U.S. workers as a part of responding to the national emergency, and facilitate the Nation’s economic recovery.

### B. Legal Authority

The Secretary of Homeland Security’s authority for these regulatory amendments is found in various sections of the INA, 8 U.S.C. 1101 *et seq.*, and the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* General authority for issuing this rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, as well as section 102 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the

Secretary to issue regulations. *See also* 6 U.S.C. 202(4) (charging the Secretary with “[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States”). Further authority for these regulatory amendments is found in:

- Section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), which classifies as nonimmigrants aliens coming temporarily to the United States to perform services in a specialty occupation or as a fashion model with distinguished merit and ability;
- Section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the terms and conditions of the admission of nonimmigrants;
- Section 214(c) of the INA, 8 U.S.C. 1184(c), which, *inter alia*, authorizes the Secretary to prescribe how an importing employer may petition for an H nonimmigrant worker and the information that an importing employer must provide in the petition;
- Section 214(i) of the INA, 8 U.S.C. 1184(i), which defines the term “specialty occupation;” and
- Section 287(b) of the INA, 8 U.S.C. 1357(b), which authorizes USCIS to administer oaths and to take and consider evidence concerning any matter which is material and relevant to the administration and enforcement of the INA.

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

### C. Summary of Costs and Benefits

This interim final rule will impose new annual costs of \$24,949,861 for petitioners completing and filing H–1B petitions<sup>9</sup> with an additional time

burden of 30 minutes. The changes in the H–1B petition, resulting from this interim final rule, result in additional time to complete and file the petition as compared to the time burden to complete the current form. By reducing uncertainty and confusion surrounding disparities between the statute and the regulations, this rule will better ensure that approvals are only granted for positions adhering more closely to the statutory definition. This rule will also result in more complete petitions and allow for more consistent and efficient adjudication decisions.

DHS estimates \$17,963,871 in annual costs to petitioners to submit contractual documents, work orders, or similar evidence required by this rule to establish an employer-employee relationship and qualifying employment. The petitioner must establish, at the time of filing, that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. In addition, all H–1B petitions for beneficiaries who will be placed at a third-party worksite must submit evidence showing that the beneficiary will be employed in a specialty occupation, and that the petitioner will have an employer-employee relationship with the beneficiary.

DHS estimates \$1,042,702 for the total annual opportunity cost of time for worksite inspections of H–1B petitions. This interim final rule is codifying DHS’ existing authority to conduct site visits and other compliance reviews and clarifying consequences for failure to allow a site visit. Conducting on-site inspections and other compliance reviews is critical to detecting and deterring fraud and noncompliance. Failure or refusal of the petitioner or third-party worksite parties to cooperate in a site visit or verify facts may be grounds for denial or revocation of any H–1B petition for workers performing services at locations which are a subject of inspection, including any third-party worksites.

DHS estimates cost savings of \$4,490,968 annually in eliminating the general itinerary requirement for H–1B petitions. Relative to the current regulation, this provision reduces the cost for petitioners who file on behalf of beneficiaries performing services in more than one location and submit itineraries.

While the maximum validity period for a specialty occupation worker is

<sup>8</sup> Following the 2019 Novel Coronavirus Outbreak, 85 FR 38263 (Jun. 25, 2020).

<sup>8</sup> See Executive Order 13927, *Accelerating the Nation’s Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities*, 85 FR 35165, sec. 2 (Jun. 9, 2020) (ordering that “agencies should take all reasonable measures to . . . speed other actions . . . that will strengthen the economy and return Americans to work”).

<sup>9</sup> DHS estimates the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, final rule (“Fee Schedule Final Rule”), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center v. Wolf*, No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation,

this rule may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I–129.

currently 3 years, this interim final rule will limit the maximum validity period to 1 year for workers placed at third-party worksites. DHS estimates costs of \$0 in FY 2021, \$376,747,030 in FY 2022, \$502,330,510 for each of FY 2023 through FY 2027, and \$349,127,070 for each of FY 2028 through FY 2030, for the increasing number of Form I-129H1 petitions to request authorization to continue H-1B employment for workers placed at third-party worksites. DHS will have greater oversight in such cases, which are most likely to involve noncompliance, fraud, or abuse, thereby strengthening the H-1B program.

DHS estimates a one-time total regulation familiarization cost of \$11,941,471 in FY2021. For the 10-year implementation period of the rule (FY 2021 through FY 2030), DHS estimates the annual net societal costs to be \$51,406,937 (undiscounted) in FY 2021, \$416,212,496 (undiscounted) in FY 2022, \$541,795,976 (undiscounted) from FY 2023 through FY 2027 each year, \$388,592,536 (undiscounted) from FY 2028 through FY 2030 each year. DHS estimates the annualized net societal costs of the rule to be \$430,797,915, annualized at 3-percent and \$425,277,621, annualized at 7-percent discount rates.

#### IV. Background

##### A. History and Purpose of the H-1B Visa Program

The H-1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations, defined by statute as occupations that require the theoretical and practical application of a body of highly specialized knowledge, and a bachelor's or higher degree in the specific specialty, or its equivalent. See INA sections 101(a)(15)(H)(i)(b) and 214(i); 8 U.S.C. 1101(a)(15)(H)(i)(b) and 1184(i). The H-1B visa program also includes workers performing services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, and services of distinguished merit and ability in the field of fashion modeling. See INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 8 CFR 214.2(h)(4)(i)(A).

The number of aliens who may be issued initial H-1B visas or otherwise provided initial H-1B nonimmigrant status during any fiscal year has been capped at various levels by Congress over time, with the current numerical limit generally being 65,000 per fiscal year. See INA section 214(g)(1)(A); 8 U.S.C. 1184(g)(1)(A). Congress has also

provided for various exemptions from the annual numerical allocations, including an exemption for 20,000 aliens who have earned a master's or higher degree from a United States institution of higher education. See INA section 214(g)(5) and (7); 8 U.S.C. 1184(g)(5) and (7). Additionally, Congress has exempted from the annual numerical allocations H-1B workers who are or will be employed at a nonprofit or public institution of higher education or a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization. See INA section 214(g)(5)(A)-(B), 8 U.S.C. 1184(g)(5)(A)-(B). The 5-year average annual number of H-1B petitions approved outside the numerical limitations established by Congress, which also includes petitions for continuing H-1B workers who were previously counted toward an annual numerical allocation and who have time remaining on their 6-year period of authorized admission, see INA section 214(g)(7), 8 U.S.C. 1184(g)(7), was approximately 214,371 based on DHS data.<sup>10</sup> As of September 30, 2019, the total H-1B authorized-to-work population was approximately 583,420.<sup>11</sup> The total H-1B authorized-to-work population, rather than the yearly cap, is more indicative of the scope of the H-1B nonimmigrant program and the urgent need to strengthen it to protect the economic interests of U.S. workers.

Despite Congress' efforts to protect the interest of U.S. workers to ensure that H-1B workers will not adversely affect them,<sup>12</sup> data show that the H-1B program has been subject to abuse or otherwise adversely affected U.S. workers from its inception.<sup>13</sup> When the Immigration Act of 1990 (IMMACT 90) was introduced, Congress specifically sought to address "the problem of H-visa abuse."<sup>14</sup> As early as 1992, the U.S. Government Accountability Office

<sup>10</sup> Office of Policy and Strategy, Policy Research Division (PRD) Claims 3 and USCIS analysis. July 29, 2020.

<sup>11</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, H-1B Authorized to Work Population Estimate, available at <https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf> (reflecting that not all of the 583,420 H-1B workers were approved in the same fiscal year as the data used to estimate the population as of September 30, 2019, was pulled on October 9, 2019).

<sup>12</sup> See INA section 212(n) and (p); 8 U.S.C. 1182(n) and (p).

<sup>13</sup> See, e.g., *How H-1B Visas Have Been Abused Since the Beginning*, CBS News, Aug. 13, 2017, <https://www.cbsnews.com/news/how-h-1b-visas-have-been-abused-since-the-beginning/>.

<sup>14</sup> 1990 U.S.C.C.A.N. 6710, 6724.

(GAO) published a report noting concerns by representatives of organized labor that H-1B nonimmigrants were adversely affecting the wages and working conditions of U.S. workers, and were allowing U.S. employers to excessively rely on foreign labor.<sup>15</sup> In September 2000, the GAO published another report highlighting documented allegations of and concerns relating to program misuse—such as employers paying workers less than comparable wages or employees using false credentials—and questioning whether the program adequately serves employers or protects workers.<sup>16</sup> This report concluded that the H-1B “program is vulnerable to abuse—both by employers who do not have bona fide jobs to fill or do not meet required labor conditions, and by potential workers who present false credentials.”<sup>17</sup> Such abuse threatens the wages and job opportunities of qualified U.S. workers. More GAO reports followed in 2003, 2006, and 2011, all continuing to report on the pervasive abuses and shortcomings in the H-1B program. For instance, the 2006 report highlighted common violations such as employers not paying their H-1B workers the required wage and owing them back wages.<sup>18</sup> The 2011 reports cited to the high incidence of wage-related complaints against staffing companies, and concluded that the involvement of staffing companies in the H-1B program further weakens U.S. labor protections.<sup>19</sup> Several news alerts and

<sup>15</sup> U.S. Gov't Accountability Off., GAO/PEMD-92-17, *Immigration and the Labor Market: Nonimmigrant Alien Workers in the United States*, at 17 (1992), <https://www.gao.gov/assets/160/151654.pdf>.

<sup>16</sup> U.S. Gov't Accountability Off., GAO/HEHS-00-157, *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, at 4 (2000), <https://www.gao.gov/new.items/he00157.pdf>.

<sup>17</sup> GAO/HEHS-00-157, at 19.

<sup>18</sup> U.S. Gov't Accountability Off., GAO-06-901T, *H-1B Visa Program: More Oversight by Labor can Improve Compliance with Program Requirements* (2006), <https://www.gao.gov/new.items/d06901t.pdf>.

<sup>19</sup> U.S. Gov't Accountability Off., GAO-11-26, *Reforms are Needed to Minimize the Risks and Costs of Current Program 60* (2011), <https://www.gao.gov/assets/320/314501.pdf> (“The involvement of staffing companies, whose share of H-1B workers is not precisely known but is likely not trivial, further weakens enforcement efforts because the end-user of the H-1B worker is not liable for complying with labor protection requirements.”); U.S. Gov't Accountability Off., GAO-11-505T, *H-1B Visa Program Multifaceted Challenges Warrant Re-examination of Key Provisions 12* (2011), <https://www.gao.gov/assets/90/82421.pdf> (“Another factor that weakens protection for U.S. workers is the fact that the H-1B program lacks a legal provision to hold employers accountable to program requirements when they obtain H-1B workers through staffing

investigative newsletters released in 2019 and 2020 by the Department of Labor (DOL) and Department of Justice (DOJ) highlighted convictions of individuals using their companies to engage in fraud through the H-1B program.<sup>20</sup>

DHS believes that the same concerns have persisted in recent years, as highlighted by certain petitions filed by entities within the information technology (IT) industry. In recent years, there has been a 75 percent increase in the proportion of IT workers in the population of H-1B approved petitions—from 32 percent in FY 2003 to 56 percent in FY 2019.<sup>21</sup> As a comparison, there has been a 16 percent increase in the proportion of IT workers in the U.S. civilian workforce—from 2.5 percent in 2000 to 2.9 percent in 2014.<sup>22</sup> At the same time, wages have largely remained flat in IT fields.<sup>23</sup> For

companies” and “Wage and Hour investigators reported that a large number of the complaints they receive about H-1B employers were related to the activities of staffing companies.”)

<sup>20</sup> See, e.g., *OIG Investigations Newsletter* (U.S. Dep’t of Lab., Off. of Inspector Gen.) (Dec. 1, 2019—Jan. 30, 2020), <https://www.oig.dol.gov/public/oignewsletter/DOL-OIG%20Investigations%20Newsletter%20December%202019%20-%20January%202020.pdf> (last visited Aug. 11, 2020); *OIG Investigations Newsletter* (U.S. Dep’t of Lab., Off. of Inspector Gen.) (Oct. 1, 2019—Nov. 30, 2019), <https://www.oig.dol.gov/public/oignewsletter/DOL-OIG%20Investigations%20Newsletter%20October%20-%20November%202019.pdf> (last visited June 23, 2020); *News Release* (U.S. Dep’t of Just., U.S. Att’y’s Off.) (Feb. 19, 2020), <https://www.justice.gov/usao-ednc/pr/corporate-president-kronsys-inc-cygtex-inc-and-arkstek-inc-sentenced-conspiracy-commit> (last visited June 23, 2020); *News Release* (U.S. Dep’t of Just., U.S. Att’y’s Off.) (Mar. 17, 2020), <https://www.justice.gov/usao-nj/pr/owner-information-technology-companies-sentenced-15-months-prison-visa-fraud-and-tax> (last visited June 23, 2020).

<sup>21</sup> Characteristics of H-1B Specialty Occupation Workers (H-1B): Fiscal Year 2004 Issued November 2006. [https://www.uscis.gov/sites/default/files/document/reports/h1b\\_fy04\\_characteristics.pdf](https://www.uscis.gov/sites/default/files/document/reports/h1b_fy04_characteristics.pdf) (last visited Sept. 18, 2020), Table 13A. IT related industry (IT industry number of petition approved is 70,189 and total number of petition approved is 217,340); Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018—September 30, 2019 (Mar. 5, 2020), [https://www.uscis.gov/sites/default/files/document/reports/Characteristics\\_of\\_Specialty\\_Occupation\\_Workers\\_H-1B\\_Fiscal\\_Year\\_2019.pdf](https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf) (last visited Aug. 11, 2020), Table 13A. IT related industry (IT industry number of petition approved is 217,447 and total number of petition is 388,403). Calculations:  $75\% = 56\%/32\% - 1$ .  $32\%$  rounded =  $(70,189/217,340) * 100\%$ ,  $56\%$  rounded =  $(217,447/388,403) * 100\%$ .

<sup>22</sup> U.S. Census Bureau, Occupations in Information Technology (Aug. 16, 2016), available at <https://www.census.gov/content/dam/census/library/publications/2016/acs/acs-35.pdf>, p2. Figure 1.

<sup>23</sup> Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, Economic Policy Institute, *Guestworkers in the High-Skill U.S. Labor Market: An analysis of supply, employment, and wage trends*, Apr. 24, 2013, at 2, 23, available at <https://files.epi.org/2013/bp359-guestworkers-high-skill-labor-market->

instance, the average IT wage was 189 percent of the national average in FY 2003 and 182 percent in FY 2019.<sup>24</sup> The disproportionate growth of H-1B petitions for computer-related occupations versus the percentage growth of IT positions in the U.S. economy, and the stagnation of IT wages, demands DHS seriously consider whether petitioners are using the H-1B program in a way that disproportionately benefits foreign IT workers and the companies who petition for them to the detriment of U.S. IT workers. DHS must also consider whether there is a correlation between the large flow of H-1B workers into the economy and the stagnation of wages for U.S. IT workers generally.<sup>25</sup> If the employment of H-1B workers is having an adverse effect on similarly employed U.S. workers by way of reducing their wages or displacing U.S. workers by hiring H-1B workers,

*analysis.pdf* (“However, following the crash of 2001, wages declined and have been essentially flat for the decade.”); Sean McLain and Dhanya Ann Thoppil, *Bulging Staff Cost, Shrinking Margins*, CRISIL Research, (2019), available at <https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html> (analyzing local wages for computer-based occupations, along with H-1B wage rates prevalent for the same computer-based occupations across the U.S., and concluding that the average per hour rate for an H-1B-based employee is ~\$33 while a locally-based employee is ~\$42). See generally Hira and Gopalaswamy, *supra* note 5, at 11 (“H-1B workers are underpaid and placed in substandard working conditions, while U.S. workers’ wages are depressed, and they lose out on job opportunities”).

<sup>24</sup> See U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *May 2003 National (XLS)*, available at <https://www.bls.gov/oes/tables.htm> (last visited Sept. 22, 2020) (showing that the annual mean wage for SOC code 00-0000 was \$36,210 in May 2003); U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *May 2019 National (XLS)*, available at <https://www.bls.gov/oes/tables.htm> (last visited Sept. 22, 2020) (showing that the annual mean wage for SOC code 00-0000 was \$53,490 in May 2019); U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *May 2003 National industry-specific (XLS)*, available at <https://www.bls.gov/oes/tables.htm> (last visited Sept. 28, 2020) (showing that the annual mean wage for SOC code 15-0000 and NAICS code 541000 was \$68,420 in May 2003); U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *May 2019 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 541000—Professional, Scientific, and Technical Services*, available at [https://www.bls.gov/oes/2019/may/naics3\\_541000.htm](https://www.bls.gov/oes/2019/may/naics3_541000.htm) (last visited Sept. 28, 2020) (showing that the annual mean wage for SOC code 15-0000 was \$97,230 in May 2019). We calculated the percentages by dividing the 2019 figures by the 2003 figures for the respective SOC codes ( $189\% = (\$68,420/\$36,210) * 100\%$ ,  $182\% = (\$97,230/\$53,490) * 100\%$ ).

<sup>25</sup> Salzman, *supra* note 22, at 26 (“In other words, the data suggest that current U.S. immigration policies that facilitate large flows of guestworkers appear to provide firms with access to labor that will be in plentiful supply at wages that are too low to induce a significantly increased supply from the domestic workforce.”).

that adverse effect likely will be proportionately greater in the IT industry.

Moreover, many H-1B petitions for IT workers are filed by companies, including staffing companies,<sup>26</sup> that place the H-1B workers at worksites of third-parties, *i.e.*, companies that did not directly petition USCIS for H-1B workers. From FY 2018 to FY 2019 an average of 71 percent of all approved H-1B petitions in the IT industry involved third-party worksites (compared to 36 percent for all approved H-1B petitions across industries).<sup>27</sup> As noted in the 2011 GAO report and evidenced by the recent convictions highlighted in the DOL and DOJ reports, the extensive involvement and lack of accountability of staffing companies within the H-1B program is a major factor that makes the program vulnerable to fraud and weakens protection for U.S. workers.<sup>28</sup> DOL has received a large number of complaints about staffing companies and participated in several investigations that led to convictions of technology staffing companies for fraudulent involvement in the H-1B program.<sup>29</sup>

Some staffing companies may also be described as outsourcing companies, *i.e.*, companies that are hired to perform services or produce goods for another company and, in some cases, also seek to transfer work from the United States to workers based abroad to reduce the overall costs of the services they provide to clients in the United States.<sup>30</sup>

<sup>26</sup> The term “staffing companies” refers to “employers that apply for H-1B workers but ultimately place these workers at the worksites of other employers as part of their business model.” GAO-11-26, at 19.

<sup>27</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, Systems: C3 database, Database Queried: 05/20/2020, Report Created: 05/20/2020. This data is based on H-1B approvals where the petitioner reported “off-site [work] at another company or organization’s location” on the Form I-129. The term “off-site” which is used on the Form I-129 has the same meaning as “third-party worksite.” The I-129 does not ask a petitioner seeking to place a beneficiary “off-site” to specify whether it is a staffing company.

<sup>28</sup> GAO-11-505T, at 12; *OIG Investigations Newsletter* (Dec. 1, 2019—Jan. 30, 2020), *supra*; *OIG Investigations Newsletter* (Oct. 1, 2019—Nov. 30, 2020), *supra*; *News Release* (Feb. 19, 2020, *supra*; *News Release* (Mar. 17, 2020), *supra*.

<sup>29</sup> See *supra* note 17.

<sup>30</sup> Merriam-Webster. (n.d.). Outsource. In *Merriam-Webster.com dictionary*. Retrieved August 3, 2020, from <https://www.merriam-webster.com/dictionary/outsource> (“to procure (something, such as some goods or services needed by a business or organization) from outside sources and especially from foreign or nonunion suppliers: To contract for work, jobs, etc., to be done by outside or foreign workers.”). While the word “outsourcing” can refer to the practice of locating work overseas, see e.g., GAO-11-26 at FN 48, it can also be used

Outsourcing companies have been criticized as “gaming the system” so that they have a ready pool of low-paid temporary workers, which ultimately hurts the wages of U.S. workers.<sup>31</sup> The “outsourcing” business model involves using H–1B visas to bring relatively low-cost foreign workers into the United States and then contracting them out to other U.S. companies seeking their services.<sup>32</sup> These H–1B workers are relatively “low-paid” or “low-cost” in the sense that they are often paid less than the local median salary for workers in the same occupation, in other words, often paid less than what the worker would command in a truly competitive open job market.<sup>33</sup> H–1B employers are able to “take advantage of program rules in order to legally pay many of their H–1B workers below the local median wage for the jobs they fill.”<sup>34</sup> By

interchangeably with the word “staffing” to refer to the general practice of contracting out H–1B workers to third-party clients, see Daniel Costa and Ron Hira, Economic Policy Institute, *H–1B Visas and Prevailing Wage Levels*, May 4, 2020, at 4, available at <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/> (describing the “outsourcing business model” as “plac[ing] H–1B hires at third-party client sites.”).

<sup>31</sup> See, e.g., Costa and Hira, *supra* note 30; Sarah Pierce and Julia Gelatt, Migration Policy Institute, *Evolution of the H–1B: Latest Trends in a Program on the Brink of Reform*, March 2018, at 2, available at <https://www.migrationpolicy.org/research/evolution-h-1b-latest-trends-program-brink-reform/>; Karen Pedersen, Peter Eckstein, Sandra Candy Robinson, *Commentary: The H–1B Visa Problem as IEEE–USA Sees It*, Mar. 6, 2017, available at <https://spectrum.ieee.org/view-from-the-valley/at-work/tech-careers/commentary-the-h1b-problem-as-ieeeusa-sees-it>; HaeYoun Park, *How Outsourcing Companies are Gaming the Visa System*, N.Y. Times, Nov. 10, 2015, available at <https://www.nytimes.com/interactive/2015/11/06/us/outsourcing-companies-dominate-h1b-visas.html>; Julia Preston, *Large Companies Game H–1B Program, Costing the U.S. Jobs*, N.Y. Times, Nov. 10, 2015, available at <https://www.nytimes.com/2015/11/11/us/large-companies-game-h-1b-visa-program-leaving-smaller-ones-in-the-cold.html?action=click&contentCollection=U.S.&region=Footer&module=WhatsNext&version=WhatsNext&contentID=WhatsNext&moduleDetail=undefined&pctype=Multimedia>.

<sup>32</sup> Pedersen, Eckstein, and Robinson, *supra* note 33.

<sup>33</sup> Costa and Hira, *supra* note 30 (explaining that “the market wage is the wage a U.S. worker would command for a position” and that “the most reasonable and closest proxy for a market wage is the median wage for an occupation in a local area”); Youyou Zhou, *Most H–1B Workers are Paid Less, But It Depends on the Type of Job*, The Associated Press, Apr. 18, 2017, available at <https://apnews.com/afs:Content:873580003> (workers in high-tech jobs such as computer science are often paid less than their American counterparts).

<sup>34</sup> Costa and Hira, *supra* note 30. As this article explains, these actions comport with the existing legal framework in which H–1B employers are only required to pay the higher of the actual wage level for similarly situated employees or the prevailing wage. See section 212(n)(1)(A) of the Act. Further, based on the way the four wage levels are set, the lowest two permissible H–1B wage levels fall below the local median salaries. See section 212(p)(4) of

bringing in lower-paid foreign workers, U.S. companies, in turn, may be incentivized to avoid hiring more U.S. workers or, even worse, lay off their own, higher-paid U.S. workers who previously performed those services adequately and replace them with lower-paid H–1B workers of lesser qualifications employed by a staffing company.<sup>35</sup> An employer’s preference for hiring H–1B workers based on their citizenship, immigration status, or national origin could violate the INA’s anti-discrimination provision at INA section 274B, 8 U.S.C. 1324b.<sup>36</sup> Further still, the outsourcing companies may ultimately send their H–1B nonimmigrant workers back to their home countries to perform their jobs or move a significant amount of work overseas to capitalize on lower costs of business, taking away even more U.S. jobs.<sup>37</sup> As a result, DHS is concerned that the current regulatory regime encourages some companies to use the H–1B visa as a tool to lower business costs at the expense of U.S. workers.<sup>38</sup>

U.S.-based companies that are not traditionally in the staffing or outsourcing business also have exploited the H–1B program in ways not contemplated by Congress.<sup>39</sup> In recent

the Act. For more general information on wage levels and how they are calculated, see Amy Marmer Nice, *Wages and High-Skilled Immigration: How the Government Calculates Prevailing Wages and Why It Matters*, American Immigration Council, Dec. 2017, available at [https://www.americanimmigrationcouncil.org/sites/default/files/research/wages\\_and\\_high-skilled\\_immigration.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/wages_and_high-skilled_immigration.pdf).

<sup>35</sup> Preston, *supra* note 33.

<sup>36</sup> See U.S. Department of Justice, Justice News, *Justice Department Settles Claim Against Virginia-Based Staffing Company for Improperly Favoring Temporary Visa Workers Over U.S. Workers* (July 27, 2020), <https://www.justice.gov/opa/pr/justice-department-settles-claim-against-virginia-based-staffing-company-improperly-favoring> (announcing a settlement agreement with a provider of IT staffing and consulting services resolving a claim that one of the provider’s offices “discriminated against U.S. workers because of their citizenship status when it posted a job advertisement specifying a preference for non-U.S. citizens who held temporary work visas. . . . Under the INA, employers cannot discriminate based on citizenship, immigration status or national origin at any stage of their hiring process, including the posting of job advertisements, regardless of whether it affects the final hiring outcome.”).

<sup>37</sup> Preston, *supra* note 33.

<sup>38</sup> Maria L. Ontiveros, *H–1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 Berkeley J. Emp. & Lab. L. 1, 17 (2017); Grace Martinez, Comment, *Legal Immigrants Displacing American Workers: How U.S. Corporations are Exploiting H–1B Visas to the Detriment of Americans*, 86 UMKC L. Rev. 209 (2017).

<sup>39</sup> Paayal Zaveri and Aditi Roy, *Big American Tech Companies are Snapping up Foreign-Worker Visas, Replacing Indian Outsourcing Firms*, CNBC, Apr. 20, 2018, available at <https://www.cnbc.com/2018/04/20/big-american-tech-companies-are-snapping-up-h1-b-visas.html>. See also H.R. REP.

years, U.S. companies such as The Walt Disney Company, Hewlett-Packard, University of California San Francisco, Southern California Edison, Qualcomm, and Toys “R” Us have reportedly laid off their qualified U.S. workers and replaced them with H–1B workers provided by H–1B-dependent outsourcing companies.<sup>40</sup> In some cases, the replaced U.S. workers were even forced to train the foreign workers who were taking their jobs and sign nondisclosure agreements about this treatment as a condition of receiving any form of severance.<sup>41</sup> These examples illustrate how the current regulatory regime of the H–1B program allows employers, whether staffing, outsourcing, or other types of companies, to exploit the H–1B program in ways not contemplated by Congress.

Employers that pay below-median wages to their H–1B workers (in other words, any employer not paying at least Level III wages) are not necessarily in violation of the law. Section 212(n)(1)(A) of the Act requires employers to pay at least the actual wage level paid to other similarly situated employees or the prevailing wage, whichever is higher. Since the

105–657, 20–21 (stating “[b]ecause the bill is so dramatically increasing the supply of foreign workers without there being firm evidence of a domestic labor shortage, it is imperative that we build into the H–1B program adequate protections for U.S. workers”).

<sup>40</sup> See Pierce and Gelatt, *supra* note 33, at 24; Hira and Gopalaswamy, *supra* note 22; Patrick Thibodeau, *Southern California Edison IT Workers “Beyond Furious” Over H–1B Replacements*, Computerworld, Feb. 4, 2015, available at <https://www.computerworld.com/article/2879083/southern-california-edison-it-workers-beyond-furious-over-h-1b-replacements.html>; DHS, Office of Inspector General, *OIG–18–03, USCIS Needs a Better Approach to Verify H–1B Visa Participants*, at 3 (Oct. 20, 2017), available at <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-18-03-Oct17.pdf>.

<sup>41</sup> See *Perrero v. HCL Am., Inc.*, No. 616CV112ORL31TBS, 2016 WL 5943600, at 1 (M.D. Fla. Oct. 13, 2016) (“According to the allegations of the Complaint (Doc. 1), which are accepted in pertinent part as true for purposes of resolving the instant motions, Perrero is a former employee of [Disney]’s information technology (“IT”) department. (Doc. 1 at 6). HCL is an IT services provider. (Doc. 27 at 1). In January 2015, he and several hundred other [Disney] IT workers were fired; their responsibilities were filled by IT workers employed by HCL. (Doc. 1 at 6). The workers who replaced the Plaintiff and his co-workers were foreign nationals holding H–1B visas. (Doc. 1 at 7) [Disney] management told Perrero and his co-workers of their imminent firing more than 90 days in advance, and informed them that if they did not stay and train the HCL IT workers during that period, they would not get a bonus and severance pay.”). See also Costa and Hira, *supra* note 30 (“the laid-off U.S. workers were required to train their H–1B replacements to do their former jobs—and in some cases sign nondisclosure agreements saying they would not speak publicly about their experiences—as a condition of receiving severance pay.”).

lowest two prevailing wage levels are currently set lower than the local median salary, employers offering wages at the two lowest permissible wage levels (Levels I and II) may be able to lawfully pay below-median wages.<sup>42</sup> In FY 2019, 60 percent of all H-1B jobs were certified at the two lowest prevailing wage levels.<sup>43</sup>

Moreover, H-1B employers that displace U.S. workers are not necessarily violating the law, either. While section 212(n)(1)(E) through (G) of the Act, 8 U.S.C. 1182(n)(1)(E)-(G), requires H-1B-dependent employers<sup>44</sup> to make certain attestations such as not displacing U.S. workers and taking good faith steps to recruit U.S. workers, the statute also offers broad exceptions to these requirements that, over time, have effectively gutted the U.S. worker recruitment requirement such as by utilizing third-party contractors<sup>45</sup> or paying a \$60,000 annual salary, among other things.<sup>46</sup> DOL data establishes that 99.3 percent of all H-1B-dependent

<sup>42</sup> Costa and Hira, *supra* note 30 (explaining how the two lowest permissible H-1B prevailing wage levels are significantly lower than the local median salaries).

<sup>43</sup> *Id.* at 18.

<sup>44</sup> The term “H-1B-dependent employer” is defined at section 212(n)(3) of the Act, 8 U.S.C. 1182(n)(3). As stated in H.R. REP. 105-657, H.R. REP. 105-657, 23 (1998), H-1B-dependent companies “often do nothing but contract their foreign workers out to other companies—often after the other companies have laid off American workers. H-1B-dependent companies have been accused of a disproportionate share of H-1B abuses.”

<sup>45</sup> See e.g. *Perrero v. HCL Am., Inc.*, *supra* at 3-4. (The Court rejected Plaintiff’s argument that, because he and his Disney co-workers were replaced by contracted HCL H-1B workers, “HCL must have lied when it made the ‘displacement’ certification on the LCA.” The Court found that the only way for HCL’s certification on the LCA to be false would have been if the working conditions of HCL’s U.S. worker employees, not Disney’s, were adversely affected by HCL’s H-1B hiring. Thus, by contracting through HCL as opposed to hiring directly, Disney and HCL circumvented worker protections, exploiting a loophole in the system designed to protect U.S. workers.). See also 144 Cong. Rec. E2323-01, 144 Cong. Rec. E2323-01, E2323, 1998 WL 785735 (stating “[t]he employers most prone to abusing the H-1B program are called ‘job contractors’ or ‘job shops’ . . . the[se] companies don’t have to shoulder the obligations of being the legally recognized employers—the job contractors/shops remain the official employers”) (statement of Rep. Lamar Smith, then chairman of the Subcommittee on Immigration and Claims).

<sup>46</sup> For example, section 212(n)(3)(B) of the Act defines “exempt H-1B nonimmigrant” as an H-1B nonimmigrant who receives annual wages equal to at least \$60,000 or has attained a master’s or higher degree (or its equivalent) in a related specialty. The \$60,000 salary threshold was set in 1998 through the American Competitiveness and Workforce Improvement Act and has not been adjusted to date. If adjusted for inflation, the salary threshold for the exemption to the U.S. worker recruitment would be over \$93,000. See, U.S. Dep’t of Labor, Bureau of Labor Statistics, *CPI Inflation Calculator*, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (comparing data from October 1998 to May 2020).

employers claim exemption from these attestation requirements,<sup>47</sup> showing how easily and frequently H-1B-dependent employers are able to bypass statutory requirements intended to protect U.S. workers. In addition, these purported U.S. worker protections only apply to employers who are H-1B-dependent employers or have been found by DOL to have committed a willful failure to meet their Labor Condition Application (LCA) obligations or material misrepresentation in its application.<sup>48</sup> However, employment discrimination in favor of H-1B visa holders over qualified U.S. workers may violate another part of the INA, at INA section 274B, 8 U.S.C. 1324b.<sup>49</sup>

Overall, these reports and studies expose significant gaps in the ability of the H-1B program, as currently structured, to serve its original intent to supplement the U.S. workforce with a limited number of highly skilled workers while protecting the economic interests of U.S. workers. The President’s recent “Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak” notes that the entry of additional workers through the H-1B program “presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak.”<sup>50</sup> The changes made in the interim final rule will extend beyond the duration of the proclamation, but the threats described in the proclamation highlight the urgent need for strengthening of the H-1B program to protect U.S. workers. The Department’s responsibility to ensure the safety and security of our country includes the protection of American workers.<sup>51</sup> This responsibility includes ensuring, as much as possible, that American workers are not negatively

<sup>47</sup> U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Public Disclosure File: LCA Data, Federal Fiscal Year: 2019.

<sup>48</sup> See INA section 212(n)(1)(E)(ii) and (G), 8 U.S.C. 1182(n)(1)(E)(ii) and (G).

<sup>49</sup> See *supra* note 36.

<sup>50</sup> See Proclamation 10052 of June 22, 2020, Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, 85 FR 38263 (Jun. 25, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-06-25/pdf/2020-13888.pdf>.

<sup>51</sup> Cf. section 101 of the Homeland Security Act of 2002, 6 U.S.C. 111(b)(1)(F), stating that a primary mission of the Department is to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”

affected by H-1B workers. Therefore, the Department believes it is imperative to issue this rule to strengthen the integrity of the H-1B program and make more certain that petitions are only approved for qualified beneficiaries and petitioners.

### B. Implementation of This Interim Final Rule

This rule only will apply to petitions filed on or after the effective date of the regulation, including amended petitions or petition extensions. DHS will not apply the new regulations to any pending petitions nor to previously approved petitions, either through reopening or through a notice of intent to revoke.

## V. Discussion of the Provisions To Strengthen the H-1B Program

### A. Amending the Definition and Criteria for a “Specialty Occupation”

#### 1. Amending the Definition of a “Specialty Occupation”

DHS is revising the regulatory definition and standards for a “specialty occupation” to align with the statutory definition of “specialty occupation.”

Section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), describes, among others, nonimmigrants coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1) states, in relevant part, “the term ‘specialty occupation’ means an occupation that requires—(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” Currently, 8 CFR 214.2(h)(4)(ii) defines “specialty occupation” as an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

First, this rule amends the definition of a “specialty occupation” at 8 CFR 214.2(h)(4)(ii) to clarify that there must be a direct relationship between the required degree field(s) and the duties of the position. Consistent with existing USCIS policy and practice, a position

for which a bachelor's degree in any field is sufficient to qualify for the position, or for which a bachelor's degree in a wide variety of fields unrelated to the position is sufficient to qualify, would not be considered a specialty occupation as it would not require the application of a body of highly specialized knowledge.<sup>52</sup> Similarly, the amended definition clarifies that a position would not qualify as a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position. This is consistent with the statutory requirement that a degree be “in the specific specialty” and has long been the position of DHS and its predecessor, Immigration and Naturalization Service (INS).<sup>53</sup>

Under this new rule, the petitioner will have the burden of demonstrating that there is a direct relationship between the required degree in a specific specialty (in other words, the degree field(s) that would qualify someone for the position) and the duties of the position. In many cases, the relationship will be clear and relatively easy to establish. For example, it should not be difficult to establish that a required medical degree is directly correlated to the duties of a physician. Similarly, a direct relationship may be established between the duties of a lawyer and a required law degree, and the duties of an architect and a required architecture degree. In other cases, the direct relationship may be less readily apparent, and the petitioner may have to explain and provide documentation to meet its burden of demonstrating the relationship. To establish a direct relationship, the petitioner would need to provide information regarding the course(s) of study associated with the required degree, or its equivalent, and the duties of the proffered position, and

demonstrate the connection between the course of study and the duties and responsibilities of the position.

The requirement of a direct relationship between a degree in a specific specialty, or its equivalent, and the position should not be misconstrued as necessarily requiring a singular field of study. Section 214(i)(1) of the INA allows the “attainment of a bachelor's or higher degree in the specific specialty (*or its equivalent*)” (emphasis added). The placement of the phrase “or its equivalent” after the phrase “in the specific specialty” means that USCIS may accept the equivalent to a degree in a specific specialty, as long as that equivalent provides the same (or essentially the same) body of specialized knowledge.<sup>54</sup> In general, provided the required fields of study are closely related, for example, electrical engineering and electronics engineering for the position of an electrical engineer, a minimum of a bachelor's or higher degree, or its equivalent, in more than one field of study may be recognized as satisfying the “degree in the specific specialty (or its equivalent)” requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B). In such a case, the “body of highly specialized knowledge” required by section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), essentially would be the same, and each field of study would be in a “specific specialty” directly related to the position consistent with section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B).

In cases where the petitioner lists degrees in multiple disparate fields of study as the minimum entry requirement for a position, the petitioner would have to establish how each field of study is in a specific specialty providing “a body of highly specialized knowledge” directly related to the duties and responsibilities of the particular position to meet the requirements of sections 214(i)(1)(A) and (B) of the INA, 8 U.S.C. 1184(i)(1)(A) and (B), the regulatory definition, and one of the four criteria at new 8 CFR 214.2(h)(4)(iii)(A).

As such, a minimum entry requirement of a bachelor's or higher degree, or its equivalent, in multiple disparate fields of study would not automatically disqualify a position from

being a specialty occupation. For example, a petitioner may be able to establish that a bachelor's degree in the specific specialties of either education or chemistry, each of which provide a body of highly specialized knowledge, is directly related to the duties and responsibilities of a chemistry teacher. In such a scenario, the “body of highly specialized knowledge” requirement of section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), and the “degree in the specific specialty” requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), would both be met and the chemistry teacher position listing multiple disparate fields of study would be in a specialty occupation.

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

If the minimum entry requirement for a position is a general degree without further specialization or an explanation as to what type of degree is required, the “degree in the specific specialty (or its equivalent)” requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), would not be satisfied. For example, a requirement of a *general* engineering degree for a position of software developer would not satisfy the specific specialty requirement. In such an instance, the petitioner would not satisfactorily demonstrate how a required general engineering degree provides a body of highly specialized knowledge that is directly related to the duties and responsibilities of a software developer position.<sup>55</sup>

Similarly, a petition with a requirement of an engineering degree in any or all fields of engineering for a position of software developer would not suffice unless the record establishes how each or every field of study within an engineering degree provides a body of highly specialized knowledge directly relating to the duties and responsibilities of the software

<sup>52</sup> See *Caremax Inc v. Holder*, 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014).

<sup>53</sup> See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (stating “[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H–1B specialty occupation visa”); see also *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1166 (D. Minn.1999) (the proffered position's requirement of a business administration degree is a general degree requirement, and therefore, INS did not abuse its discretion in denying the H–1B petition); *All Aboard Worldwide Couriers, Inc. v. Attorney General*, 8 F. Supp. 2d 379, 381 (S.D.N.Y. 1998) (INS did not abuse its discretion in determining that the proffered position did not qualify as a specialty occupation based on “an absence of evidence that [the petitioner] require[s] job candidates to have a B.A. in a specific, specialized area.”).

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

<sup>55</sup> See *supra* note 54.

developer position.<sup>56</sup> The issue is whether a proffered position requires the application of a body of highly specialized knowledge as required by section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), and attainment of at least a bachelor's degree in the specific specialty (or its equivalent) as required by section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B). If an individual could qualify for a software developer position based on having a seemingly unrelated degree in any engineering field or in general engineering, or its equivalent, then it cannot be concluded that the position requires the application of a body of highly specialized knowledge and a degree in a specific specialty because someone with an entirely or largely unrelated degree may qualify to perform the job.<sup>57</sup> In such a scenario, the requirements of sections 214(i)(1)(A) and (B) of the INA, 8 U.S.C. 1184(i)(1)(A) and (B), would not be satisfied.

Similarly, a requirement of a bachelor's degree in an unspecified "quantitative field" (which could include mathematics, statistics, economics, accounting, or physics) for a software developer position would be insufficient to meet the requirements of a specialty occupation unless the record identifies specific specialties within the wide variety of "quantitative fields" and establishes how each identified degree in a specific specialty provides a body of highly specialized knowledge, consistent with section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), that is directly related to the duties and responsibilities of the software developer position. While a position may allow a range of degrees, and apply multiple bodies of highly specialized knowledge, each of those qualifying degree fields must be directly related to the proffered position.

## 2. Amending the Criteria for Specialty Occupation Positions

As quoted above, under section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1), a "specialty occupation" requires attainment of a bachelor's or higher

<sup>56</sup> The requirement of any engineering degree could include, for example, a chemical engineering degree, marine engineering degree, mining engineering degree, or any other engineering degree in a multitude of unrelated fields.

<sup>57</sup> In these examples, the educational credentials are referred to by the title of the degree for expediency. However, USCIS separately evaluates whether the beneficiary's actual course of study is directly related to the duties of the position, rather than merely the title of the degree. When applicable, USCIS will consider whether the beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation.

degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. However, the current regulatory criteria at 8 CFR 214.2(h)(4)(iii)(A) states that a bachelor's degree be "normally" required, or "common to the industry," or that the knowledge required for the position is "usually associated" with at least a bachelor's degree or equivalent. The words "normally," "common," and "usually" are not found in the statute, and therefore, should not appear in the regulation. To conform to the statutory definition of a "specialty occupation" and promote consistent adjudications, DHS is eliminating the terms "normally," "common," and "usually" from the regulatory criteria. See new 8 CFR 214.2(h)(4)(iii)(A). This change means that the petitioner will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that this is always the requirement for the occupation as a whole, the occupational requirement within the relevant industry, the petitioner's particularized requirement, or because the position is so specialized, complex, or unique that it is necessarily required to perform the duties of the specific position.

The wording of the current regulatory criteria creates ambiguity. For example, the dictionary definition of "normally" is "usually, or in most cases," and "usually" is defined as "in the way that most often happens."<sup>58</sup> "Most" is defined as "the biggest number or amount (of), or more than anything or anyone else,"<sup>59</sup> and is a synonym for "normally" or "usually." These definitions could be read to encompass anything from 51 percent to 99 percent, and possibly a broader range depending on the interpretation, highlighting how ambiguous they are. Use of these terms, if interpreted to mean that a position is a specialty occupation if merely 51 percent of positions within a certain occupation require at least a certain bachelor's degree, is inconsistent with the most natural read of, and arguably runs directly contrary to the statutory definition of, a "specialty occupation" which imposes a minimum entry requirement of a bachelor's or higher degree in the specific specialty (or its

equivalent). See section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1). Thus, DHS believes that it is imperative to align the regulatory language with the statutory language and clarify that a bachelor's (or higher) degree in a directly related specific specialty is required. It will no longer be sufficient to show that a degree is normally, commonly, or usually required. In FY 2018, USCIS frequently issued Requests for Evidence (RFEs) in H-1B cases, requesting more evidence or explanations to establish that proffered positions qualified as specialty occupations.<sup>60</sup> DHS believes that the revisions in this rule will clarify the requirements for establishing a specialty occupation and reduce the need for RFEs in future adjudications.

In addition, DHS is replacing the phrase, "To qualify as a specialty occupation," with the phrase "A proffered position does not meet the definition of specialty occupation unless it also satisfies" prior to setting forth the regulatory criteria. See new 8 CFR 214.2(h)(4)(iii)(A). This change will clarify that meeting one of the regulatory criteria is a necessary part of—but not necessarily sufficient for—demonstrating that a position qualifies as a specialty occupation. This is not new; the criteria at current 8 CFR 214.2(h)(4)(iii)(A) must be construed in harmony with and in addition to other controlling regulatory provisions and with the statute as a whole. In 2000, the U.S. Court of Appeals for the Fifth Circuit highlighted the ambiguity of the regulatory provision's current wording, and petitioners have misinterpreted the criteria in 8 CFR 214.2(h)(4)(iii)(A) as setting forth both the necessary and sufficient conditions to qualify as a specialty occupation, a reading that resulted in some positions meeting one condition of 8 CFR 214.2(h)(4)(iii)(A), but not the definition as a whole.<sup>61</sup>

<sup>60</sup> See USCIS report *Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs were Issued for H-1B Petitions in Fiscal Year 2018*, available at <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/understanding-requests-for-evidence-h-1b-petitions-in-fiscal-year-2018.pdf>.

<sup>61</sup> *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000) (stating that current 8 CFR 214.2(h)(4)(iii)(A) "appears to implement the statutory and regulatory definition of specialty occupation through a set of four different standards. However, this section might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition. The ambiguity stems from the regulation's use of the phrase 'to qualify as.' In common usage, this phrase suggests that whatever conditions follow are both necessary and sufficient conditions. Strictly speaking, however, the language logically entails only that whatever conditions follow are necessary conditions. . . . If § 214.2(h)(4)(iii)(A) is read to create a necessary and

<sup>58</sup> Cambridge Dictionary, normally, <https://dictionary.cambridge.org/us/dictionary/english/normally> (last visited Sept. 9, 2020); Cambridge Dictionary, usually, <https://dictionary.cambridge.org/us/dictionary/english/usually> (last visited Sept. 9, 2020).

<sup>59</sup> Cambridge Dictionary, most, <https://dictionary.cambridge.org/us/dictionary/english/most> (last visited Sept. 9, 2020).

These changes will eliminate this source of confusion.

DHS also is amending 8 CFR 214.2(h)(4)(iii)(A)(1) by replacing the word “position” with “occupation,” so that it sets forth “the minimum requirement for entry into the particular occupation in which the beneficiary will be employed.” See new 8 CFR 214.2(h)(4)(iii)(A)(1). DHS believes that replacing “position” with “occupation” will clarify that the first criterion can be satisfied if the petitioner can show that its position falls within an occupational category for which all positions within that category have a qualifying minimum degree requirement.<sup>62</sup> DHS further believes that this revision provides added clarity to the regulatory criteria as the criteria will flow from general to specific (*i.e.*, occupation level to industry to employer to position). If the occupation requires at least a bachelor’s degree in a specific specialty (*e.g.*, lawyer or doctor) then it necessarily follows that a position in one of those occupations would require a degree and qualify as a specialty occupation. If that is not applicable, then the petitioner could submit evidence to show that at least a bachelor’s degree in a specific specialty (or its equivalent) is required based on industry norms, the employer’s particular requirement, or because of the particulars of the specific position. USCIS will continue its practice of consulting DOL’s *Occupational Outlook Handbook* and other reliable and informative sources submitted by the petitioner, to assist in its determination regarding the minimum entry requirements for positions located within a given occupation.

DHS further is amending 8 CFR 214.2(h)(4)(iii)(A)(2) by consolidating this criterion’s second prong into the fourth criterion. See new 8 CFR 214.2(h)(4)(iii)(A)(2). The second prong of current 8 CFR 214.2(h)(4)(iii)(A)(2), which focuses on a position’s complexity or uniqueness, is similar to current 8 CFR 214.2(h)(4)(iii)(A)(4), which focuses on a position’s complexity and specialization. In practice, they are frequently consolidated into the same analysis. This amendment streamlines both criteria, as well as the explanation and analysis in written decisions issued by USCIS pertaining to specialty

sufficient condition for being a specialty occupation, the regulation appears somewhat at odds with the statutory and regulatory definitions of ‘specialty occupation.’”

<sup>62</sup> DHS generally determines a position’s occupation or occupational category by looking at the standard occupational classification (SOC) code designated on the LCA.

occupation determinations, as such decisions discuss all four criteria and are necessarily repetitive because of the existing overlap between 8 CFR 214.2(h)(4)(iii)(A)(2) and (4). This amendment also simplifies the analysis because petitioners may now demonstrate eligibility under this criterion if the position is “so specialized, complex, or unique” (emphasis added), as opposed to “so complex or unique” under current 8 CFR 214.2(h)(4)(iii)(A)(2) and “so specialized and complex” under current 8 CFR 214.2(h)(4)(iii)(A)(4) (emphasis added). Notwithstanding these amendments, the analytical framework of the first prong of 8 CFR 214.2(h)(4)(iii)(A)(2) generally will remain the same. Thus, a petitioner will satisfy new 8 CFR 214.2(h)(4)(iii)(A)(2) if it demonstrates that the specialty degree requirement is the minimum entry requirement for (1) parallel positions (2) at similar organizations (3) within the employer’s industry in the United States. This criterion is intended for the subset of positions with minimum entry requirements that are determined not necessarily by occupation, but by specific industry standards. For example, registered nurses (RNs) generally do not qualify for H-1B classification because most RN positions normally do not require a U.S. bachelor’s or higher degree in nursing (or a directly related field), or its equivalent, as the minimum for entry into these particular positions.<sup>63</sup> However, advanced practice registered nurses generally would be specialty occupations due to the advanced level of education and training required for certification.<sup>64</sup> For this criterion, DHS would continue its practice of consulting the DOL’s *Occupational Outlook Handbook* and other reliable and informative sources, such as information from the industry’s professional association or licensing body, submitted by the petitioner.

The third criterion at 8 CFR 214.2(h)(4)(iii)(A)(3) essentially will remain the same, other than the deletion of “normally.” This criterion still will recognize an employer’s valid employment practices, provided that

<sup>63</sup> See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, “Registered Nurses,” <https://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4> (indicating that nurses can have a bachelor’s or associate’s degree in nursing, or a diploma from an approved nursing program) (last visited Jun. 25, 2020).

<sup>64</sup> USCIS Policy Memorandum PM-602-0104, Adjudication of H-1B Petitions for Nursing Occupations (Feb. 18, 2015), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015-0218\\_EIR\\_Nursing\\_PM\\_Effective.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015-0218_EIR_Nursing_PM_Effective.pdf).

those practices reflect actual requirements. The additional sentence, “The petitioner also must establish that the proffered position requires such a directly related specialty degree, or its equivalent, to perform its duties,” simply will reinforce the existing requirements for a specialty occupation, in other words, that the position itself must require a directly related specialty degree, or its equivalent, to perform its duties. See new 8 CFR 214.2(h)(4)(iii)(A)(3). Employers requiring degrees as a proxy for a generic set of skills will not meet this standard. Employers listing a specialized degree as a hiring preference will not meet this standard either. If USCIS were constrained to recognize a position as a specialty occupation merely because an employer has an established practice of demanding certain educational requirements for the proffered position—without consideration of whether the position requires the application of a body of highly specialized knowledge consistent with the degree requirement—then any beneficiary with a bachelor’s degree in a specific specialty could be brought into the United States to perform work in a non-specialty occupation if the employer arbitrarily imposed such a degree requirement for the non-specialty occupation position.<sup>65</sup> With respect to the first part of this criterion, a petitioner could submit evidence of an established recruiting and hiring practice for the position to establish its requirements for the position. DHS is leaving the term “established practice” undefined to allow more flexibility for petitioners, although it notes that petitioners seeking to fill a position for the first time generally would not be able to demonstrate an “established practice.”<sup>66</sup>

As discussed above, the criterion at the new 8 CFR 214.2(h)(4)(iii)(A)(4) incorporates the second prong of current 8 CFR 214.2(h)(4)(iii)(A)(2). See new 8 CFR 214.2(h)(4)(iii)(A)(4). No other substantive changes are being made to this criterion. Thus, the fourth criterion can be satisfied if the petitioner

<sup>65</sup> *Defensor*, 201 F.3d at 388 (noting “If only [the employer]’s requirements could be considered, then any alien with a bachelor’s degree could be brought into the United States to perform a non-specialty occupation, so long as that person’s employment was arranged through an employment agency which required all clients to have bachelor’s degrees. Thus, aliens could obtain six-year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H-1B [sic] visas to positions which require specialized experience and education to perform.”)

<sup>66</sup> First-time hirings are not precluded from qualifying under one of the other criteria.

demonstrates that the proffered position's job duties are so specialized, complex, or unique that they necessitate the attainment of a U.S. bachelor's degree in a directly related specific specialty, or its equivalent.

DHS acknowledges that some petitioners may believe they have a reliance interest in retaining the existing regulatory framework for specialty occupation. For example, by eliminating the word "normally" from the regulatory criterion at 8 CFR 214.2(h)(4)(iii)(A)(1), some occupations that previously qualified under this criterion may no longer qualify because a bachelor's degree in a specific specialty or its equivalent is not always a minimum requirement for entry. To the extent that petitioners may have a reliance interest in retaining the current regulations, the government's interests in having the regulations conform to the best reading of the statutory definition and creating clearer standards to facilitate more consistent adjudications<sup>67</sup> far outweigh any such reliance interest. It is important to note that, although some occupations will no longer qualify under 8 CFR 214.2(h)(4)(iii)(A)(1), the petitioner may still establish that the proffered position satisfies any one of the other criteria at 8 CFR 214.2(h)(4)(iii)(A)(2)–(4). None of the revised provisions categorically prevent any particular position from qualifying as a specialty occupation.

Further, DHS recognizes the possibility that some petitions for H-1B nonimmigrant classification might have been approved in error under the current regulation even though the petitions indicated that an alien could qualify to perform the relevant position based on a general degree. USCIS has generally denied such petitions on the basis that such petitions do not meet the statutory and regulatory definition of specialty occupation under the current regulation, but recognizes that a small number might have been approved in error and that similar petitions will be denied as a result of this Rule's clarification of the definition of "specialty occupation." For example, by adding the phrase "A position is not a specialty occupation if attainment of a

general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position" at new 8 CFR 214.2(h)(4)(ii), positions where a general degree may qualify someone to perform the job, and that may have been erroneously approved as specialty occupations because of confusion created by the ambiguous wording in the current regulations, may now be denied. But again, to the extent that the revised regulations would result in the denial of some petitions that were erroneously approved under the current regulatory scheme, the government's interests in better adhering to the statute and better ensuring consistent adjudication far outweigh any interests petitioners may have in receiving continued petition approvals in a small number of cases based on error resulting from imprecise regulatory text. DHS notes that each case is decided on its own merits, and simply because a petition was approved previously does not guarantee that a similar petition would be approved in the future as prior approvals are not binding on USCIS.<sup>68</sup> The burden of proof remains on the petitioner, even where an extension of stay in H-1B nonimmigrant status is sought.<sup>69</sup>

#### *B. Defining "Worksite" and "Third Party Worksite"*

DHS will add definitions for "worksite" and "third-party worksite" to the existing list of definitions at 8 CFR 214.2(h)(4)(ii). *See* new 8 CFR 214.2(h)(4)(ii). First, DHS will define "worksite" similar to the DOL definition of "place of employment" in 20 CFR 655.715 as "the physical location where the work is actually performed by the H-1B nonimmigrant." A "worksite" will not include any location that would not be considered a "worksite" for LCA purposes, meaning that DHS will apply the same exclusions and examples of "non-worksite locations" as set forth in DOL's regulations.<sup>70</sup> As H-1B petitioners and USCIS officers should already be familiar with the concept of "worksite" because it also applies in the

LCA context, DHS believes that this definition does not represent a significant change. Second, DHS will define "third-party worksite" as "a worksite, other than the beneficiary's residence in the United States, that is not owned or leased, and not operated, by the petitioner." *See* new 8 CFR 214.2(h)(4)(ii).<sup>71</sup> This definition is similar to the "owned or operated" test commonly used in the LCA context.<sup>72</sup> Again, as this concept should already be familiar to H-1B petitioners and USCIS officers, this definition should not be a significant change.

The newly added definitions are helpful because the terms "worksite" and "third-party worksite" are used elsewhere in the amended regulations. As explained below, the new employer-employee relationship definition specifically refers to the beneficiary's worksite as a relevant factor in determining whether such relationship exists (*e.g.*, "where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision," *see* new 8 CFR 214.2(h)(4)(ii)). Further, a 1-year maximum validity period will apply whenever the beneficiary will be working at a third-party worksite. *See* new 8 CFR 214.2(h)(9)(iii)(A)(1). Finally, the new site visit provisions will clarify that inspections may include any third-party worksites, as applicable. *See* new 8 CFR 214.2(h)(4)(i)(B)(7).

#### *C. Clarifying the Definition of "United States Employer"*

Currently, the term "United States employer" is defined at 8 CFR 214.2(h)(4)(ii) as "a person, firm, corporation, contractor, or other association, or organization in the United States" which, among other things, "[e]ngages a person to work within the United States" and "[h]as an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." Through this rule, DHS is changing this definition by: (1) Striking the word "contractor" from the general definition of "United States employer"; (2) inserting the word "company" in that general definition; (2) expanding upon the existing requirement to engage the beneficiary to work within the United

<sup>67</sup> *See* GAO/HEHS-00-157, at 25 (finding that "a petition previously submitted and denied can be approved by another adjudicator, even if the denying adjudicator determined that the employer does not meet H-1B requirements" owing to inconsistently available reasons for denials and information system limitations); GAO-11-26, at 27 (noting examples of instances in which "[e]xecutives at several companies" experienced inconsistencies in the adjudication process, including decisions to deny or grant H-1B classification based on whether projects required "specialty occupation").

<sup>68</sup> *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 51 (2001); *Matter of Church Scientology Intl*, 19 I&N Dec. 593, 597 (Comm'r 1988).

<sup>69</sup> *See* 8 CFR 103.2(b)(1) ("An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication"); 8 CFR 214.1(c)(5) ("Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service.")

<sup>70</sup> *See* 20 CFR 655.715 (definition of "place of employment").

<sup>71</sup> While the definition of "third-party worksite" will exclude the beneficiary's U.S. residence, employment of the beneficiary from home must still be in accordance with all applicable laws.

<sup>72</sup> *See* 20 CFR 655.734(a)(1)(ii)(A) (the petitioner's obligation requires proper notice at each place of employment "whether such place of employment is owned or operated by the employer or by some other person or entity").

States; and (3) expanding upon the employer-employee relationship and the factors used to determine if a valid “employer-employee relationship” between the petitioner and the beneficiary exists or will exist. *See* new 8 CFR 214.2(h)(4)(ii).

DHS believes these revisions are necessary to clarify the requirements to qualify as an employer for purpose of the H-1B classification. As previously discussed, the current regulation at 8 CFR 214.2(h)(4)(ii) defines “United States employer” as an entity that has an “employer-employee relationship” with an “employee.” But these terms are not adequately defined. Section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as a worker coming temporarily to the United States to perform services in a specialty occupation, and for whom the intending “employer” has filed a labor condition application. Section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1), states in relevant part that the question of importing any alien as an H-1B nonimmigrant shall be determined after consultation with appropriate agencies of the Government, upon petition of the importing employer. Congress continued using the term “employer” and “employment” in subsequent amendments, but without specifically defining those terms. *See, e.g.*, section 214(n) of the INA, 8 U.S.C. 1184(n), as amended by the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, 114 Stat. 1251 (authorizing the H-1B nonimmigrant to accept new “employment” upon the filing of an H-1B petition by the “prospective employer”). DHS believes the revisions in this rule are necessary to clarify and strengthen the requirements to qualify as a United States employer for the H-1B program.

#### 1. Replacing “contractor” With “company”

First, striking “contractor” will avoid potential confusion as the term “contractor” in the definition is misleading. The inclusion of “contractors” in the regulatory language could be read to suggest that contractors should generally qualify under the definition of a “United States employer.” While a contractor is certainly not excluded from qualifying as a “United States employer” for purposes of an H-1B petition, the contractor, like any petitioner, must establish the requisite “employer-employee relationship” with the H-1B beneficiary. This revision will also update the definition to include

reference to “company,” as that term is commonly used to describe various types of business entities, such as limited liability companies.

DHS acknowledges that third-party arrangements involving one or more contractors may be a legitimate business model.<sup>73</sup> However, these types of business arrangements generally make it more difficult to assess whether the petitioner and the beneficiary have or will have the requisite employer-employee relationship. Typically, these types of business arrangements require the beneficiary to be placed at one or more third-party worksites, which are not owned or leased and not operated, by the petitioner. This placement, in itself, potentially dilutes the petitioner’s control over the beneficiary. The difficulty of assessing control is increased in situations where there are one or more intermediary contractors (often referred to as “vendors”)<sup>74</sup> involved in the contractual chain. Overall, the more parties there are in the contractual chain, the more likely those other parties exert control over the beneficiary’s work, and more importantly, potentially limit the amount of control, if any, that the petitioner would have over the beneficiary’s employment. As a result, the relationship between the petitioner and the beneficiary becomes more attenuated.

By removing the word “contractor”, DHS seeks to avoid any confusion or mistaken belief that contractors should generally qualify as “United States employers.” Petitioners that are contractors are reminded of their burden, similar to all other H-1B petitioners, whether they are a person, corporation, or company, to establish the employer-employee relationship for each H-1B petition they file.

Nevertheless, it is important to note that the deletion of the term “contractor” from the regulatory definition does not mean that a

<sup>73</sup> Karen Jensen, *Barriers to H-1B Visa Sponsorship in the IT Consulting Industry: The Economic Incentive to Alter H-1B Policy*, 35 *Fordham International Law Journal* Volume 1027, 1036 (2017).

<sup>74</sup> The “vendor” concept is frequently referenced in H-1B petitions that involve the information technology (IT) industry. While the term is not precisely defined, petitions commonly refer to “primary vendors,” who have an established or preferred relationship with a client, or “implementing vendors,” who bid on an IT project with a client and then implement the contract using their own staff. Primary or implementing vendors may turn to secondary vendors to fill staffing needs on individual projects. *See, e.g., Acclaim Systems, Inc. v. Infosys*, No. Civ.A. 13-7336, 2016 WL 974136 at \*2 (E.D. Pa. Mar. 11, 2016). As a result, the ultimate client project may be staffed by a team of H-1B beneficiaries who were petitioned for by different, unrelated employers.

contractor never would qualify as a “United States employer” for the purpose of filing an H-1B petition. A contractor may be a person, firm, company, corporation, or other association or organization, and the contractor (whatever the form) still may qualify as a U.S. employer of the H-1B beneficiary if the contractor demonstrates the requisite employer-employee relationship with the beneficiary.<sup>75</sup> Because this change will not impact a contractor’s continued ability to establish a valid employer-employee relationship on a case-by-case basis, DHS does not believe that removing the term “contractor” will have a substantive impact on the eligibility determination. The change is simply intended to remove a term that is typically associated with work arrangements that typically do not involve an employer and employee.

#### 2. Engaging the Beneficiary To Work

As currently written in 8 CFR 214.2(h)(4)(ii), the requirement for a petitioner to “[engage] a person to work within the United States” has limited practical value. It does not specify that the petitioner should engage the beneficiary (rather than “a person”). And it does not qualify the work to be performed within the United States. By stating in new 8 CFR 214.2(h)(4)(ii) that an employer must “[engage] the beneficiary to work within the United States, and ha[ve] a bona fide, non-speculative job offer for the beneficiary,” DHS seeks to provide more meaningful requirements for the definition of “United States employer,” consistent with statutory references to the intending or importing employer petitioning for an alien to perform services in a specialty occupation.<sup>76</sup>

<sup>75</sup> DHS recognizes that this change will result in a definition of “United States employer” that is slightly different from DOL’s definition of “employer.” 20 CFR 655.715 states in pertinent part: “Employer means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B . . . nonimmigrants and/or U.S. worker(s).” However, DHS does not believe this disparity would be significant, particularly because the DOL definition still requires the contractor to have an employment relationship with the H-1B nonimmigrant based on the common law. Furthermore, DHS definitions are separate from, and generally serve different purposes than, DOL definitions. While DOL may deem the person or entity filing an H-1B petition to be the employer for purpose of enforcing wage and other obligations, DHS must determine whether the petitioner qualifies as the intending or importing United States employer. *See, e.g.*, 20 CFR 655.705 (DOL administers the LCA process and most enforcement provisions).

<sup>76</sup> Consistent with the existing rule, this language does not and will not prohibit H-1B nonimmigrants from travelling internationally.

New 8 CFR 214.2(h)(4)(ii) will make it clear that a petitioner must have non-speculative employment for the beneficiary at the time of filing.<sup>77</sup> At the time of filing, the petitioner must establish that a bona fide job offer exists and that actual work will be available as of the requested start date.<sup>78</sup> If the petitioner does not have any work available, then it cannot reasonably engage the beneficiary “to work within the United States” in order to qualify as a United States employer at the time of filing. See 8 CFR 214.2(h)(4)(ii).

The agency long held and communicated the view that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position, stating that historically, USCIS (or the Service, as it was called at the time) has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment.<sup>79</sup> This proposed rule explained that the H-1B classification was not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts.<sup>80</sup> Speculative employment undermines the integrity and a key goal of the H-1B program, which is to help U.S. employers obtain the skilled workers they need to meet their business needs, subject to annual numerical limitations, while protecting the wages and working

conditions of U.S. workers. Further, USCIS cannot reasonably ascertain whether the beneficiary will be employed in a specialty occupation if the employment is speculative.

Note, however, that establishing non-speculative employment does not amount to demonstrating non-speculative daily work assignments through the duration of the requested validity period. DHS is not by this rule requiring employers to establish non-speculative and specific assignments for each and every day of the proposed period of employment.<sup>81</sup> Again, under new 8 CFR 214.2(h)(4)(ii), a petitioner must demonstrate, at the time of filing, availability of actual work as of the requested start date.

### 3. Clarifying the “Employer-Employee Relationship”

Third, DHS will remove the phrase “as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee” from the current definition of “United States employer,” and replace that phrase with a separate, more extensive definition of “employer-employee relationship” based on USCIS’ interpretation of existing common law. See new 8 CFR 214.2(h)(4)(ii). These revisions will clarify the test for establishing the requisite “employer-employee relationship” and eliminate the ambiguity and confusion created by the existing regulation.

The term “employer-employee relationship” at 8 CFR 214.2(h)(4)(ii) is not adequately defined. The phrase in that provision which reads, “as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee,” does not give sufficient guidance. For example, it is unclear whether the five factors are entirely disjunctive, such that the test is met if any one factor is met, or whether the last factor (“or otherwise control”) is merely

disjunctive of the fourth factor (“supervision”), such that the first three factors (“hire, pay, fire”) must always be met.<sup>82</sup> Although some courts have viewed this phrase as establishing that any single listed factor, such as pay, in and of itself is sufficient to establish the requisite control,<sup>83</sup> DHS agrees with the Fifth Circuit’s statement in *Defensor* that the conjunctive interpretation, where “hire, pay, fire, supervise” are read together “as one prong of the test and ‘otherwise control the work’ is . . . viewed as an independent prong of the test *accords better with the commonsense notion of employer.*”<sup>84</sup> DHS firmly disagrees with the disjunctive interpretation because it leads to the illogical result of virtually any petitioner satisfying the definition, because H-1B petitioners are generally required to submit an LCA that includes an attestation that the petitioner will pay the beneficiary at least the required wage. If the regulation is read to set forth a five-factor disjunctive test, then arguably all petitioners who submit an LCA would satisfy the pay factor, such that reference to other factors would be superfluous in any case where the petitioner is required to submit an LCA.

In the absence of specific, clear, and relevant statutory or regulatory definitions, USCIS has interpreted these terms consistent with its understanding of current common law. In 2010, USCIS provided clarifying policy guidance regarding the employer-employee regulation and factors based on the common law that USCIS officers should consider when adjudicating H-1B

<sup>77</sup> Cf. 8 CFR 103.2(b)(1) (eligibility must be established at the time of filing).

<sup>78</sup> The requested start date as indicated on the H-1B petition in this context may differ from when an H-1B nonimmigrant is considered to “enter into employment” for purposes of receiving required pay under DOL regulations. See 20 CFR 655.731(c)(6), section 212(n) of the INA. While DOL regulations provide for a limited period of time for the employer to place the beneficiary on the payroll, that is a separate rule pertaining to the employer’s wage obligation under section 212(n) of the INA and does not pertain to the petitioner’s obligation under section 214 of the INA and new 8 CFR 214.2(h)(4)(ii) to establish that work is available for the beneficiary to perform as of the start date requested by the petitioner. The requirement in new 8 CFR 214.2(h)(4)(ii) will be met if work is available for the beneficiary as of the start date of intended employment requested on the H-1B petition.

<sup>79</sup> *Petitioning Requirements for the H Nonimmigrant Classification*, 63 FR 30419, 30419–20 (proposed June 4, 1998) (to be codified at 8 CFR part 214).

<sup>80</sup> *Id.* See also GAO/HEHS–00–157, *supra* at 10 (“The petition is required to contain the necessary information to show that a bona fide job exists. . . .”); *Serenity Info Tech v. Cuccinelli*, 2020 WL 2544534, at \*13 (N.D. Ga. 2020) (“Demonstrating that the purported employment is actually likely to exist for the beneficiary is a basic application requirement. . . .”).

<sup>81</sup> See *ITServe Alliance, Inc. v. Cissna*, 443 F.Supp.3d 14, 19 (D.D.C. Mar. 10, 2020) (the U.S. District Court for the District of Columbia, in considering a requirement that an H-1B petitioner establish non-speculative assignments for the entire time requested in a petition, explained that “very few, if any, U.S. employers would be able to identify and prove daily assignments for the future three years for professionals in a specialty occupation” and that “[n]othing in [the definition of ‘specialty occupation’] requires specific and non-speculative qualifying day-to-day assignments for the entire time requested in the petition.”); *Serenity*, 2020 WL 2544534, at \*13 (citing *ITServe*). Speculative employment should not be confused with employment that is contingent on petition approval, visa issuance (when applicable), and the grant of H-1B status. DHS recognizes that employment may be actual, but contingent on petition approval and the alien being granted H-1B status.

<sup>82</sup> See, e.g., *Defensor*, 201 F.3d at 388 (“Under § 214.2(h)(4)(ii)(2), an employer is someone who [h]as an employer-employee relationship with respect to the employees . . . as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” It is unclear whether Vintage’s ability to simply ‘hire’ or ‘pay’ an employee is sufficient standing alone to grant Vintage employer status under this definition. Another interpretation would be that ‘hire, pay, fire, supervise’ are to be read conjunctively as one prong of the test and ‘otherwise control the work’ is to be viewed as an independent prong of the test. Under the latter interpretation, merely being able to ‘hire’ or ‘pay’ an employee, by itself, would be insufficient to grant employer status to an entity that does not also supervise or actually control the employee’s work. . . . [T]he second interpretation accords better with the commonsense notion of employer. . . .”)

<sup>83</sup> See, e.g., *ITServe*, 2020 WL 1150186, at \*17 (“The use of ‘or’ distinctly informs regulated employers that a single listed factor can establish the requisite ‘control’ to demonstrate and employer-employee relationship. This formulation makes evidence that there are multiple ways to demonstrate employer control, that is, by hiring or paying or firing or supervising or ‘otherwise’ showing control.”).

<sup>84</sup> See *Defensor*, 201 F.3d at 388 (emphasis added).

petitions.<sup>85</sup> While the listed factors were based on the agency's interpretation of the common law, they were specifically tailored to the H-1B program based on the agency's expertise and experience dealing with challenges posed particularly by cases where the beneficiary was placed at a third-party worksite.<sup>86</sup> This policy guidance remained in effect for more than a decade and was only recently rescinded in response to a recent court decision finding the policy guidance, as applied, to be a new substantive rule that required rulemaking in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*<sup>87</sup> This interim final rule will restore, with additional clarification, the policy that existed since 2010 and only recently was rescinded due to a judicial ruling on procedural grounds.

USCIS interprets the term "employer-employee relationship" to be the "conventional master-servant relationship as understood by common-law agency doctrine."<sup>88</sup> That doctrine, as explained by the Supreme Court, requires an evaluation of the hiring party's right to control the manner and means by which the product is accomplished "among the other factors" relevant to the employer-employee relationship.<sup>89</sup> As the common law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."<sup>90</sup>

Foremost, in addition to restoring through this rule the longstanding

<sup>85</sup> USCIS Policy Memorandum HQ 70/6.2.8, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements (Jan. 8, 2010). This memorandum was superseded and archived on June 17, 2020. Therefore, it can be found in the Supporting Documents accompanying this interim final rule.

<sup>86</sup> For example, the 2010 memorandum's listed factor of "does the petitioner supervise the beneficiary and is such supervision off-site or on-site" was an elaboration of the common-law factor of "the location of the work," *Darden*, 503 U.S. at 323-24, but was tailored to issues commonly presented by H-1B cases where the petitioner claimed to supervise the beneficiary, but was not physically located at the same worksite as the beneficiary and end-client.

<sup>87</sup> See, e.g., *ITServe*, 2010 WL 1150186, at \*2 ("The current CIS interpretation of the employer-employee relationship requirement is inconsistent with its regulation, was announced and applied without rulemaking, and cannot be enforced.")

<sup>88</sup> See *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

<sup>89</sup> *Darden*, 503 U.S. at 323-24.

<sup>90</sup> *Id.* at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)); see also *Clackamas*, 538 U.S. at 445.

policy that USCIS has applied until recently but had rescinded in order to reduce the potential for additional APA-based litigation, the revised regulation will make clear that USCIS will assess and weigh all relevant aspects of the relationship. See new 8 CFR 214.2(h)(4)(ii). DHS does not believe that any one factor should be decisive. To do otherwise could be construed as contrary to the Supreme Court's declaration in *Nationwide Mutual Ins. Co. v. Darden* that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."<sup>91</sup>

Paragraph (1) of the revised "employer-employee" definition lists non-exhaustive factors to be considered in the totality of the circumstances in cases where the H-1B beneficiary does not possess an ownership interest in the petitioning organization or entity. The revised regulation lists the following factors: (i) Whether the petitioner supervises the beneficiary and, if so, where such supervision takes place; (ii) where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision; (iii) whether the petitioner has the right to control the work of the beneficiary on a day-to-day basis and to assign projects; (iv) whether the petitioner provides the tools or instrumentalities needed for the beneficiary to perform the duties of employment; (v) whether the petitioner hires, pays, and has the ability to fire the beneficiary; (vi) whether the petitioner evaluates the work-product of the beneficiary; (vii) whether the petitioner claims the beneficiary as an employee for tax purposes; (viii) whether the petitioner provides the beneficiary any type of employee benefits; (ix) whether the beneficiary uses proprietary information of the petitioner in order to perform the duties of employment; (x) whether the beneficiary produces an end-product that is directly linked to the petitioner's line of business; and (xi) whether the petitioner has the ability to control the manner and means in which the work product of the beneficiary is accomplished. By listing these factors out, DHS is making clear that no single factor is dispositive and that all factors must be taken into consideration to the extent applicable and appropriate to the facts of the specific case.

While the new regulation will clarify the employer-employee relationship test, it is largely consistent with past USCIS policy and practice and the standard familiar to USCIS officers and

H-1B petitioners.<sup>92</sup> Specifically and as mentioned earlier, in 2010, USCIS issued a policy memorandum, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements"<sup>93</sup> which explained the agency's approach of relying on common law doctrine, as articulated by the Supreme Court, to interpret the existing regulatory provision. This memorandum elaborated on a number of factors that USCIS considers particularly relevant in the H-1B context, based on its interpretation of the common law and the facts typically present in H-1B adjudications based on USCIS' experience. New 8 CFR 214.2(h)(4)(ii) incorporates the same factors listed in this memorandum with two exceptions, neither of which would have a significant impact on the adjudication of H-1B petitions. More specifically, the 2010 memorandum stated the third factor as, "Does the petitioner have the right to control the beneficiary on a day-to-day basis if such control is required?" In clarifying the factors in this regulation, DHS is not including the misleading phrase, "if such control is required," that was previously included in the 2010 USCIS policy guidance because this phrase implies that control is not necessarily required. DHS believes that the petitioner should be required to demonstrate control, which includes, but is not limited to, the inquiry of whether the petitioner has the right to control day-to-day.

The 2010 memorandum contained another potentially confusing or inaccurate statement in footnote 6 that the employer-employee relationship "hinges upon the right to control." USCIS now believes that this statement places an undue emphasis on the right to control and that the best interpretation of existing case law is that

<sup>92</sup> As early as 2009, various Administrative Appeals Office (AAO) non-precedent decisions began relying on the common law doctrine, as articulated by the Supreme Court, to analyze the regulatory provision for employer-employee relationship at 8 CFR 214.2(h)(4)(ii). See, e.g., (Identifying Information Redacted by Agency) Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. S 1101, 2009 WL 3555560, at \*2-3 (applying the common law test as described by the Supreme Court to determine the employer-employee relationship); (Identifying Information Redacted by Agency) Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. S 1101, 2009 WL 3555481, at \*2-3 (same); (Identifying Information Redacted by Agency) Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. S 1101, 2009 WL 4982248, at \*7-8 (same).

<sup>93</sup> See *supra* note 85.

<sup>91</sup> 503 U.S. at 324.

“right to control” is just one factor in the overall common law analysis rather than the determinative test. Specifically, the Supreme Court in *Darden* stated:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. *Among the other factors* relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party (emphasis added).<sup>94</sup>

While the first sentence suggests that the test is right to control, the second sentence suggests that right to control is one of many factors, rather than the test. Further, in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, the Supreme Court focused on “the common-law element of control [a]s the principal guidepost that should be followed in this case,” and proceeded to analyze “‘the extent of control’ that one may exercise over the details of the work of the other,”<sup>95</sup> which again suggests that the test does not hinge on the right to control. In *Clackamas*, the Supreme Court also emphasized that the employer-employee relationship depends on all incidents of the relationship, with no one factor being decisive.<sup>96</sup> As the quoted language in these cases suggests, the employer-employee relationship does not hinge upon any single factor. Thus, the 2010 memorandum’s emphasis on the right to control arguably is in tension with these Supreme Court decisions. DHS believes that the new definitions in 8 CFR 214.2(h)(4)(ii), along with this explanation, will clarify that the right to control is not determinative and will not, in itself, be sufficient to demonstrate an employer-employee relationship, consistent with common law.

DHS believes that this clarification of “right to control” as one factor rather than a determinative factor is not a clear departure from the way USCIS has generally applied the common law test over many years. While the rescinded 2010 memorandum indicated that the determination hinges on the right to

control, the analysis has always required an evaluation of the totality of the facts involved, including, in part, the degree to which the petitioner exercises actual control over the beneficiary’s work. Some officers have placed more weight on the relevance of the actual control exercised, or to be exercised, when making the determination. For example, various Administrative Appeals Office (AAO) non-precedent decisions, citing the rule established in *Darden*, have stated that we “. . . must examine who has actual control, not just the right to control, the beneficiary’s work.”<sup>97</sup> Other officers may have placed less weight on the relevance of the actual control exercised, or to be exercised, and more weight on the petitioner’s legal right to control the beneficiary’s work. In 2018, USCIS provided further clarification on its website regarding the implementation of the 2010 policy memorandum interpreting the employment relationship regulatory requirement:

Although the 2010 memorandum states that the “employer-employee relationship hinges on the right to control” the beneficiary’s employment, the factors that are generally taken into consideration when assessing the relationship primarily focus on who actually takes/will take the action rather than the right to take certain action. For example, when assessing whether the petitioner provides or will provide the tools or instrumentalities for the beneficiary, the primary focus is not whether the petitioner has the right to provide such tools or instrumentalities, but whether the petitioner actually provides or will provide such items.<sup>98</sup>

Accordingly, as reflected on the USCIS website in the 2018 clarification, whether the petitioner actually controls the beneficiary’s employment has been an important factor in the overall analysis.

Therefore, DHS believes that this provision will not represent a clear change in longstanding past practice.<sup>99</sup>

<sup>97</sup> See, e.g., *Matter of K-I-S- Inc.*, 2019 WL 2090064, at \*4 (AAO Apr. 24, 2019) (citing *Darden*, 503 U.S. at 323); *Matter of A- Inc.*, 2017 WL 3034820, at \*6 (AAO June 29, 2017) (observing that “if mid-vendors or the end-client exercise actual control over his work on a daily basis, then we cannot find the Petitioner to be the Beneficiary’s ‘employer’ for H-1B purposes” (emphasis in original)).

<sup>98</sup> See <https://www.uscis.gov/news/public-releases-topic/business-immigration/questions-answers-memoranda-establishing-employer-employee-relationship-h-1b-petitions>.

<sup>99</sup> While USCIS rescinded the 2010 and 2018 policy guidance on June 17, 2020, and has abstained from applying the common law analysis in its adjudication of employer-employee relationship, this is merely a temporary change to allow for rulemaking to occur and avoid continued litigation of this issue. See USCIS Policy

The revised provision, however, will clarify that the employer-employee relationship determination will be based on the totality of the circumstances. USCIS will analyze the applicability of the relevant factors listed in the definition based on the specific evidence provided by the petitioner when making the employment relationship determination, consistent with its historical past practice. USCIS will assess and weigh each factor as it exists or will exist “in the reality of the actual working relationship.”<sup>100</sup> Thus, even though the “right to control the work of the beneficiary” is listed as a relevant factor, it is one among many factors that will be weighed. USCIS will also consider other factors, as noted above, including the petitioner’s ability to control the manner and means in which the work product of the beneficiary is accomplished. Similarly, when assessing whether the petitioner provides or will provide the tools or instrumentalities for the beneficiary, USCIS believes that the primary focus should not be on whether the petitioner has the right to provide such tools or instrumentalities, but whether the petitioner actually provides or will provide such items.<sup>101</sup> While another person or entity may have the right to provide tools or instrumentalities to the worker, the relevant point of focus is on who will actually provide the tools or instrumentalities. For example, if the tools or instrumentalities will be provided by the H-1B beneficiary or end-client, that fact may weigh against a finding that the petitioner will be the employer. If, however, the petitioner will provide the tools and instrumentalities for the beneficiary to perform the work, that fact would weigh in favor of a finding that the petitioner will be the employer. Overall, the petitioner will be required to demonstrate that it can actually take the claimed actions when it comes to these factors. It will not be enough for a petitioner to simply show that it retains the right to control.<sup>102</sup>

Memorandum PM-602-0114, Rescission of Policy Memoranda (June 17, 2020), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/PM-602-0114\\_ITServeMemo.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/PM-602-0114_ITServeMemo.pdf). This interim practice, however, has only been for a short period of time and certainly not long enough to create any reliance interests based on this interim practice.

<sup>100</sup> *NLRB*, 390 U.S. at 259; see *Darden*, 503 U.S. at 323–24.

<sup>101</sup> See *Darden*, 503 U.S. at 323–324 (listing “the source of the instrumentalities and tools,” as opposed to the right to provide such instrumentalities and tools).

<sup>102</sup> DHS believes that this new regulation is not necessarily inconsistent with the DOL definition of “Employed, employed by the employer, or employment relationship” at 20 CFR 655.715.

<sup>94</sup> *Darden*, 503 U.S. at 323–24.

<sup>95</sup> *Clackamas*, 538 U.S. at 448.

<sup>96</sup> 538 U.S. at 451 (quoting *Darden* and *NLRB*).

Paragraph (2) of the revised provision lists additional factors that would be considered in cases where the H-1B beneficiary possesses an ownership interest in the petitioning organization or entity. These factors include: (i) Whether the petitioning entity can hire or fire the beneficiary or set the rules and parameters of the beneficiary's work, (ii) whether and, if so, to what extent the petitioner supervises the beneficiary's work, (iii) whether the beneficiary reports to someone higher in the petitioning entity, (iv) whether and, if so, to what extent the beneficiary is able to influence the petitioning entity, (v) whether the parties intended that the beneficiary be an employee, as expressed in written agreements or contracts, and (vi) whether the beneficiary shares in the profits, losses, and liabilities of the organization or entity. All of these are additional factors, meaning that they would supplement, not replace, the other factors listed in paragraph (1) of the revised definition. These additional factors mirror the Supreme Court's analysis in *Clackamas*, consistent with DHS's position that the term "employer," undefined in the statute, should be interpreted consistent with the common law. These additional factors, as provided in *Clackamas*, are also familiar to USCIS officers and H-1B petitioners given the specific references to *Clackamas* in the 2010 policy guidance that was in effect until June 2020.<sup>103</sup>

DHS recognizes that, as a general principle of law, a corporation is a separate legal entity from its shareholders.<sup>104</sup> Nevertheless, DHS may look beyond the corporate entity to assess whether a valid employment relationship exists between the petitioner and the beneficiary such that

Although the DOL regulation states that "the key determinant is the putative employer's right to control the means and manner in which the work is performed," it also recognizes that "[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." Further, in promulgating the regulation, DOL acknowledged that a list of factors based on the common law provided a "useful framework" for analyzing an employment relationship. *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States*, 65 FR 80110, 80139 (Dec. 20, 2000). To the extent that there are inconsistencies, DHS believes the common law supports the proposition that right to control alone is not sufficient to establish an employer-employee relationship, and that all incidents of the relationship must be considered in making the determination.

<sup>103</sup> 538 U.S. at 448–449.

<sup>104</sup> See *Matter of Aphrodite Invs. Ltd.*, 17 I&N Dec. 530 (Comm'r 1980); *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980).

the petitioner, rather than the beneficiary, truly qualifies as an "employer" pursuant to the statute. Absent unusual factual circumstances, a beneficiary who is the sole or majority shareholder of the petitioning entity, does not report to anyone higher within the organization, is not subject to the decisions made by a separate board of directors, and has veto power over decisions made by others on behalf of the organization, will likely not be considered an "employee" of that entity for H-1B purposes. On the other hand, if a beneficiary is bound by decisions (including the decision to terminate the beneficiary's position) made by a separate board of directors or similar managing authority, and does not have veto power (including negative veto power) over those decisions, then the mere fact of his or her ownership interest will not necessarily preclude the beneficiary from being considered an employee.

USCIS considered alternatives for defining the term "employer[.]" including revising the current regulatory definition to delete and replace the disjunctive "or" with "and[.]" or listing the common law factors verbatim from existing case law. USCIS declined to simply delete and replace the disjunctive "or[.]" and otherwise retain the current regulation, as it fails to provide the same level of clarification and guidance as the new definition listing factors relevant to employer-employee relationship determinations, including those where the beneficiary has an ownership interest in the petitioner. USCIS also declined simply to cite to the existing case law or list the factors verbatim from the existing case law. USCIS believes that its officers and H-1B petitioners are most familiar with the general factors as articulated in the rescinded 2010 policy memorandum. USCIS seeks to restore the policy that has guided H-1B adjudications of this issue for more than a decade, with certain changes for added clarity, and believes that the definition in this interim final rule best accomplishes that goal with the least amount of potential disruption for USCIS officers and H-1B petitioners. USCIS rescinded the 2010 policy memorandum because of a recent court decision finding the memorandum, as applied, imposed a substantive rule that departs from the existing regulation, thereby failing to comply with the APA's rulemaking requirements. This interim final rule will restore the policy as articulated in the 2010 memorandum, with additional clarifications, in compliance with the APA.

DHS recognizes that some petitioners may have developed a reliance interest based on H-1B adjudications subsequent to the June 2020 rescission of the 2010 policy memorandum. DHS believes, however, that the reliance interest some petitioners may have based on recent adjudications does not outweigh the importance of restoring guidance, with additional clarification, that has existed since 2010 and on which USCIS officers and H-1B petitioners have relied to assess eligibility for H-1B classification. The disjunctive wording of the current regulation is confusing for USCIS officers and H-1B petitioners alike, and DHS believes that any reliance interest that may have developed in the short time since June 2020 should yield to restoring guidance that is more detailed and less ambiguous for all involved in the H-1B program.

#### *D. Corroborating Evidence of Work in a Specialty Occupation*

Pursuant to section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), an H-1B nonimmigrant must be coming temporarily to the United States to perform services in a specialty occupation. USCIS interprets this statutory provision to require that the petitioner must actually have work in the specialty occupation listed in the H-1B petition available for the beneficiary as of the start date of intended employment. Therefore, DHS is making it clear at new 8 CFR 214.2(h)(4)(iv)(C) that the petitioner must establish, at the time of filing, that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. New 8 CFR 214.2(h)(4)(iv)(C) complements the revised definition of "United States employer" at new 8 CFR 214.2(h)(4)(ii) requiring evidence of a bona fide, non-speculative job offer. Read together, both new provisions reinforce that speculative employment is not permitted in the H-1B program. As stated earlier, USCIS cannot reasonably ascertain whether the beneficiary will be employed in a specialty occupation if the employment is speculative.<sup>105</sup> USCIS must assess the actual services to be performed to determine whether the alien will be performing services in a specialty occupation. That determination necessarily requires review and analysis

<sup>105</sup> Again, speculative employment should not be confused with employment that is contingent on petition approval, visa issuance (when applicable), and the grant of H-1B status. DHS recognizes that employment may be actual, but contingent on petition approval and the alien being granted H-1B status.

of the actual work to be performed and cannot be based on speculation.

Importantly, new 8 CFR 214.2(h)(4)(iv)(C) clarifies the types of corroborating evidence petitioners must submit in third-party placement cases. Based on USCIS' program experience, petitioners who regularly place their workers at third-party worksites often submit uncorroborated statements describing the role the H-1B beneficiary will perform at the third-party worksite. Such statements, without additional evidence, are generally insufficient to establish by a preponderance of the evidence that the H-1B beneficiary will actually perform work in a specialty occupation. Moreover, such uncorroborated statements are generally insufficient to establish that the petitioner will have and maintain an employer-employee relationship while the beneficiary works at the third-party worksite.<sup>106</sup> Therefore, where a beneficiary will be placed at one or more third-party worksites, DHS will require the petitioner to submit evidence such as contracts, work orders, or other similar evidence (such as a detailed letter from an authorized official at the third-party worksite) to establish that the beneficiary will perform services in a specialty occupation at the third-party worksite(s), and that the petitioner will have an employer-employee relationship with the beneficiary. See new 8 CFR 214.2(h)(4)(iv)(C).

If submitting contracts, the petitioner should include both the master services agreement and the accompanying work order(s), statement(s) of work, or other similar legally-binding agreements under different titles. These contracts should be signed by an authorized official of the third-party entity that will use the beneficiary's services. In general, the master services agreement (also commonly called a supplier agreement) sets out the essential contract terms and provides the basic framework for the overall relationship

between the parties.<sup>107</sup> The work order or statement of work provides more specific information, such as the scope of services to be performed, details about the services, and the allocation of responsibilities among the parties.<sup>108</sup> The petitioner may also submit a detailed letter signed by an authorized official of the ultimate end-client company or companies where the beneficiary will actually work. Other types of corroborating evidence may include technical documentation, milestone tables, marketing analyses, cost-benefit analyses, brochures, and funding documents, insofar as this evidence corroborates that the petitioner will have an employer-employee relationship with the beneficiary, and that the beneficiary will perform services in a specialty occupation at the third-party worksite(s). Overall, the totality of the evidence submitted by the petitioner must be detailed enough to provide a sufficiently comprehensive view of the work available and substantiate, by a preponderance of the evidence, the terms and conditions under which the work will be performed. Documentation that merely sets forth the general obligations of the parties to the agreement, or which do not provide specific information pertaining to the actual work to be performed, would generally be insufficient.<sup>109</sup>

Further, in cases where the beneficiary is staffed to a third-party, the submitted corroborating documents should generally demonstrate the requirements of the position as imposed by the third-party entity (commonly referred to as the "end-client") that will use the beneficiary's services. As noted in *Defensor v. Meissner*, if only the petitioner's requirements are considered, "then any beneficiary with a bachelor's degree could be brought into the United States to perform work in a non-specialty occupation, so long as that person's employment was arranged

through an employment agency that required all [staffed workers] to have bachelor's degrees."<sup>110</sup> This result would be completely opposite of the plain purpose of the statute and regulations, which is to limit H-1B visas to positions which require specialized education to perform duties that require theoretical and practical application of a body of highly specialized knowledge.<sup>111</sup> However, not all third-party placements would necessarily require such evidence. For example, where the beneficiary is placed at a third-party's worksite, but performs work as part of a team of the petitioner's employees, including an on-site supervisor employed by the petitioner and who manages the work of the petitioner's employees, the requirements of the position as established by the petitioner may be determinative. USCIS will make the determination as to whether the requirements of the petitioner or third-party entity are controlling on a case-by-case basis, taking into consideration the totality of the relevant circumstances, as described above.

Finally, new 8 CFR 214.2(h)(4)(iv)(C) will also state that, in accordance with 8 CFR 103.2(b) and 214.2(h)(9), USCIS may request copies of contracts, work orders, or other similar corroborating evidence on a case-by-case basis in all cases, regardless of where the beneficiary will be placed. While USCIS already has general authority to request any document it deems necessary, this additional provision will make it clear that USCIS has authority to specifically request contracts and other similar evidence. This provision will apply to any H-1B petition, including a petition where the petitioner indicates that the beneficiary will exclusively work in-house. For example, if a petitioner indicates that the beneficiary will develop system software for a client but will perform such work exclusively at the petitioner's premises, USCIS may request a copy of the client contract or other corroborating evidence to confirm that the relevant work exists to ensure that the beneficiary will be employed in a specialty occupation.

#### *E. Maximum Validity Period for Third-Party Placements*

While DHS recognizes that third-party arrangements may generally be part of a legitimate business model, this business model presents more challenges in the context of the H-1B program and USCIS' ability to better ensure eligibility and compliance. Accordingly, DHS will

<sup>106</sup> See Part II.A. above, for descriptions of program violations and other issues arising with third-party placements. See also 144 Cong. Rec. E2323-01, E2323, 1998 WL 785735 (stating "[t]he employers most prone to abusing the H-1B program are called 'job contractors' or 'job shops'. Much, or all, of their workforces are composed of foreign workers on H-1B visas. Many of these companies make no pretense of looking for American workers and are in business to contract their H-1Bs out to other companies. The companies to which the H-1Bs are contracted benefit in that the wages paid to the foreign workers are often well below what comparable Americans would receive. Also, the companies don't have to shoulder the obligations of being the legally recognized employers—the job contractors/shops remain the official employers") (statement of Rep. Lamar Smith, then chairman of the Subcommittee on Immigration and Claims).

<sup>107</sup> See § 49:35. Contract scope—Master services agreement, 3 Successful Partnering Between Inside and Outside Counsel § 49:35.

<sup>108</sup> See § 49:37. Contract scope—Statements of work, 3 Successful Partnering Between Inside and Outside Counsel § 49:37.

<sup>109</sup> When requested evidence may contain trade secrets, for example, the petitioner may redact or sanitize the relevant sections to provide a document that is still sufficiently detailed and comprehensive, yet does not reveal sensitive commercial information. Although a petitioner may always refuse to submit confidential commercial information if deemed too sensitive, the petitioner must also satisfy the burden of proof. Cf. *Matter of Marques*, 16 I&N Dec. 314, 316 (BIA 1977) ("The respondent had every right to assert his claim under the Fifth Amendment. However, in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application for discretionary relief.").

<sup>110</sup> 201 F.3d at 387-88.

<sup>111</sup> *Id.*

set a 1-year maximum validity period for all H-1B petitions in which the beneficiary will be working at a third-party worksite. *See* new 8 CFR 214.2(h)(9)(iii)(A)(1). To make the determination of whether a beneficiary will be working or placed at a third-party worksite, USCIS will rely on information contained in the H-1B petition and any accompanying LCA, which must identify each worksite where the beneficiary will work and the name of any third-party entity (secondary entity) at each worksite.<sup>112</sup>

Although the maximum period of authorized admission for an H-1B nonimmigrant has been established by Congress in section 214(g)(4) of the INA, 8 U.S.C. 1184(g)(4), Congress did not specify the validity period for an approved H-1B visa petition. Congress authorized DHS to promulgate regulations setting the validity period, including a range of validity periods not to exceed the maximum period of authorized admission. *Id.* In relevant part, section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), states, “the admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe. . . .” *See also* section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1) (“The question of importing any alien as [an H-1B nonimmigrant] in any specific case or specific cases shall be determined by [DHS] . . . upon petition of the importing employer . . . . The petition shall be in such form and contain such information as [DHS] shall prescribe.”). Under current regulations at 8 CFR 214.2(h)(9)(iii), the maximum validity period an H-1B petition may be approved is “up to three years,” which necessarily allows for lesser periods as well. USCIS has an established practice of approving H-1B petitions for less than 3 years for various reasons, such as to conform to the dates of the accompanying LCA. *See id.* Further, DHS regulations already limit the validity period to 1 year in cases of temporary licensure. *See* 8 CFR 214.2(h)(4)(v)(C). Likewise, DHS will now limit the validity period for third-party placement petitions to a maximum of 1 year.

DHS believes that the 1-year limit is reasonable given the nature of third-party placements. In general, the nature

of contracting work leads to beneficiaries being more transient, as well as greater potential for changes to the terms and conditions of employment. Specifically, these are situations where the petitioner is not the end-user of the H-1B worker’s services, and the beneficiary performs work for another entity at that other entity’s worksite. DHS believes that enhanced monitoring of compliance is valuable and needed to ensure that the beneficiary is being employed consistent with the terms and conditions of the petition approval.<sup>113</sup> The fact that 6 to 12 month work orders are common in petitions involving third-party placements, based on USCIS’ program experience and review of evidence in such cases,<sup>114</sup> supports DHS’s belief that limiting the validity period to up to one year is reasonable as it more closely aligns with the length of time that a beneficiary would generally be assigned under a particular work order. It is also common based on USCIS’ program experience that, despite the requirement that the petitioner must file an amended or new H-1B petition with the corresponding LCA when there is a material change in the terms and conditions of employment,<sup>115</sup> once a certain work order expires, a petitioner may obtain another work order under

<sup>113</sup> This includes, among other terms and conditions, that the petitioner is maintaining the required employer-employee relationship with the beneficiary. Enhanced monitoring of the employer-employee relationship is particularly important in cases where a staffing company uses H-1B workers to fill positions previously occupied by the petitioner’s in-house employees.

<sup>114</sup> *See, e.g., Matter of I-S-S- LLC*, Appeal of California Service Center Decision Form I-129, Petition for a Nonimmigrant Worker, 2017 WL 959844, at \*5 (the Petitioner stated in its support letter that “industry convention is to issue work orders for a short duration and continue extending them through project completion.”); *Matter of K-T-, Inc.*, Appeal of Vermont Service Center Decision Form I-129, Petition for a Nonimmigrant Worker, 2019 WL 1469913, at \*4 (the Petitioner asserted that contract extensions for six-month intervals are common within the IT consulting industry); (Identifying Information Redacted by Agency) Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. S 1101, 2013 WL 4775077, at \*8 (on appeal, counsel states that in the petitioner’s industry, it is standard to issue work orders or statements of work for short-term project, which typically last for six to nine months, and that it “is neither typical nor normal for a company to have a [statement of work] that covers a three-year period of time.”).

<sup>115</sup> *See* 8 CFR 214.2(h)(2)(i)(E) (requiring that a petitioner file an amended or new petition to reflect any material changes in the terms and conditions of employment or training or the alien’s eligibility as specified in the original approved petition), (h)(11)(i)(A) (requiring the petitioner to “immediately notify the [agency] of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility”); *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 547 (AAO 2015).

changed terms and conditions, including a different work location, or even assign the beneficiary to a different client, without timely filing the required amended or new petition. Such unaccounted changes increase the risk of violations of H-1B program requirements. DHS believes that continuing to approve third-party petitions for longer periods of time, including the maximum three-year validity period, would greatly diminish USCIS’ ability to properly monitor program compliance in cases where fraud and abuse are more likely to occur.

DHS considered an alternative of limiting validity periods only when the beneficiary would “primarily” work at a third-party worksite. DHS believes that this alternative would allow petitioners to easily avoid the limited validity period provision. For example, if “primarily” were defined to mean more than half of the time, the petitioner could claim that a beneficiary would not work 51% of the time (and thus not “primarily”) at a third-party worksite to circumvent this limitation. This would undermine the effectiveness of the rule. It would also create additional burdens on DHS in that it would require adjudicators to review and evaluate evidence regarding where a beneficiary would “primarily” be placed. Further, DHS believes that excluding any location that would not require an LCA from the definition of “worksite” provides sufficient flexibility in the application of this rule.<sup>116</sup> Therefore, DHS rejected the alternative of limiting validity periods only when the beneficiary would “primarily” work at a third-party worksite.

DHS believes that limiting approvals for third-party placement petitions to a maximum of 1 year will allow the agency to more consistently and thoroughly monitor a petitioner’s and beneficiary’s continuing eligibility, including whether the beneficiary has maintained H-1B status, whether the beneficiary’s position remains a specialty occupation (e.g., whether the terms of the contract or placement have changed), and whether any changes in the nature of the placement interfere with the necessary employer-employee relationship between the petitioner and the beneficiary, through the adjudication of more frequent petitions

<sup>116</sup> For example, DOL’s definition of worksite (which DHS adopts) excludes locations where an H-1B nonimmigrant’s job functions may necessitate frequent changes of location with little time spent at any one location, such as jobs that are peripatetic in nature. *See* 20 CFR 655.715.

<sup>112</sup> The Labor Condition Application for H-1B, H-1B1 and E-3 Nonimmigrant Workers Form ETA-9035CP—General Instructions for the 9035 & 9035E, defines “secondary entity” as “another entity at which or with which LCA workers will be placed during the period of certification.” *See* <https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Form%20ETA-9035CP%20Instructions.pdf>.

requesting an extension of status.<sup>117</sup> Additionally, it will reduce the potential for employer violations. Based on the agency's experience in administering the H-1B program, significant employer violations, including placing beneficiaries in non-specialty occupation jobs, may be more likely to occur when petitioners place beneficiaries at third-party worksites.<sup>118</sup> In many instances, the relationship between the petitioning employer and the H-1B beneficiary is more attenuated when the beneficiary is working at a third-party worksite. Petitioners who contract H-1B workers out to another company at a third-party worksite generally have less visibility into the actual work being performed, including whether it is the appropriate work for a specialty occupation, the hours worked, and the relationship between the beneficiary and his or her on-site supervisor. As the GAO stated in its 2011 report to Congress, DOL's Wage and Hour investigators reported that a large number of the complaints they received were related to the activities of staffing companies, where the H-1B beneficiary is placed at a third-party worksite.<sup>119</sup>

DHS believes that fraud and abuse is more likely to occur in cases involving third-party placements, as evidenced by the higher rate of noncompliance in those cases. Noncompliance is determined when an immigration officer conducts a compliance review to ensure that the petitioner (employer) and beneficiary (job applicant or other potential employee) follow the terms and conditions of their petition.<sup>120</sup> This process includes reviewing the petition and supporting documents, researching information in public records and government systems, and, where

possible, interviewing the petitioner and beneficiary through unannounced site visits.<sup>121</sup> DHS analyzed a sampling of H-1B petitions filed during FYs 16-19 (through March 27, 2019) and found that the noncompliance rate for petitioners who indicated the beneficiary works at an off-site or third-party location is much higher compared to worksites where the beneficiary does not work off-site (21.7 percent vs 9.9 percent).<sup>122</sup> DHS believes that limiting the maximum validity period for petitions where beneficiaries are placed at third-party worksites is reasonable given this significantly higher noncompliance rate, and so will also encourage compliance with the regulations and improve the program's overall integrity.

When approving an H-1B petition involving third-party placement, USCIS will generally consider granting the maximum validity period of 1 year, barring a separate consideration consistent with the controlling statutes and DHS regulations (such as the beneficiary reaching the 6-year maximum period of authorized admission pursuant to section 214(g)(4) of the INA, and not being eligible for an exemption from that 6-year limit) compelling a shorter approval period. This general practice will have the added benefit of providing petitioners who provide sufficient evidence a degree of certainty with respect to what validity period to request and to expect, if approved. If a petitioner indicates in the H-1B petition or LCA that the beneficiary will be working at a third-party worksite, then the maximum validity period the petitioner should request is 1 year. And if USCIS approves such petition for the maximum period of 1 year after making a determination that the petitioner has met its burden of proof, then there should be no reason to dispute the length of the validity period since it is set by regulation.<sup>123</sup>

As with any petition requesting an extension of stay, a petition requesting a 1-year extension of stay for a beneficiary who will work at a third-party worksite may be accompanied by either a new, or a photocopy of the prior, LCA from DOL that the petitioner continues to have on file, provided that the LCA is still valid for the period of time requested and properly corresponds to the petition. See 8 CFR 214.2(h)(15)(ii)(B). In this sense, a prior

LCA is still valid if the validity period does not expire before the end date of the extension petitioner's requested validity period.<sup>124</sup> However, note that a new LCA is required if there are any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. See 8 CFR 214.2(h)(2)(i)(E) (requiring that a petitioner file an amended or new petition to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition, and that "this requirement includes a new labor condition application").

DHS recognizes that new 8 CFR 214.2(h)(9)(iii)(A)(1) will require those affected petitioners to submit extension petitions more frequently, thereby incurring more filing costs. DHS further recognizes that some of these affected petitioners may incur significantly higher filing costs with each extension petition, namely, the 9-11 Response and Biometric Entry-Exit Fee (Pub. L. 114-113 Fee) of \$4,000.<sup>125</sup> If the Fee Schedule Final Rule takes effect, the Public Law 114-113 Fee would apply to any petitioner filing an H-1B petition that employs 50 or more employees in the United States if more than 50 percent of the petitioner's employees in the aggregate are in H-1B, L-1A or L-1B nonimmigrant status, including filing an extension of stay request.<sup>126</sup> DHS recognizes the increased cost on this population of affected petitioners, but believes this increased cost is justified due to the importance of better ensuring compliance with the terms and conditions of the petition approval in these instances, as explained above. Additionally, nothing in this rulemaking limiting the maximum

<sup>117</sup> The approval of a new or amended petition for a beneficiary placed at a third-party worksite will also be limited to a maximum of 1 year. See 8 CFR 214.2(h)(2)(i)(E); see also *Matter of Simeio Solutions, LLC*, *supra* at 547.

<sup>118</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Research Division (2019). Summary of H-1B Site Visits Data (showing a higher rate of noncompliance for petitioners who indicated the beneficiary works at an off-site or third-party location compared to worksites where the beneficiary does not work off-site). See also, e.g., U.S. Gov't Accountability Office, GAO-11-26, H-1B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program (2011) (describing the lack of accountability and types of common violations for staffing companies).

<sup>119</sup> GAO-11-26, *supra*.

<sup>120</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Administrative Site Visit and Verification Program* (last updated Sept. 9, 2019), <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program> (last visited Sept. 18, 2020).

<sup>121</sup> *Id.*

<sup>122</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Research Division (2019). Summary of H-1B Site Visits Data.

<sup>123</sup> Note, however, that a petitioner is not precluded from filing a motion or appeal.

<sup>124</sup> Because the maximum validity period of a certified LCA is three years, see 20 CFR 655.750(a), DHS recognizes that the validity date of the LCA and the requested validity date in the extension petition will not always match. DHS will accept a prior LCA as long as that LCA is still valid, as explained above.

<sup>125</sup> Consolidated Appropriations Act, 2016, Public Law 114-113, December 18, 2015, 129 Stat 2242.

<sup>126</sup> Presently, the Public Law 114-113 fee is required for H-1B petitions filed by certain petitioners only when the Fraud Fee also applies, meaning that it is not currently required for H-1B extensions. The Fee Schedule Final Rule will require payment of the Public Law 114-113 fee for all H-1B petitions filed by those petitioners, unless the petition is an amended petition without an extension of stay request. While implementation of the Fee Schedule Final Rule has been enjoined, DHS nevertheless estimates costs of this interim final rule based on the fees that will be required if the injunction is lifted and the Fee Schedule Final Rule takes effect so as to avoid underestimating potential costs of this interim final rule. See *supra* note 9.

validity period to 1 year for H-1B aliens placed at third-party worksites would directly result in such alien worker being unable to obtain the statutory maximum six years of H-1B status. Instead, through this rulemaking, petitioners with this business model will have to pay more filing costs for the continued use of H-1B workers than they currently do. It is valuable to note that the amount and parameters of the Public Law 114-113 Fee is mandated by Congress. In creating the Public Law 114-113 Fee, the goal was to impose this additional fee on employers that overly rely on H-1B or L nonimmigrant workers.<sup>127</sup>

#### F. Written Explanation for Certain H-1B Approvals

DHS is amending its regulations to require its issuance of a brief explanation when an H-1B nonimmigrant petition is approved but USCIS grants an earlier end validity date than requested by the petitioner. See new 8 CFR 214.2(h)(9)(i)(B). Providing such an explanation will help ensure that the petitioner is aware of the reason for the limited validity approval.

#### G. Revising the Itinerary Requirement for H-1B Petitions

DHS is revising the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) (for service or training in more than one location) to specify that this particular provision will not apply to H-1B petitions. See new 8 CFR 214.2(h)(2)(i)(B). DHS is making this revision in response to a recent court decision specific to H-1B petitions.<sup>128</sup> The itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) will still apply to other H classifications. In addition, DHS will still apply the itinerary requirement at 8 CFR 214.2(h)(2)(i)(F)(1) for H-1B petitions filed by agents.

#### H. Site Visits

Pursuant to its general authority under sections 103(a) and 287(b) of the INA, 8 U.S.C. 1103(a) and 1357(b), and 8 CFR 2.1, USCIS conducts inspections, evaluations, verifications, and compliance reviews to ensure that an alien is eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. These inspections and other compliance reviews may be conducted telephonically or electronically, as well as through physical on-site inspections

(site visits). The existing authority to conduct inspections is vital to the integrity of the immigration system as a whole, including the H-1B program specifically, and protecting American workers. In this rule, DHS is adding regulations specific to the H-1B program to codify its existing authority and clarify the scope of inspections—particularly on-site inspections—and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections.<sup>129</sup> See new 8 CFR 214.2(h)(4)(i)(B)(7). The authority of USCIS to conduct on-site inspections or other compliance reviews to verify information does not relieve the petitioner of its burden of proof or responsibility to provide information in the petition (and evidence submitted in support of the petition) that is complete, true, and correct.

In 2008, USCIS conducted a review of 246 randomly selected H-1B petitions filed between October 1, 2005, and March 31, 2006, and found violations ranging from “document fraud to deliberate misstatements regarding job locations, wages paid, and duties performed” in 20.7 percent of the cases reviewed.<sup>130</sup> Following this, in July 2009, USCIS started the Administrative Site Visit and Verification Program as an additional way to verify information in certain visa petitions. Under this program, USCIS Fraud Detection and National Security (FDNS) officers make unannounced site visits to collect information as part of a compliance review. A compliance review verifies whether petitioners and beneficiaries are following the immigration laws and regulations that are applicable in a particular case. This process includes researching information in government databases, reviewing public records and evidence accompanying the petition, and interviewing the petitioner and beneficiary.<sup>131</sup> It also includes conducting site visits.

In addition, beginning in 2017, USCIS began taking a more targeted approach in conducting site visits related to the H-1B program. USCIS started focusing

on H-1B-dependent employers (those who have a high ratio of H-1B workers as compared to U.S. workers, as defined in section 212(n) of the INA), cases in which USCIS cannot validate the employer's basic business information through commercially available data, and employers petitioning for H-1B workers who work off-site at another company or organization's location.

The site visits conducted by USCIS through the Administrative Site Visit and Verification Program have uncovered a significant amount of noncompliance in the H-1B program. From Fiscal Year (FY) 2013 through FY 2016, USCIS conducted 30,786 H-1B compliance reviews. Of those, 3,811 (12 percent) were found to be noncompliant.<sup>132</sup> From FY 2016 through March 27, 2019, USCIS conducted 20,492 H-1B compliance reviews and found 2,341 (11.4 percent) to be noncompliant.<sup>133</sup> Further, DHS analyzed the results of the compliance reviews from FY16–FY19 and found that the noncompliance rate for petitioners who indicated the beneficiary works at an off-site or third-party location is much higher compared to worksites where the beneficiary does not work off-site (21.7 percent versus 9.9 percent, respectively).<sup>134</sup>

Site visits are important to maintaining the integrity of the H-1B program and in detecting and deterring fraud and noncompliance with H-1B program requirements.<sup>135</sup> By better

<sup>127</sup> USCIS, Fiscal Year 2017 Report to Congress: *H-1B and L-1A Compliance Review Site Visits*, Fraud Detection and National Security Compliance Review Data (October 1, 2012 to September 30, 2016), p. 7 (January 17, 2018), available at <https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf> (last visited Aug. 11, 2020).

<sup>128</sup> Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Research Division (PRD) (2019). Summary of H-1B Site Visits Data.

<sup>129</sup> *Id.*

<sup>130</sup> DHS acknowledges the 2017 Office of Inspector General report that addressed concerns with the H-1B site visit program and made recommendations for improvement. OIG-18-03, *supra*. Since the issuance of this report, USCIS has greatly improved its site visit program pursuant to the report's recommendations, such that USCIS believes the concerns addressed in the 2017 report no longer pertain. Specifically, the report's assessment that “USCIS site visits provide minimal assurance that H-1B visa participants are compliant and not engaged in fraudulent activity” no longer pertains. As of March 31, 2019, the recommendations have been resolved. See DHS, Office of Inspector General, DHS Open Unresolved Recommendations Over Six Months Old, as of March 31, 2019, [https://www.oig.dhs.gov/sites/default/files/DHS-Open-Recommendations-As-Of-033119\\_053019.pdf](https://www.oig.dhs.gov/sites/default/files/DHS-Open-Recommendations-As-Of-033119_053019.pdf) (not listing OIG-18-03 as an “open unresolved” report). DHS maintains that site visits, generally, are an important and effective tool

Continued

<sup>127</sup> 85 FR at 46867.

<sup>128</sup> See *ITServe*, 2020 WL 1150186, at \*21 (“the itinerary requirement in the INS 1991 Regulation [codified at 8 CFR 214.2(h)(2)(i)(B)] . . . has been superseded by statute and may not be applied to H-1B visa applicants”).

<sup>129</sup> Although DHS is only revising H-1B regulations at this time, DHS reiterates that it has the same authority to conduct on-site inspections and other compliance reviews for other nonimmigrant and immigrant categories.

<sup>130</sup> Written Testimony of Donald Neufeld, Associate Director, Service Center Operations Directorate, USCIS (March 31, 2011), available at [https://www.uscis.gov/sites/default/files/USCIS/Resources/Congress/Testimonies/2011/testimony\\_2011331\\_H-1B\\_Neufeld.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Congress/Testimonies/2011/testimony_2011331_H-1B_Neufeld.pdf).

<sup>131</sup> Outside of the Administrative Site Visit and Verification Program, USCIS conducts forms of compliance review in every case, whether it is by researching information in relevant government databases or by reviewing public records and evidence accompanying the petition.

ensuring program integrity and detecting and deterring fraud and noncompliance, DHS will better ensure that the H-1B program is used appropriately and that the economic interests of U.S. workers are protected. Therefore, as noted above, DHS is adding regulations specific to the H-1B program to set forth the scope of on-site inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections. The new regulations make clear that inspections may include, but are not limited to, an on-site visit of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the H-1B petition, such as facts relating to the petitioner's and beneficiary's H-1B eligibility and compliance. See new 8 CFR 214.2(h)(4)(i)(B)(7)(i). The new regulation also clarifies the possible scope of an inspection, which may include the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable. DHS believes that the ability to inspect various locations is critical since the purpose of a site inspection is to confirm information related to the H-1B petition, and any one of these locations may have information relevant to a given petition.

The new regulation also states that, if USCIS is unable to verify facts related to an H-1B petition or to compliance with H-1B petition requirements due to the failure or refusal of the petitioner or third-party to cooperate with a site visit,<sup>136</sup> then such failure or refusal may be grounds for denial or revocation of any H-1B petition for H-1B workers performing services at the location or locations which are a subject of inspection, including any third-party worksites. See new 8 CFR 214.2(h)(4)(i)(B)(7)(iii). This new provision will put petitioners on notice

for the H-1B program. The new site visit provisions at 8 CFR 214.2(h)(4)(i)(B)(7)(i) will directly support USCIS' continued efforts to strengthen the effectiveness of the site visit program and the integrity of the H-1B program overall.

<sup>136</sup> In the context of a FDNS field inquiry, failure to cooperate means that contact with the petitioner or third party was made, the FDNS officer had the chance to properly identify her/himself, and the petitioner or third party refused to speak to the officer or agreed to speak, but did not provide the information requested within the time period specified.

of the specific consequences for noncompliance, whether by them or by a contractual third-party. It has long been established that, in H-1B visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought.<sup>137</sup> If USCIS conducts a site visit in order to verify facts related to the H-1B petition or to verify that the beneficiary is being employed consistent with the terms of the petition approval, and is unable to verify relevant facts and otherwise confirm compliance, then DHS believes that it would be reasonable to conclude that the petitioner will not have met its burden of proof and the petition may be properly denied or revoked. This would be true whether the unverified facts relate to a petitioner worksite or a third-party worksite at which a beneficiary has been or will be placed by the petitioner. It would also be true whether the failure or refusal to cooperate is by the petitioner or a third-party.

In addition, with respect to a failure or refusal to cooperate by a third-party, DHS believes this provision is reasonable because the third-party is benefiting from the services performed by the H-1B worker at its location. The third-party should not be permitted to benefit from the services performed by the H-1B worker if it simultaneously refuses to allow DHS access to verify that those services are being performed in accordance with the law. Additionally, if this provision did not apply to third-party worksites, such that a third-party's failure to cooperate with a site visit could not be grounds for denial or revocation, then this would create an unfair loophole with respect to third-party worksites, which could be exploited by unscrupulous petitioners and undermine the integrity of the H-1B program.

As with all other new provisions in this interim final rule, new 8 CFR 214.2(h)(4)(i)(B)(7)(iii) will apply to petitions filed on or after the effective date of the regulation. If, for example, a third-party refuses to cooperate with a site visit conducted after the effective date of the regulation, but in connection with a petition that was filed before the effective date of the regulation, USCIS will make a final decision on that petition under the legal framework in effect at the time the petition was filed.

### *I. Severability*

Finally, DHS has added a clause to clarify its intent with respect to the provisions being amended or added by

<sup>137</sup> See section 291 of the INA, 8 U.S.C. 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

this rule; DHS intends that all the provisions covered by this rule function separately from one another and be implemented as such. Therefore, in the event of litigation or other legal action preventing the implementation of some aspect of this rule, DHS intends to implement all others to the greatest extent possible.

## **VI. Statutory and Regulatory Requirements**

### *A. Administrative Procedure Act*

The COVID-19 pandemic is an unprecedented "economic cataclysm."<sup>138</sup> This is one of the direst national emergencies the United States has faced in its history. In just one week, unemployment claims skyrocketed from "a historically low number" to the most extreme unemployment ever recorded: Nearly quintuple the previous worst-ever level of unemployment claims, observed during the 1982 recession.<sup>139</sup> DHS must respond to this emergency immediately.

Accordingly, this rule is being issued without prior notice and opportunity to comment pursuant to 5 U.S.C. 553(b)(B). The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). The good cause exception for forgoing notice and comment rulemaking "excuses notice and comment in emergency situations, . . . or where delay could result in serious harm." *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good cause exception is "narrowly construed and only reluctantly countenanced," the Department has appropriately invoked the exception in this case, for the reasons set forth below.<sup>140</sup>

The pandemic emergency's economic impact is an "obvious and compelling fact" that justifies good cause to forgo regular notice and comment. Such good cause is "justified by obvious and compelling facts that can be judicially noticed." *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1490 (Temp. Emer. Ct. App. 1983).

The reality of the COVID-19 national emergency is omnipresent and

<sup>138</sup> Ben Casselman et al., *New Data Shows Staggering Toll of Outbreak*, N.Y. Times, Mar. 27, 2020, at A1.

<sup>139</sup> *Front Page of the New York Times*, N.Y. Times, Mar. 27, 2020, at A1; Casselman et al., *supra* note 140, at A1. See also *id.* tbl. 1.

<sup>140</sup> *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (quoting *New Jersey v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir.1980)).

undeniable. In addition to “obvious and compelling facts” known to virtually all Americans during this pandemic, multiple executive orders and declarations further establish the fact of a “crisis,” “fiscal calamity,” and unprecedented national emergency. *Sorenson Commc’ns Inc. v. F.C.C.*, 755 F.3d 702, 707 (D.C. Cir. 2014) (“Though no particular catechism is necessary to establish good cause, something more than an unsupported assertion is required.”). Good cause to forgo notice and comment in this instance is consistent with the principle that “use of these exceptions by administrative agencies should be limited to emergency situations.” *Am. Fed’n of Gov’t Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). “Emergencies, though not the only situations constituting good cause, are the most common.” *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 n.2 (9th Cir. 1992).

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act in response to COVID-19.<sup>141</sup> On March 13, 2020, President Trump declared a National Emergency concerning the COVID-19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the United States.<sup>142</sup> On June 4, the President issued the E.O. 13927 Accelerating the Nation’s Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities, which among other things urges agencies to “take all appropriate steps to use their lawful emergency authorities and other authorities to respond to the national emergency and to facilitate the Nation’s economic recovery . . . [including] other actions . . . that will strengthen the economy and return Americans to work.”<sup>143</sup> On June 22, 2020, the President issued a *Proclamation Suspending Entry of Aliens Who Present*

*a Risk to the U.S. Labor Market Following the Coronavirus Outbreak*.<sup>144</sup> On June 29, 2020, the President issued further clarification in a *Proclamation on Amendment to Proclamation 10052*.<sup>145</sup> Subject to certain exceptions, the proclamation, as amended, restricts the entry of certain immigrants and nonimmigrants, including certain H-1B nonimmigrants, into the United States through December 31, 2020 as their entry would be detrimental to the interests of the United States. The proclamation notes that “between February and April of 2020 . . . more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H-1B and L workers to fill positions.” While the proclamation only restricts new entries (with certain exceptions) by aliens who do not have H-1B visas or other listed travel documents on the effective date of the proclamation, Section 5 of the proclamation directs the Secretary of Homeland Security to “as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action regarding . . . ensuring that the presence in the United States of H-1B nonimmigrants does not disadvantage United States workers.” The issuance of this interim final rule to strengthen the integrity of the H-1B nonimmigrant visa program is thus also consistent with the aims of the new proclamation.

H-1B workers comprise a much larger share of the U.S. labor market than the 65,000 annual numerical limitations and therefore have the potential to impact the availability of job opportunities for similarly situated U.S. workers who may be competing for jobs with H-1B workers as well as their wages and working conditions, particularly in industries where H-1B workers are predominantly employed. In recent years, the overwhelming majority of H-1B petitions have been filed for positions in the one industry, the IT industry—the share of H-1B workers in computer-related occupations grew from 32 percent in FY 2003 to 56 percent in FY2019.<sup>146</sup> The 5-year average annual number of H-1B petitions approved outside the numerical limitations established by Congress, which includes petitions for

continuing H-1B workers who were previously counted toward an annual numerical allocation and who have time remaining on their 6-year period of authorized admission, see INA section 214(g)(7), 8 U.S.C. 1184(g)(7), was approximately 214,371 based on DHS data.<sup>147</sup> As of September 30, 2019, the total H-1B authorized-to-work population was approximately 583,420.<sup>148</sup> The total H-1B authorized-to-work population, rather than the yearly cap, is more indicative of the scope of the H-1B program and the urgent need to strengthen it to protect the economic interests of U.S. workers. This is particularly urgent given the exceptionally high unemployment rate in the United States—10.2 percent as of August 7, 2020.<sup>149</sup> In addition to high unemployment generally, there has been a significant jump in unemployment due to COVID-19 between August 2019 and August 2020 in two industry sectors where a large number of H-1B workers are employed, from 4.7 percent to 8.6 percent in the Information sector, and from 3.2 to 7.2 percent in the Professional and Business Services sector.<sup>150</sup>

The changes being made through this rule clarify statutory requirements and limit the potential for fraud and abuse in the H-1B program, thereby protecting the wages, working conditions, and job opportunities of U.S. workers, while continuing to provide U.S. employers with access to qualified workers consistent with congressional intent. Namely, this rule clarifies the requirements for petitioners to prove that H-1B workers will be employed in a specialty occupation, as required by 8 U.S.C. 1182(i). This requirement is

<sup>147</sup> Office of Policy and Strategy, Policy Research Division (PRD) Claims 3 and USCIS analysis. July 29, 2020.

<sup>148</sup> See *supra* note 11.

<sup>149</sup> U.S. Dep’t of Labor, Bureau of Labor Statistics, Economic News Release, *Employment Situation News Release* (Aug. 7, 2020), available at [https://www.bls.gov/news.release/archives/empst\\_08072020.htm](https://www.bls.gov/news.release/archives/empst_08072020.htm) (last visited Aug. 11, 2020).

<sup>150</sup> See, e.g., U.S. Dep’t of Labor, Bureau of Labor Statistics, Economic News Release, *Table A-14. Unemployed Persons by Industry and Class of Worker, Not Seasonally Adjusted* (last modified Sept. 23, 2020), available at <https://www.bls.gov/news.release/empst.t14.htm> (last visited Sept. 29, 2020); United States Census Bureau, Industry and Occupation Code Lists & Crosswalks, *Census 2017 Industry List with Crosswalk*, available at <https://www.census.gov/topics/employment/industry-occupation/guidance/code-lists.html> (last visited Aug. 11, 2020). “Information” sector includes internet publishing and broadcasting and web search portals, and Data processing, hosting, and related services. “Professional and Business Services, i.e. Professional, Scientific, and Management, and Administrative and Waste Management Services” includes Computer systems design and related services, and Management, scientific, and technical consulting services.

<sup>141</sup> HHS, Determination that a Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last reviewed Aug. 11, 2020). See also HHS, Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020).

<sup>142</sup> Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020). See also White House, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited Aug. 11, 2020).

<sup>143</sup> See Executive Order 13927, *Accelerating the Nation’s Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities*, 85 FR 35165, sec. 2 (Jun. 9, 2020).

<sup>144</sup> Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 FR 38263 (Jun. 25, 2020).

<sup>145</sup> Proclamation 10054 of June 29, 2020, *Amendment to Proclamation 10052*, 85 FR 40085 (Jul. 2, 2020).

<sup>146</sup> See *supra* note 1.

intended to ensure that the H–1B classification is used as intended by Congress while ensuring that H–1B workers are not negatively affecting U.S. workers. The rule revises the definition of “United States employer” and defines the term “employer-employee relationship” to more clearly establish what it means for the petitioner to be a U.S. employer for purposes of H–1B petition eligibility. In addition, the rule limits the petition validity period for third-party placements to a maximum of 1 year. Finally, this rule includes consequences for the failure to comply with USCIS site visits—one of the key ways in which USCIS verifies information provided by the petitioner and ensures compliance with statutory and regulatory requirements. The rule makes clear that if USCIS is denied access to a worksite to conduct a site visit, USCIS can deny or revoke any H–1B petition for workers performing services at that worksite. These changes cumulatively limit the potential for fraud and abuse, particularly in third-party worksite cases, and better ensure that petitioners have insight into and a tangible connection to the work H–1B beneficiaries will be doing in order to ensure that H–1B beneficiaries will be employed by the petitioning employers in specialty occupations to fill structural skill and employment gaps in the U.S. labor force. Given exceptionally high unemployment in the United States—highest since the Great Depression,<sup>151</sup> including in the industries where a large share of H–1B workers is employed—these regulatory changes are urgently needed to ensure that the Nation continues toward economic recovery without disadvantaging U.S. workers.

Courts have found “good cause” under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. For example, an agency may rely upon the good-cause exception to address “a serious threat to the financial stability of [a government] benefit program,” *Nat’l Fed’n of Fed. Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982), and “[c]ourts have upheld a ‘good cause’ exception when notice and comment could result in serious damage to important interests. *Id.* at 611–12.

Here, delay in responding to the COVID–19 economic emergency and its cataclysmic unemployment crisis

threatens a “weighty, systemic interest” that this rule protects: Ensuring the employment of H–1B workers is consistent with the statutory requirements for the program and thus is not disadvantaging U.S. workers. *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012). Already, the impact of the COVID–19 unemployment crisis is projected to last a decade.<sup>152</sup> Loss or prolonged lack of employment reduces or eliminates an unemployed person’s income, and therefore has the tendency to reduce that person’s demand for goods and services as a consumer. This reduced demand can cause further job losses among the producers that would otherwise supply the unemployed person’s demands. Therefore, the faster the United States can address high unemployment, the better it can protect future employment. But the slower unemployment recovers in the present, the longer it will languish into the future. Good cause to forego notice and comment rulemaking in this case is “an important safety valve to be used where delay would do real harm.” *U.S. Steel Corp. v. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979). Each effort to strengthen the United States labor market for U.S. workers during this emergency, however marginal in isolation, is necessary to accomplish the goal of facilitating an economic recovery in the aggregate.

Furthermore, the relatively limited scope of this rule also conforms it to the proper application of the “good cause” exception. First, this rule operates as an interim rule, not yet a final rule, and thus may be subject to change in the future. “[T]he interim status of the challenged rule is a significant factor” favoring the good cause “determination.” *Mid-Tex Elec. Co-op., Inc. v. F.E.R.C.*, 822 F.2d 1123, 1132 (D.C. Cir. 1987). Second, the rule only affects several discrete aspects of the H–1B program, as discussed above. “[T]he less expansive the interim rule, the less the need for public comment.” *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (citing *AFL–CIO v. Block*, 655 F.2d at 1156). “The more expansive the regulatory reach of these rules, of course, the greater the necessity for public comment.” 655 F.2d at 1156.

<sup>152</sup> See, e.g., Annekin Tappe, *Unemployment rate won’t recover for the next decade*, CBO projects, CNN, July 2, 2020, <https://www.cnn.com/2020/07/02/economy/congressional-budget-office-projections-economy/index.html>; Congressional Budget Office, *An Update to the Economic Outlook: 2020 to 2030* (July 2, 2020), available at <https://www.cbo.gov/system/files/2020-07/56442-CBO-update-economic-outlook.pdf> (last visited Aug. 11, 2020).

Therefore, consistent with the above authorities, the Department is bypassing notice and comment requirements of 5 U.S.C. 553(b) and (c) to urgently respond to the COVID–19 resulting economic crises, including high unemployment. Instead of amending its regulations through notice and comment rulemaking which is generally a lengthy process, DHS is taking post-promulgation comments and providing a 60-day delayed effective date to ensure that the regulated public has advanced notice to adjust to these regulatory changes.

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

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs, benefits, and transfers of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Pursuant to E.O. 12866 (Regulatory Planning and Review), the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget has determined that this is an economically significant regulatory action. However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A).

#### 1. Summary of Economic Impacts

DHS is amending its regulations governing H–1B specialty occupation nonimmigrant workers in this interim final rule. DHS is implementing a number of revisions and clarifications to better ensure that each H–1B nonimmigrant worker will be working for a qualified petitioner and in a job which meets the statutory definition of specialty occupation, and to help protect the wages and working conditions of U.S. workers while improving the integrity of the H–1B program. This interim final rule amends the relevant sections of DHS regulations to reflect these changes.

For this analysis, DHS uses the term “H–1B petition” or “Form I–129 H–1B” to generally refer to the historical *Form I–129 (H Classification Supplement, H–1B and H–1B1 data collection)* and the planned *Form I–129H1* that may replace the historical form. Where it is more

<sup>151</sup> Andrew Soergel, *Unemployment Highest Since Great Depression as Coronavirus Collapses Labor Market*, U.S. News & World Report, May 8, 2020, <https://www.usnews.com/news/national-news/articles/2020-05-08/unemployment-highest-since-great-depression-as-coronavirus-collapses-labor-market>.

accurate to specifically refer to the Form I-129H1 that will take effect if the Fee Schedule Final Rule takes effect, DHS uses the term “Form I-129H1.”<sup>153</sup>

For the 10-year implementation period of the rule (FY2021 to FY2030), DHS estimates the annual net societal costs to be \$51,406,937 (undiscounted)

in FY2021, \$416,212,496 (undiscounted) in FY2022, \$541,795,976 (undiscounted) from FY2023 to FY2027 each year, \$388,592,536 (undiscounted) from FY2028 to FY2030 each year. DHS estimates the annualized net societal costs of the rule to be \$430,797,915,

annualized at 3-percent and \$425,277,621, annualized at 7-percent discount rates.

Table 1 provides a detailed summary of the regulatory changes and their impacts.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS OF THE INTERIM FINAL RULE

Provision	Description of change to provision	Estimated costs of provisions	Estimated benefits of provisions
(a) Revising the regulatory definition and standards for specialty occupation so they align more closely with the statutory definition of the term.	The changes in the Form I-129H1 result in additional time to complete and file Form I-129H1 as compared to the time burden to complete the current Form I-129. The time burden will change to 4.5 hours from the current 4.0 hours. DHS applies the additional time burden to complete and file Form I-129H1 (0.5 hours per petition).	Quantitative: Petitioners— • \$24,949,861 costs annually for petitioners completing and filing Form I-129H1 petitions with an additional time burden of 30 minutes. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • By reducing uncertainty and confusion surrounding disparities between the statute and the regulations, this rule will better ensure that approvals are only granted for positions adhering more closely to the statutory definition. This rule will also result in more complete petitions and allow for more consistent and efficient adjudication decisions.
(b) Requiring corroborating evidence of work in a specialty occupation 8 CFR 214.2(h)(4)(iv).	The petitioner must establish, at the time of filing, that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. In addition, all H-1B petitions for beneficiaries who will be placed at a third-party worksite must submit evidence showing that the beneficiary will be employed in a specialty occupation, and that the petitioner will have an employer-employee relationship with the beneficiary. USCIS may request copies of contracts, work orders, or other similar corroborating evidence on a case-by-case basis in all cases, regardless of where the beneficiary will be placed.	Quantitative: Petitioners— • \$17,963,871 in costs annually to petitioners to submit contractual documents, work orders, or similar evidence required by this rule to establish an employer-employee relationship and qualifying employment. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • Written evidentiary requirements would serve the critical purpose of informing USCIS of the terms and conditions of the work to be performed.

<sup>153</sup> DHS estimates the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, final rule (“Fee Schedule Final Rule”), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee

Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. See, *Immigrant Legal Resource Center v. Wolf*, No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020).

DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this rule may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I-129.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS OF THE INTERIM FINAL RULE—Continued

Provision	Description of change to provision	Estimated costs of provisions	Estimated benefits of provisions
(c) Codifying in regulations existing authority to conduct site visits and other compliance reviews, and clarifying consequences for failure to allow a site visit 8 CFR 214.2(h)(4)(i)(B)(7).	DHS is clarifying that inspections and other compliance reviews may include, but are not limited to, a visit of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS considers pertinent to the petitioner's H-1B eligibility and compliance. An inspection may be conducted at locations including the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable.	Quantitative: Petitioners— • \$1,042,702 annually for the total annual opportunity cost of time for worksite inspections of H-1B petitions. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— Conducting on-site inspections and other compliance reviews is critical to detecting and deterring fraud and noncompliance. Failure or refusal of the petitioner or third-party worksite parties to cooperate in a site visit or verify facts may be grounds for denial or revocation of any H-1B petition for workers performing services at locations which are a subject of inspection, including any third-party worksites.
(d) Eliminating the general itinerary requirement for H-1B petitions 8 CFR 214.2(h)(2)(i)(B).	This provision change eliminates the general itinerary requirement for H-1B petitions.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • Cost savings \$4,490,968 annually. • Total cost savings over 10-year ranges. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.
(e) Limiting maximum validity period for third-party placement 8 CFR 214.2(h)(9)(iii)(A)(1).	Under current regulations at 8 CFR 214.2(h)(9)(iii), the maximum validity period an H-1B petition may be approved is “up to three years”. While the maximum validity period for a specialty occupation worker is currently 3 years, this interim final rule will limit the maximum validity period to 1 year for workers placed at third-party worksites. This provision will result in more extension petitions from petitioners with beneficiaries who work at third-party worksites.	Quantitative: Petitioners— • Costs \$0 in FY2021, \$376,747,030 in FY2022, \$502,330,510 in FY2023–FY2027 each year, \$349,127,070 in FY2028–FY2030 each year for the increasing Form I-129H1 petitions to request authorization to continue H-1B employment for workers placed at third-party worksites. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • USCIS would have greater oversight for those H-1B petitions most likely to involve fraud and abuse, thereby strengthening the H-1B program.
(f) Providing a Written Explanation for Certain H-1B Limited Approvals 8 CFR 214.2(h)(9)(i).	DHS will revise the regulations to require issuance of a brief explanation when an H-1B non-immigrant petition is approved but USCIS grants an earlier validity period end date than requested by the petitioner.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • Providing a written explanation for limited validity period will help ensure that the petitioner is aware of the reason for shorter validity periods. DHS/USCIS— • None.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS OF THE INTERIM FINAL RULE—Continued

Provision	Description of change to provision	Estimated costs of provisions	Estimated benefits of provisions
(g) Familiarization Cost .....	Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule in order to fully comply with the new regulation(s).	Quantitative: Petitioners— • One-time cost of \$11,941,471 in FY2021. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.

In addition to the impacts summarized above, Table 2 presents the accounting statement and as required by Circular A-4.<sup>154</sup>

TABLE 2—OMB A-4 ACCOUNTING STATEMENT  
[\$, 2019 for FY2021–FY2030]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
<b>BENEFITS</b>				
Annualized Monetized Benefits (discount rate in parenthesis).	(3 percent) N/A .....	N/A	N/A	RIA.
	(7 percent) N/A .....	N/A	N/A	RIA.
Annualized quantified, but un-monetized, benefits.	N/A			RIA.
Unquantified Benefits .....	The purpose of the changes in this interim final rule is to ensure that each H-1B nonimmigrant beneficiary will be working for a qualified petitioner and in a job that meets the statutory definition of specialty occupation. In addition, these changes will strengthen U.S. worker protections while improving the integrity of the H-1B program by preventing fraud and abuse			RIA.
<b>COSTS</b>				
Annualized monetized costs (discount rate in parenthesis).	(3 percent) \$430,797,915 .....	.....	.....	RIA.
	(7 percent) \$425,277,621 .....	.....	.....	RIA.
Annualized quantified, but un-monetized, costs.	N/A			
Qualitative (unquantified) costs .....	N/A			
<b>TRANSFERS</b>				
Annualized monetized transfers: “on budget”.	N/A .....	N/A	N/A	
From whom to whom?				
Annualized monetized transfers: “off-budget”.	N/A .....	N/A	N/A	
From whom to whom? .....	N/A .....	N/A	N/A	
Miscellaneous Analyses/Category	Effects			Source Citation
Effects on state, local, and/or tribal governments.	N/A			
Effects on small businesses .....	N/A			
Effects on wages .....	N/A			
Effects on growth .....	N/A			

<sup>154</sup> White House, Office of Management and Budget, *Circular A-4 (Sept. 17, 2003)*, available at

<https://www.whitehouse.gov/sites/whitehouse.gov/>

[files/omb/circulars/A4/a-4.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf) (last visited Aug. 11, 2020).

## 2. Provisions of the Interim Final Rule With Economic Impacts

The H-1B nonimmigrant visa program helps U.S. employers meet their business needs by temporarily employing foreign workers in specialty occupations. A specialty occupation is defined as an occupation that requires (1) theoretical and practical application of a body of highly specialized knowledge, and (2) the attainment of a bachelor's degree (or higher) in the specific specialty (or its equivalent) as a minimum qualification for entry into the occupation in the United States.<sup>155</sup> The H-1B visa program also includes workers performing services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, and services of distinguished merit and ability in the field of fashion modeling.

As discussed in detail in the preamble, the purpose of the changes in the rule is to better ensure that each H-1B nonimmigrant worker will be working for a qualified petitioner and in a job that meets the statutory definition of specialty occupation. Additionally, the changes help strengthen the integrity of the H-1B program and better ensure that visas are only awarded to qualified beneficiaries and petitioners.

DHS is amending its regulations governing H-1B specialty occupation workers by providing revisions and clarifications that will better align the

regulations with Congressional intent and will strengthen the integrity of the H-1B program. DHS is making the following amendments to the H-1B regulations through this interim final rule:

(a) Revising the regulatory definition and criteria for determining whether the job the H-1B beneficiary will be employed in is in a specialty occupation, so they align more closely with the statutory definition of the term;

(b) Requiring corroborating evidence of work in a specialty occupation;

(c) Codifying in regulations existing authority to conduct site visits and other compliance reviews, and consequences for failure to allow a site visit; and

(d) Eliminating the general itinerary requirement for H-1B petitions.

(e) Limiting maximum validity period for third-party placements;

(f) Providing a written explanation for certain H-1B approvals.

In the sections that follow, DHS discusses the quantified economic impacts of each provision listed above except for provision f) which has no quantifiable economic impact. Provision f) is qualitatively discussed in benefits section vi.

## 3. Population

In order to estimate the economic effects of this interim final rule, DHS forecasts the affected population for the ten-year period from the beginning of fiscal year (FY) 2021. The affected population is defined as the annual

population of Form I-129H1<sup>156</sup> petitions for specialty occupation workers. DHS assumes that there are three primary components that determine the population forecast: The historical number of H-1B petitions, the expected change in the number of petitions due to macroeconomic changes, and the expected changes in the number of petitions due to provisions in this interim final rule.

The historical number of H-1B petitions is summarized in Table 3 below. In each year between FY2015 and FY2019, DHS received between 123,203 and 141,190 initial H-1B petitions, with an annual average of 133,451 initial petitions received. In addition, DHS received between 235,566 and 279,946 H-1B extension petitions, with an annual average of 268,405 extension petitions received. Ignoring macroeconomic effects and any effects of this interim final rule, DHS does not expect the number of initial petitions approved to trend upwards or downwards. This is borne out in the data: Neither the annual number of initial petitions nor the annual number of extension petitions exhibit a trend; both series rise and fall over the five-year historical period. Absent changes in macroeconomic conditions and changes due to this interim final rule, DHS would expect similar numbers in FY2021 to FY2030.

<sup>155</sup> See INA 214(i)(1), 8 U.S.C. 1184(i)(1).

<sup>156</sup> See *supra* notes 9 and 153.

TABLE 3—TOTAL RECEIPTS, APPROVALS OF FORM I-129 H-1B BY TYPE OF PETITION, FY 2015 TO FY 2019

Fiscal year	Number of petitions received	Number of initial petitions received	Number of extension petitions received	Number of petitions approved	Number of initial petitions approved	Number of extension petitions approved
	A = B + C	B	C	D = E + F	E	F
2015 .....	368,160	132,594	235,566	238,956	91,267	147,689
2016 .....	398,800	129,098	269,702	304,911	87,765	217,146
2017 .....	403,149	123,203	279,946	326,798	82,041	244,757
2018 .....	418,596	141,190	277,406	298,625	76,747	221,878
2019 .....	420,574	141,170	279,404	365,199	124,816	240,383
Total .....	2,009,279	667,255	1,342,024	1,534,489	462,636	1,071,853
5-yr average .....	401,856	133,451	268,405	306,898	92,527	214,371

Source: Office of Policy and Strategy, Policy Research Division (PRD), Claims 3 and USCIS analysis. July 29, 2020.

The number of H-1B petition submissions is partially dependent on macroeconomic conditions. For example, a drastic improvement in U.S. economic conditions may result in higher demand from U.S. employers for H-1B specialty occupation workers. DHS acknowledges future uncertainty surrounding the impacts of the COVID pandemic on the U.S. economy but does not expect this to significantly alter the affected population described. Consequently, the impacts of this interim final rule are evaluated based on an assumed continuation of the conditions observed in the historical data period (FY2015–2019) over the projected period (FY2021–2030). Thus, DHS does not incorporate any macroeconomic changes in its population forecast.

Finally, the number of H-1B petitions may also change due to behavioral responses to provisions in the interim final rule. For example, provisions that increase filing costs may discourage potential petitioners from filing, and provisions that decrease the term of the H-1B validity period may result in increased filings by the same petitioners. DHS examined each of the provisions and determined that one provision would materially change the filing behavior of potential petitioners: This interim final rule will reduce the maximum validity period for third-party

placement to one year compared to the three-year current maximum validity period. This provision will result in more petitions from petitioners with beneficiaries who work at third-party worksites. DHS incorporates this increase in its FY2021–2030 forecasts of the affected population. A detailed discussion of this provision's effect on the forecasted population of petition is provided in the corresponding cost analysis subsection.

DHS acknowledges that changes to the H-1B program may impact dependent H-4 nonimmigrants. DHS is unable to quantify the number of H-1B workers that will be ineligible or no longer apply for a visa due to this interim final rule and is therefore unable to quantify the costs to the dependent H-4 nonimmigrants. H-1B nonimmigrant workers who are the beneficiaries of petitions that are denied

<sup>157</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019*, 19–21 (Mar. 5, 2020), [https://www.uscis.gov/sites/default/files/document/reports/Characteristics\\_of\\_Specialty\\_Occupation\\_Workers\\_H-1B\\_Fiscal\\_Year\\_2019.pdf](https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf) (last visited Aug. 11, 2020).

<sup>158</sup> The number of petitions approved is based on the validity start date. If validity start date is unavailable, approval is based on approval date. The number of petitions denied is based on the date the application was denied irrespective of the initial date of submission.

as a result of the petitioner's failure to establish eligibility or noncompliance with the changes made by this rule would be required to seek eligible employment to avoid additional impacts to their dependents.

DHS acknowledges that some industries may be affected more than others. According to FY2019 Annual Report to Congress,<sup>157</sup> approximately half of H-1B petitions approved are for industries related to computers, software, or data processing. These industries would be most affected by this rule.

#### i. Historical Population of H-1B Specialty Occupation Worker Program

Table 4 shows the number of receipts, approvals, and denials for all Form I-129 H-1B petitions including initials and extensions from FY2015 to FY2019.<sup>158</sup> During this period, the total annual receipts for Form I-129 H-1B petitions have steadily increased each year and ranged from a low of 368,160 in FY 2015 to a high of 420,574 in FY 2019. Accordingly, over the 5-year period, USCIS received an average of 401,856 Form I-129 H-1B petitions and approved an average of 306,898 petitions annually. DHS estimates the approval rate for Form I-129 H-1B petitions is about 78 percent and the denial rate is about 22 percent.

TABLE 4—TOTAL RECEIPTS, APPROVALS, AND DENIALS OF FORM I-129 H-1B PETITIONS WITH AN H-1B CLASSIFICATION, FY 2015 TO FY 2019

Fiscal year	Number of petitions received <sup>a</sup>	Number of petitions approved	Number of petitions denied	Number of petitions approved or denied <sup>b</sup>	Approval rate (%)	Denial rate (%)
	A	B	C	D = B + C	E = B/D	F = C/D
2015 .....	368,160	238,956	69,179	308,135	77.5	22.5
2016 .....	398,800	304,911	78,782	383,693	79.5	20.5
2017 .....	403,149	326,798	82,316	409,114	79.9	20.1
2018 .....	418,596	298,625	104,174	402,799	74.1	25.9
2019 .....	420,574	365,199	106,311	471,510	77.5	22.5
Total .....	2,009,279	1,534,489	440,762	1,975,251	.....	.....
5-yr average .....	401,856	306,898	88,152	395,050	77.7	22.3

Source: Office of Policy and Strategy, Policy Research Division (PRD), Claims 3 and USCIS analysis. July 29, 2020. Number of Petition Denied data is pulled on April 22, 2020.

<sup>a</sup> The number of petitions received includes all initial petitions and petitions for extension.

<sup>b</sup> The sum of petitions approved or denied does not equal the number of petitions received because some petitions are revoked, withdrawn, or still pending.

To determine the cost of preparing and filing a petition, DHS assumes that petitioners may use human resources (HR) specialists (or others that provide equivalent services) (hereafter HR specialist) or use lawyers or accredited representatives<sup>159</sup> to complete and file Form I-129 H-1B petitions. A lawyer or accredited representative appearing before DHS must file Notice of Entry of

Appearance as Attorney or Accredited Representative (Form G-28) to establish the eligibility and authorization of a lawyer or accredited representative to represent a client (applicant, petitioner, requestor, beneficiary or derivative, or respondent) in an immigration matter before DHS. Table 5 presents the total number of Form G-28 filings by petitioners who filed Form I-129 H-1B.

DHS estimates that about 74 percent (73.5 percent rounded up) of Form I-129 H-1B petitions were completed and filed by a lawyer or other accredited representative (hereafter lawyer). DHS assumes the remaining 26 percent of Form I-129 H-1B petitions were completed and filed by HR specialists.

TABLE 5—TOTAL NUMBER OF FORMS G-28<sup>a</sup> FILED WITH FORM I-129 H-1B PETITIONS, FY 2015 TO FY 2019

Fiscal year	Receipts of form I-129 H-1B Petitions	Number of form G-28 Filed with form I-129 H-1B petitions	Percent of form I-129 H-1B petitions filed with form G-28 (%)
	A	B	C = B/A
2015 .....	368,160	257,771	70.0
2016 .....	398,800	273,497	68.6
2017 .....	403,149	292,390	72.5
2018 .....	418,596	324,206	77.5
2019 .....	420,574	329,399	78.3
Total .....	2,009,279	1,477,263	.....
5-year Average .....	401,856	295,453	73.5

\*\*Source: Office of Policy and Strategy, Policy Research Division (PRD) and USCIS analysis. April 22, 2020.

<sup>a</sup> Form G-28 has no filing fee.

<sup>159</sup> Accredited representatives are defined in 8 CFR 292.1(a)(4) as a person representing an organization described in 8 CFR 292.2 who has been accredited by the Board. USCIS limited its

analysis to HR specialists, in-house lawyers, and outsourced lawyers to present estimate cost. However, USCIS understands that not all occupations employ individuals with these

occupations and; therefore, recognizes equivalent occupations may also prepare and file these petitions.

Petitioners who use lawyers or accredited representatives to complete and file Form I-129 H-1B petitions may either use an in-house lawyer or hire an outsourced lawyer.<sup>160</sup> Of the total number of Form I-129 H-1B petitions filed between FY2015 and FY2019 by lawyers or accredited representatives (74 percent), DHS estimates that 24 percent of Form I-129 H-1B petitions filed by lawyers were filed by in-house lawyers while the remaining 50 percent were filed by outsourced lawyers.<sup>161</sup>

ii. Population Affected by the Rule  
 DHS uses the estimates derived from the historical data shown in tables 4 and 5 to estimate the baseline population. Accordingly, the baseline population consists of 401,856 Form I-129 H-1B petitions received annually, which is disaggregated into the percent of Form I-129 H-1B petitions filed by HR specialists (26 percent), in-house lawyers (24 percent), or outsourced lawyer (50 percent). Additionally, DHS

uses these percentage shares to disaggregate the 306,898 H-1B petitions approved annually. For each provision, DHS further estimates the subpopulation that is affected by that particular provision using the same proportion of HR specialist, in-house lawyer, and outsourced lawyer. These estimates are detailed in the separate provision discussed in the cost analysis of this interim final rule.

TABLE 6—SUMMARY OF ESTIMATED AVERAGE NUMBER OF PETITIONS RECEIVED ANNUALLY BY TYPE OF FILER

Affected population	Estimated average population affected A	Number of petitions filed by HR specialists B = A × 26%	Number of petitions filed by in-house lawyers C = A × 24%	Number of petitions filed by outsourced lawyers D = A × 50%
Estimated average number of Form I-129 H-1B petitions received annually	401,856	104,483	96,445	200,928
Estimated average number of petitions approved annually .....	306,898	79,793	73,656	153,449

Source: USCIS analysis.

As discussed above, DHS forecasts an increase in the affected population due to the new interim final rule. Table 7

below summarizes this increase for FY2021–FY2030. The forecasted increase is discussed in detail in section

“Limiting maximum validity period for third-party placements.”

TABLE 7—FORECASTING TOTAL RECEIPTS OF FORM I-129H1 FOR FY2021 TO FY2030

Fiscal year	Historical baseline: <sup>a</sup> number of petitions received	Estimated increase in number of petitions received	Total estimated number of petitions received
2021 .....	401,856	0	401,856
2022 .....	401,856	110,483	512,339
2023 .....	401,856	147,311	549,167
2024 .....	401,856	147,311	549,167
2025 .....	401,856	147,311	549,167
2026 .....	401,856	147,311	549,167
2027 .....	401,856	147,311	549,167
2028 .....	401,856	147,311	549,167
2029 .....	401,856	147,311	549,167
2030 .....	401,856	147,311	549,167

Source: USCIS analysis.

<sup>a</sup> Historical Baseline is the 5-year averages of received H-1B petitions for FY2015–2019 from Table 4.

<sup>160</sup> DHS uses the terms “in-house lawyer” and “outsourced lawyer” to differentiate between the types of lawyers that may file Form I-129H1 on behalf of an employer petitioning for an H-1B beneficiary.

<sup>161</sup> DHS uses data from the longitudinal study conducted in 2003 and 2007 on legal career and placement of lawyers, which found that 18.6, 55, and 26.2 percent of lawyers practice law at government (federal and local) institutions, private law firms, and private businesses (as inside counsel), respectively. See Dinovitzer et al (2009). *After the JD II: Second Results from a National Study of Legal Careers*, The American Bar

Foundation and the National Association for Law Placemen (NALP) Foundation for Law Career Research and Education, Table 3.1, p. 27. <https://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf>.

Among those working in private law firms and private businesses (55 and 26.2 percent, respectively), DHS estimates that while 67.7 percent of lawyers practice law in private law firms, the remaining 32.3 percent practice in private businesses (55 percent + 26.2 percent = 81.2 percent, 67.7 percent = 55/81.2 \* 100, 32.2 percent = 26.2/81.2 \* 100). Because 74 percent of the H-1B petitions are filed by lawyers or accredited

representatives, DHS multiplies 74 percent by 32.3 and 67.7 percent to estimate the proportion of petitions filed by in-house lawyers (working in private businesses) and outsourced lawyer (working in private law firms), respectively.

24 (rounded) percent of petitions filed by in-house lawyers = 74 percent of petitions filed by lawyers or accredited representatives × 32.3 percent of lawyers work in private businesses.

50 (rounded) percent of petitions filed by in-house lawyers = 74 percent of petitions filed by lawyers or accredited representatives × 67.7 percent of lawyers work in private law firms.

#### 4. Costs and Cost Savings of Regulatory Changes to Petitioners

##### i. Estimated Wage by Type of Filers

As previously discussed, DHS assumes that a petitioner will use an HR specialist, in-house lawyer, or outsourced lawyer to complete and file Form I-129H1 petitions.<sup>162</sup> In this analysis, DHS estimates the opportunity cost of time for these occupations using average hourly wage rates of \$32.58 for HR specialists and \$69.86 for lawyers.<sup>163</sup> These average hourly wage rates do not account for worker benefits such as paid leave, insurance, and retirement. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the most recent DOL, Bureau of Labor Statistics (BLS) report detailing average compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.46.<sup>164</sup>

For petitioners filing Form I-129 H1, DHS calculates the average total rate of compensation as \$47.57 per hour for an HR specialist, where the average hourly wage is \$32.58 per hour worked and average benefits are \$14.99 per hour.<sup>165</sup> Additionally, DHS calculates the average total rate of compensation as \$102.00 per hour for an in-house lawyer, where the average hourly wage is \$69.86 per hour worked and average benefits are \$32.14 per hour.<sup>166</sup>

<sup>162</sup> DHS limits its analysis to HR specialists, in-house lawyers, and outsourced lawyer to present estimated costs. However, DHS acknowledges that not all entities employ individuals with these occupations and, therefore, recognizes equivalent occupations may also prepare and file these petitions.

<sup>163</sup> See U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2019 National Occupational Employment and Wage Estimates-National, SOC 13-1071—Human Resources Specialist and SOC 23-1011—Lawyers, available at [https://www.bls.gov/oes/2019/may/oes\\_nat.htm](https://www.bls.gov/oes/2019/may/oes_nat.htm) (last visited Aug. 11, 2020).

<sup>164</sup> The benefits-to-wage multiplier is calculated as follows:  $(\$37.10 \text{ Total Employee Compensation per hour}) \div (\$25.47 \text{ Wages and Salaries per hour}) = 1.457 = 1.46$  (rounded) See U.S. Dep't of Labor, Bureau of Labor Statistics, Economic News Release, *Employer Cost for Employee Compensation (December 2019)*, Table 1 (Mar. 19, 2020), available at [https://www.bls.gov/news.release/archives/ecec\\_03192020.pdf](https://www.bls.gov/news.release/archives/ecec_03192020.pdf) (last visited Aug. 11, 2020). Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group.

<sup>165</sup> Calculation of the weighted mean hourly wage for HR specialists:  $\$32.58 \text{ per hour} \times 1.46 = \$47.566 = \$47.57$  (rounded) per hour.

<sup>166</sup> Calculation of weighted mean hourly wage for in-house lawyers:  $\$102.00 \text{ average hourly total rate}$

Moreover, DHS recognizes that a petitioner may choose, but is not required, to hire an outsourced lawyer to prepare and file the H-1B petition. Therefore, DHS calculates the average total rate of compensation as \$174.65 per hour for an outsourced lawyer, where the average hourly wage is \$69.86 per hour worked and the average benefits are \$104.79 per hour.<sup>167</sup> Table 6 shows the compensation rates used in this analysis.

TABLE 8—SUMMARY OF ESTIMATED WAGES FOR FORM I-129 H-1B PETITION FILERS BY TYPE OF FILER

	Hourly compensation rate
Human Resources (HR)	
Specialist .....	\$47.57
In-house Lawyer .....	102.00
Outsourced Lawyer .....	174.65

Source: USCIS analysis.

##### ii. Baseline Estimate of Current Costs

In the current filing process, an employer petitioning on behalf of an H-1B specialty occupation worker must complete and file Form I-129H1. The filing fee for Form I-129H1 is \$555 per petition and the time burden to review instructions and complete and submit Form I-129H1 is 4.0 hours per petition.<sup>168</sup> To estimate petitioners' postage cost of mailing a package containing a completed Form I-129H1 petition and all required supporting documents to USCIS, DHS uses the shipping price of United States Postal Service (USPS) Domestic Priority Mail Express Flat Rate Envelopes, which is priced at \$27.55 per package.<sup>169</sup>

of compensation for in-house lawyer = \$69.86 average hourly wage rate for lawyer (in-house)  $\times$  1.46 benefits-to-wage multiplier.

<sup>167</sup> Calculation of weighted mean hourly wage for outsourced lawyer:  $\$174.65 \text{ average hourly total rate of compensation for outsourced lawyer} = \$69.86 \text{ average hourly wage rate for lawyer (in-house)} \times 2.5 \text{ conversion multiplier}$ . DHS uses a conversion multiplier of 2.5 to estimate the average hourly wage rate for outsourced lawyer based on the hourly wage rate for an in-house lawyer. DHS has used this conversion multiplier in various previous rulemakings. For example, the DHS analysis in, *Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 83 FR 24905 (May 31, 2018), used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages.

<sup>168</sup> See *supra* notes 9 and 153.

<sup>169</sup> Although petitioners may choose other means of shipping, for the purposes of this analysis, DHS uses the shipping prices of United States Postal

Public Law 114-113 requires payment of \$4,000 for certain H-1B petitions filed by employers that meet the statute's 50 employee/50 percent test. The Fee Schedule Final Rule, if it takes effect, would extend applicability of the Public Law 114-113 fee, such that it would be required for all H-1B petitions filed by those employers, unless the petition is an amended petition without an extension of stay request.<sup>170</sup> In order to estimate the number of petitions that would require the Public Law 114-113 fee, DHS uses the estimated percentage of H-1B petitions filed by petitioners that have 50 or more employees and 50 percent of the employees are in the H-1B or L-1 visa classification: 26 percent. This fee applies to certain petitions filed on or before September 30, 2027.<sup>171</sup> The affected population to which the \$4,000 fee is applied is 104,483, which is 26 percent of 401,856, the average number of petitions received annually from FY2015 to FY2019.

DHS applies a fraud prevention and detection fee of \$500 to certain H-1B petitions.<sup>172</sup> In order to estimate the number of petitions that will be filed with the fraud prevention and detection fee DHS uses the percentage of H-1B petitions filed with the fraud prevention and detection fee in FY2018 (52 percent) and multiplied by the 5-year average number of petitions received annually from FY2015 to FY2019 in Table 9 below (401,856). Therefore, the fraud prevention and detection fee is applied to 208,965 petitions.

Service (USPS) Domestic Priority Mail Express Flat Rate Envelopes, which is currently priced at \$27.55 per package, as a proxy estimate for the postage cost of mailing a package containing completed Form I-129H1. DHS also assumes that the package on average weighs three pounds and ships locally or in zone 1 or 2. See U.S. Postal Service, Price List, Notice 123, Effective January 26, 2020, available at <https://pe.usps.com/text/dmm300/Notice123.htm#c011> (last visited Aug. 11, 2020).

<sup>170</sup> See *supra* note 126. Currently, the Public Law 114-113 fee is required for H-1B petitions filed by certain petitioners only when the Fraud Fee also applies, meaning that it is not currently required for H-1B extensions. While implementation of the Fee Schedule Final Rule has been enjoined, DHS nevertheless estimated costs of this interim final rule based on the fees that will be required if the injunction is lifted and the Fee Schedule Final Rule takes effect so as to avoid underestimating potential costs of this interim final rule.

<sup>171</sup> See *supra* note 126.

<sup>172</sup> See section 214(c)(12)(A) of the INA, 8 U.S.C. 1184(c)(12)(A).

TABLE 9—NUMBER OF H-1B PETITION FILED FOR FRAUD PREVENTION AND DETECTION FEE AND ACWIA FEE OR EXEMPTION FROM ACWIA FEE FOR FY 2018

	FY2018	Percentage	Estimated petitions
Total Petitions Filed .....	418,799	.....	401,856 *
<b>Fraud Prevention and Detection Fee</b>			
Total Petitions Filed with Fee .....	218,333	52% <sup>b</sup>	208,965 <sup>g</sup>
<b>ACWIA Fee</b>			
Total Petitions Filed:			
Without any fee exemptions .....	277,979	66% <sup>c</sup>	265,225 <sup>h</sup>
With at least one exemption .....	140,820	34% <sup>d</sup>	136,631 <sup>i</sup>
Size of Employer:			
Full time employees <26 .....	39,333	11% <sup>e</sup>	29,175 <sup>j</sup>
Full time employees >25 .....	316,972	89% <sup>f</sup>	235,946 <sup>k</sup>
Number of employees unknown .....	62,494	.....	.....
Total without unknown .....	356,305 <sup>a</sup>	.....	.....

Source: Report on H-1B Petitions, Fiscal Year 2018 Annual Report to Congress, March 18, 2019 (Table 2 and Table 4).

\* 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) is from Table 4.

<sup>a</sup> Total without unknown (356,305) = Total Petitions Filed FY2018 (418,799) – Number of employees unknown (62,494).

<sup>b</sup> Percentage of Total Petitions filed with Fraud Fee FY2018 (52%) = Total petitions filed with Fee FY2018/Total petitions filed FY2018 = 218,333/418,799.

<sup>c</sup> Percentage of Total petitions filed without any ACWIA fee exemptions FY2018 (66%) = Total petitions filed without any ACWIA fee exemption FY2018/Total petitions filed FY2018 = 277,979/418,799.

<sup>d</sup> Percentage of Total petitions filed with at least one ACWIA fee exemptions FY2018 (34%) = Total petitions filed with at least one ACWIA fee exemption FY2018/Total petitions filed FY2018 = 140,820/418,799.

<sup>e</sup> Percentage of Full-time employees <26 FY2018 (11%) = Full time employees <26 FY2018/Total without unknown FY2018 = 39,333/356,305.

<sup>f</sup> Percentage of Full-time employees >25 FY2018 (89%) = Full time employees >25 FY2018/Total without unknown FY2018 = 316,972/356,305.

<sup>g</sup> Total estimated petitions filed with Fraud Fee (208,965) = 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) \* Percentage of Total Petitions filed with Fraud Fee FY2018 (52%).

<sup>h</sup> Total estimated petitions filed without any ACWIA fee exemptions (265,225) = 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) \* Percentage of Total petitions filed without any ACWIA fee exemptions FY2018 (66%).

<sup>i</sup> Total estimated petitions filed with at least one ACWIA fee exemptions FY2019 (136,631) = 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) \* Percentage of Total petitions filed with at least ACWIA fee exemptions FY2018 (34%).

<sup>j</sup> Estimated Full-time employees <26 (29,175) = Total estimated petitions filed without any ACWIA fee exemptions (265,225) \* Percentage of Full-time employees <26 FY2018 (11%).

<sup>k</sup> Estimated Full-time employees >25 (235,946) = Total estimated petitions filed without any ACWIA fee exemptions (265,225) \* Percentage of Full-time employees >25 FY2018 (89%).

DHS also applies the American Competitiveness and Workforce Improvement Act (ACWIA) fee.<sup>173</sup> Certain petitions are exempt from the ACWIA fee and, when required, the amount of the fee depends on the size of the entity. It is \$750 for employers with 25 or fewer full-time employees or \$1,500 for employers with 26 or more full-time employees. In order to estimate the number of petitions that will be filed with the ACWIA fee, DHS uses the percentage of H-1B petitions filed with the ACWIA fee in FY2018 (66 percent) and the 5-year average of the annual number of H-1B petitions received (401,856) from Table 9 above. Total estimated petitions filed with the ACWIA fee is 265,225 as described in Table 9. Among the estimated petitions

filed with the ACWIA fee (265,225) using the percentage of H-1B petitions filed with the ACWIA fee in FY2018 there are 29,175 (11 percent) employers with 25 or fewer full-time employees and 235,946 (89 percent) employers with 26 or more full-time employees also as described in Table 9. Based on these estimated annual number of petitions, DHS estimates that 29,175 petitions would require an ACWIA fee of \$750 and 235,946 petitions would require an ACWIA fee of \$1,500 for each fiscal year for FY2021 to FY2030.

Table 10 shows the total annual cost of filing Form I-129 H-1B using the historical data on petitions received for FY2015 to FY2019. The baseline population is estimated using the 5-year average of the annual number of H-1B

petitions received from FY2015 to FY2019 (401,856) in Table 4. Various fees are applied to the proportion of the baseline population as described in Table 9. DHS estimates the total annual cost under current regulation is \$1,331,915,275, or an average of \$3,314 per petition received. This baseline cost per petition received is applied to the baseline population for FY2021 to FY2027.<sup>174</sup> Since the Public Law 114–113 Fee of \$4,000 is currently set to expire at the end of FY2027, DHS removes this fee from its baseline per petition cost in fiscal years FY2028 to FY2030. For those years, the baseline cost per petition received is estimated to be \$2,274 per petition received.<sup>175</sup>

<sup>173</sup> See INA 214(c)(9), 8 U.S.C. 1184(c)(9).

<sup>174</sup> Average per petition received cost (\$3,314, rounded) = Total annual cost (\$1,331,915,275)/5-year average petition received annually (401,856) for FY2015 to FY2019.

<sup>175</sup> Average per petition received cost without Public Law 114–113 Fee of \$4,000 (\$2,274, rounded) = Total annual cost without Public Law 114–113 Fee of \$4,000 (\$913,983,275)/5-year average petition received annually (401,856) for

FY2015 to FY2019; Total annual cost without Public Law 114–113 Fee of \$4,000 (\$913,983,275) = Total annual cost (\$1,331,915,275)—Public Law 114–113 fee (\$417,932,000) from Table 10.

TABLE 10—ESTIMATED ANNUAL BASELINE (CURRENT) COST OF FILING FORM I-129 H-1B PETITIONS

Cost items	Affected population A	Time burden (hours) B	Compensation rate C	Total annual cost D = A × B × C
Opportunity cost of time to complete Form I-129 petitions by:				
HR specialist .....	104,483	4.0	\$47.57	\$19,881,025
In-house lawyer .....	96,445	4.0	102.00	39,349,560
Outsourced lawyer .....	200,928	4.0	174.65	140,368,301
Form I-129 filing fee cost .....	401,856	.....	555	223,030,080
Public Law 114-113 fee .....	104,483	.....	4,000	417,932,000
Fraud prevention and detection fee .....	208,965	.....	500	104,482,500
ACWIA fee <26 .....	29,175	.....	750	21,881,059
ACWIA fee >25 .....	235,946	.....	1,500	353,919,617
Postage cost per package to mail completed Form I-129 .....	401,856	.....	27.55	11,071,133
<b>Total Baseline Cost .....</b>	.....	.....	.....	<b>1,331,915,275</b>

Source: USCIS analysis.

DHS estimates the total annual additional costs of the regulatory changes or cost savings from the regulatory changes. DHS presents each of these costs/cost savings separately in sections that follow.

iii. Detailed Economic Effects of Each Provision in the Interim Final Rule

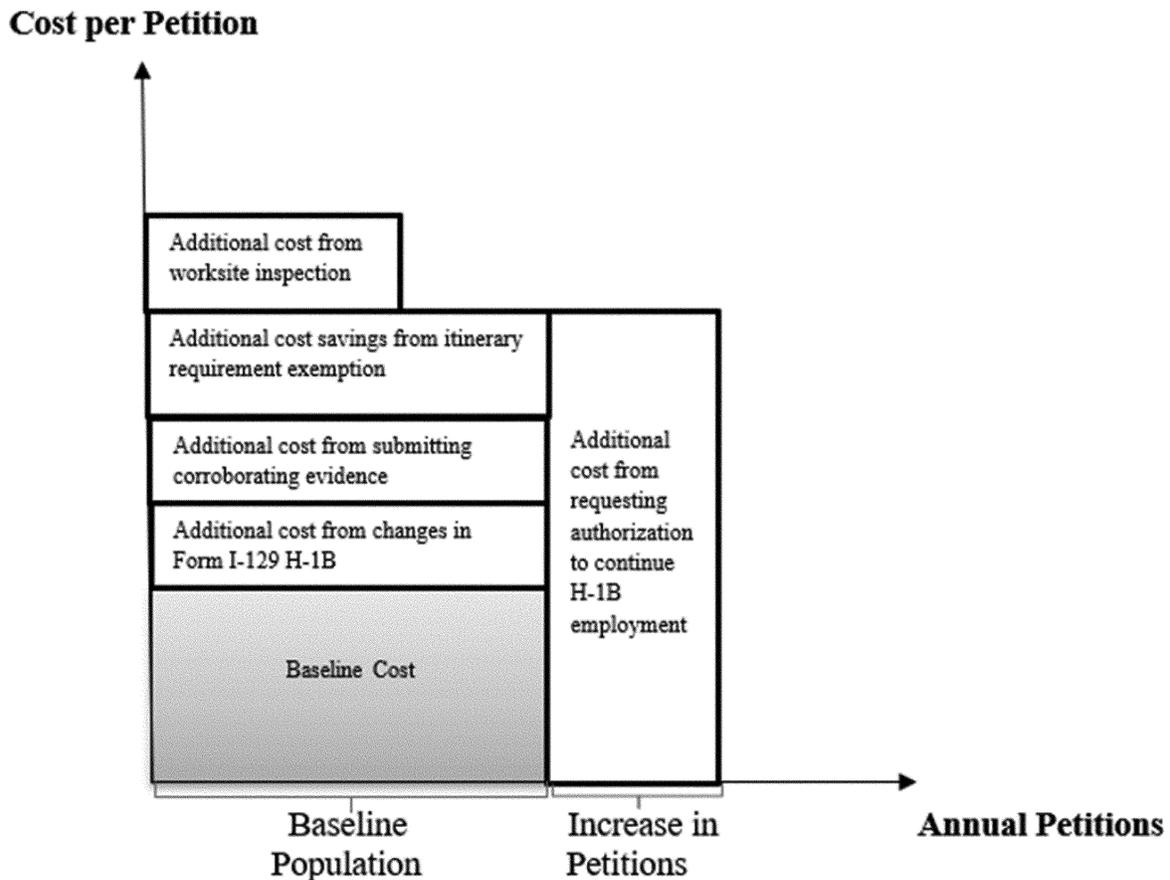
The interim final rule changes the requirements governing the petitioning process for H-1B specialty occupation workers, which will result in additional costs for petitioners. The additional costs include increase in time burden of completing and filing an H-1B petition, submitting contractual documents, work orders, or similar documentary evidence if the beneficiary will work at a third-party worksite, requesting authorization to continue H-1B employment beyond 1 year for a subset of petitioners, codifying existing authority for conducting worksite inspections, and clarifying petition denials or revocations

for failure to cooperate with a site inspection. In addition, the interim final rule will eliminate the general itinerary requirement for H-1B petitions which will result in cost savings for petitioners.

The additional cost and cost savings discussed above reflect changes to per petition costs. In addition, the interim final rule will also increase the affected population. To better illustrate the effects of each provision, DHS disentangles the effects of changes in per-petition costs from the effects of changes in the affected population. This is illustrated in the Diagram 1 below.<sup>176</sup> In Diagram 1, the vertical axis denotes per-petition costs and the horizontal axis denotes the affected population. The area of the shaded rectangle thus represents the current, baseline cost of preparing and filing H-1B petitions to petitioners. The provisions that affect the per-petition cost, including additional costs changes in Form I-129

H-1B, submitting corroborating evidence, and additional cost savings from itinerary requirement exemption, are represented as rectangles above the baseline population, denoting that the additional costs are calculated based on the baseline population. Separately, DHS adds a rectangle to the right of the baseline cost rectangle to represent the additional costs resulting from population changes due to the provision to limit the maximum validity period for third-party worksites. As the rectangle illustrates, DHS incorporates the per-petition cost increases into the cost calculation of the population increase. Finally, DHS separately estimates the cost of worksite inspections, which is represented by the small rectangle on the top. The number of worksite inspections does not depend on the number of H-1B petitions received and is not expected to be affected by the provision that limits the validity period.

<sup>176</sup>Diagram 1 excludes a one-time familiarization cost.

**Diagram 1. Breakdown of the Total Cost of the IFR**

a. Revising the Regulatory Definition and Standards for Specialty Occupation So They Align More Closely With the Statutory Definition of the Term

1. Additional Costs Due To Changes in Form I-129 for H-1B Petitions

DHS is amending its regulations governing H-1B specialty occupation workers by making a number of revisions and clarifications to strengthen the integrity of the H-1B program, thereby better protecting the wages and working conditions of U.S. workers. DHS is amending Form I-129H1, which must be filed by petitioners on behalf of H-1B beneficiaries, in order to align them with the regulatory changes DHS is making in the interim final rule. The changes to Form I-129H1 will result in an increased time burden to complete and submit the form.

As discussed, the current estimated time burden to complete and file Form I-129H1 takes a total of 4.0 hours per petition.<sup>177</sup> As a result of the changes in this interim final rule, DHS estimates the total time burden to complete and

file Form I-129H1 will be 4.5 hours per petition, to account for the additional time petitioners will spend on reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request. DHS estimates the time burden will increase by a total of 30 minutes (0.5 hours) per petition.<sup>178</sup>

To estimate the additional cost of filing due to changes in Form I-129H1 petitions, DHS applies the additional estimated time burden to complete and file Form I-129H1 (0.583 hours) to the respective total population and compensation rate of who may file, including an HR specialist, in-house lawyer, or outsourced lawyer.

The total affected population for this provision is the number of petitions, including both initial and continuing petitions, for FY2021–2030. The total affected population for FY2021–2030 is

<sup>178</sup> 0.5 hours additional time to complete and file new Form I-129H1 = (4.5 hours to complete and file new Form I-129 H1) – (4.0 hours to complete and file current Form I-129H1).

estimated using the 5-year average of the annual number of H-1B petitions received for FY2015–FY2019, as listed in Table 4. Although the provision's increase in time burden may affect the total affected population, DHS believes that any effect would be de minimis: The estimated cost of the additional 30 minutes of time burden per petition is \$62,<sup>179</sup> which is less than 0.06 percent of \$107,000,<sup>180</sup> the average annual

<sup>179</sup> Calculation: The estimated cost of the additional 30 minutes of time burden per petition (\$72, rounded) = (\$47.57 (HR specialist hourly wage rate, Table 6) \* 26% (percent of H-1B petitions filed by HR specialist, Table 5) + \$102 (In-house lawyer hourly wage rate, Table 6) \* 24% (percent of H-1B petitions filed by in-house lawyer, Table 5) + \$174.65 (Outsourced lawyer hourly wage rate, Table 6) \* 50% (percent of H-1B petitions filed by outsourced lawyer, Table 5)) \* 0.5 (30 minute increase in time burden).

<sup>180</sup> This is the annual average earning of all H-1B nonimmigrant workers in all industries with known occupations (excluding industries with unknown occupations) for FY 2019. It is what employers agreed to pay the nonimmigrant workers at the time the petitions were filed and estimated based on full-time employment for 12 months, even if the nonimmigrant worker worked fewer than 12 months. Source: USCIS, March 5, 2020. See Characteristics of H-1B Specialty Occupation

<sup>177</sup> See *supra* note 9.

earnings of all H-1B nonimmigrant workers. DHS believes that this cost increase may lead to *de minimis*

changes on the margin to the set of petitioners.  
As shown in Table 11, DHS estimates the total additional annual cost to

petitioners of completing and filing Form I-129H1 petitions will be approximately \$24,949,861, or an average of \$62 per petition received.<sup>181</sup>

TABLE 11—ADDITIONAL OPPORTUNITY COSTS OF TIME TO PETITIONERS FOR FILING FORM I-129H1 PETITIONS FROM AN INCREASE IN TIME BURDEN

Cost items	Total affected population	Additional time burden to complete form I-129H (hours)	Compensation rate	Total cost
	A	B	C	D = A × B × C
Opportunity cost of time to complete Form I-129 H1 petitions by:				
HR specialist .....	104,483	0.5	\$47.57	\$2,485,128
In-house lawyer .....	96,445	0.5	102.00	4,918,695
Outsourced lawyer .....	200,928	0.5	174.65	17,546,038
<b>Total .....</b>	<b>401,856</b>	<b>.....</b>	<b>.....</b>	<b>24,949,861</b>

Source: USCIS analysis.

b. Requiring Corroborating Evidence of Work in a Specialty Occupation

1. Costs of Submitting Contracts, Work Orders, or Similar Evidence Establishing Specialty Occupation and Employer-Employee Relationship

Petitioners who regularly place their workers at third-party worksites often submit uncorroborated statements describing the role the H-1B beneficiary will perform at the third-party worksite. Such statements by the petitioner, without additional corroborating evidence, are generally insufficient to establish by a preponderance of the evidence that the H-1B beneficiary will actually perform specialty occupation work, and that the petitioner will have an employer-employee relationship with the beneficiary. Therefore, where a beneficiary will be placed at one or more third-party worksites, DHS will require the petitioner to submit evidence such as contracts, work orders, or other similar evidence to establish that the beneficiary will perform services in a specialty occupation at the third-party worksite(s), and that the petitioner will have an employer-

employee relationship with the beneficiary.<sup>182</sup>

DHS estimates the time burden required to gather and submit corroborating evidence (such as contracts, work orders, or similar evidence) for petitioners with third-party worksite beneficiaries. DHS notes that corroborating evidence will have to be detailed enough to provide a sufficiently comprehensive view of the work available, and the terms and conditions under which the work will be performed at the third-party worksite. Since these petitioners will generally need to provide more documentation than petitioners who do not seek to employ H-1B workers at third-party worksite locations, DHS estimates the time burden for petitioners will be approximately 1 hour to gather and submit these documents as required under this interim final rule.<sup>183</sup> DHS requests public comment on this time burden estimate.

Since the terms “worksite” and “third-party worksite” are referenced in the new regulations, this interim final rule defines these terms. For example,

the new regulation defining an employer-employee relationship refers to the “worksite” where the beneficiary will be employed as a relevant factor. The term “off-site” used on the Form I-129 H-1B has the same meaning as “third-party worksite.”<sup>184</sup> Therefore, DHS uses the data on off-site locations to forecast the number of petitions involving a third-party worksite. To estimate the population impacted by the requirements for third-party worksites, DHS uses data on approved Form I-129 H-1B petitions. DHS uses available data for FY 2018 and FY 2019 to estimate the percentage of petitions that are approved for third-party worksites. Accordingly, Table 12 shows the average number of Form I-129 H-1B petitions approved in FY 2018 and FY 2019 for workers placed at off-site location. Nearly 36 percent of petitions were approved for workers placed at off-site locations.<sup>185</sup> DHS uses the estimated 36 percent as the proportion of both the population of received petitions and the population of approved petitions that are third-party worksite.

TABLE 12—FORM I-129 H-1B PETITIONS FOR WORKERS PLACED AT OFF-SITE LOCATIONS

Fiscal year	Total approved petitions for workers placed at off-site locations	Total approved petitions	Percent placed at off-site locations (%)
2018 .....	112,071	302,159	37.1

Workers, Fiscal Year 2019, p.16, Table 10, *supra* note 21.

<sup>181</sup> Additional annual cost per petition received for completing and filing Form I-129 H-1B petitions (\$62, rounded) = Total baseline cost (\$24,949,861)/5-year average petition received annually (401,856).

<sup>182</sup> See new 8 CFR 214.2(h)(4)(iv)(C).

<sup>183</sup> DHS notes that it is using approximate time burden estimates in this analysis because DHS does not have relevant information on how much time it would take affected petitioners to gather and submit corroborating evidence as required in the interim final rule. Therefore, DHS assumes 1 hour for the time to gather and submit written evidentiary document requirements.

<sup>184</sup> See *supra* note 27.

<sup>185</sup> Estimate based on data obtained from the Office of Policy and Strategy, Policy Research Division (PRD). 36 (rounded) percent petitions approved for off-site locations in FY 2018 and FY2019 = 239,916 total petitions approved for off-site locations in FY 2018 and FY2019 ÷ 671,209 total petitions approved in FY 2018 and FY2019.

TABLE 12—FORM I-129 H-1B PETITIONS FOR WORKERS PLACED AT OFF-SITE LOCATIONS—Continued

Fiscal year	Total approved petitions for workers placed at off-site locations	Total approved petitions	Percent placed at off-site locations (%)
2019 .....	127,845	369,050	34.6
Total .....	239,916	671,209	71.7
2-year Average .....	119,958	335,605	35.8

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD). May 27, 2020.

Based on DHS' previous estimate of the average annual total number of receipts of Form I-129 H-1B petitions (401,856), we estimate that approximately 144,668 petitions would be filed requesting workers to be placed at third-party worksites.<sup>186</sup> To estimate the total cost of submitting documentary evidence as per the requirements of this provision, DHS multiplies the rate of compensation according to who would file the petition (an HR specialist, in-

house lawyer, or outsourced lawyer, respectively) among the affected population by the estimated time burden to submit the documents. As shown in Table 13, DHS estimates that the total annual cost of submitting corroborating evidence (such as contracts, work orders or similar documents) required by this rule is \$17,963,871 for the population of 144,668 petitions of workers placed at third-party worksites.

To estimate the effect of this provision in conjunction with other provisions that change the forecasted population, DHS calculates the cost of this provision on a per-petition-received basis. The annual cost of this provision, divided amongst the entire population of received petitions, would average out to approximately \$45 per received petition.<sup>187</sup>

TABLE 13—FORM I-129 H1 PETITIONERS' COST FOR SUBMITTING CORROBORATING EVIDENCE TO ESTABLISH THAT THE BENEFICIARY WILL BE EMPLOYED BY THE PETITIONER IN A SPECIALTY OCCUPATION AT THE THIRD-PARTY WORKSITE

Cost items	Affected population A	Time burden (hours) B	Compensation rate C	Total cost D = A × B × C
Opportunity cost of time to complete Form I-129 H1 petitions by:				
HR specialist <sup>a</sup> .....	37,614	1	\$47.57	\$1,789,298
In-house lawyer <sup>b</sup> .....	34,720	1	102.00	3,541,440
Outsourced lawyer <sup>c</sup> .....	72,334	1	174.65	12,633,133
Total .....	144,668	.....	.....	17,963,871

Source: USCIS Analysis.

<sup>a</sup>37,614 petitions filed by HR specialist annually = 144,668 petitions request workers to be placed at third-party worksite annually × 26 percent.

<sup>b</sup>34,720 petitions filed by in-house lawyers annually = 144,668 petitions request workers to be placed at third-party worksites annually × 24 percent.

<sup>c</sup>72,334 petitions filed by outsourced lawyer annually = 144,668 petitions request workers to be placed at third-party worksites annually × 50 percent.

Although the provision's increase in time burden may affect the total affected population, DHS believes that any effect would be de minimis: The estimated cost of the additional one hour of time burden per petition involving third-party worksites is \$124,<sup>188</sup> which is less than 0.12 percent of \$107,000,<sup>189</sup> the average annual earnings of all H-1B nonimmigrant workers. DHS believes that this cost increase is so small that no potential petitioner would change their

decision to file based solely on this change.

c. Codifying in Regulations Existing Authority To Conduct Site Visits and Other Compliance Reviews and Clarifying Consequences for Failure To Allow a Site Visit

1. Cost of Worksite Inspections

Using its general authority, USCIS may conduct audits, on-site inspections,

compliance reviews, or investigations to help verify a petitioner's and beneficiary's H-1B eligibility and better ensure that all laws have been complied with before and after approval of such benefits.<sup>190</sup> The existing authority to

<sup>186</sup>DHS uses the proportion of workers approved for off-site locations petitions (36 percent) as an approximate measure to estimate the number of workers to be placed at third-party worksites from the total number of petitions filed. 144,668 petitions filed requesting workers to be placed at third-party worksites = 401,856 petitions filed annually × 36 percent.

<sup>187</sup>The annual cost of the provision per received petition (\$45) = Total annual cost of submitting corroborating evidence (\$17,963,871)/Total number of H-1B petitions filed annually (401,856).

<sup>188</sup>Calculation: The estimated cost of the additional one hour of time burden per petition (\$124, rounded) = \$47.57 (HR specialist hourly wage rate, Table 6) \* 26% (percent of H-1B petitions filed by HR specialist, Table 5) + \$102 (In-house lawyer hourly wage rate, Table 6) \* 24% (percent of H-1B petitions filed by in-house lawyer, Table 5) + \$174.65 (Outsourced lawyer hourly wage rate, Table 6) \* 50% (percent of H-1B petitions filed by outsourced lawyer, Table 5).

<sup>189</sup>This is the annual average earning of all H-1B nonimmigrant workers in all industries with

known occupations (excluding industries with unknown occupations) for FY 2019. It is what employers agreed to pay the nonimmigrant workers at the time the petitions were filed and estimated based on full-time employment for 12 months, even if the nonimmigrant worker worked fewer than 12 months. See Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2019, p.16, Table 10, *supra* note 21.

<sup>190</sup>See Section 103 of the INA and 8 CFR part 2.1. As stated in subsection V.A.5.ii(d) of this analysis,

conduct on-site inspection is critical to the integrity of the H-1B program to detect and deter fraud and noncompliance. In this rule, DHS is adding regulations specific to the H-1B program to codify its existing authority and clarify the scope of inspections—particularly on-site inspections—and the consequences of a petitioner’s or third party’s refusal or failure to fully cooperate with these inspections.

To be clear, USCIS has historically conducted site visits and has had the authority to deny or revoke petitions for reasons including noncompliance with a site visit request. However, the authority to conduct a site visit is not currently codified in CFR for the H-1B program. Since this interim final rule newly codifies this authority, DHS quantitatively estimates the costs associated with conducting site visits. Also, the provision delineates that failure or refusal to cooperate with a site visit request and allow USCIS to verify facts may result in denial or revocation. DHS considers this part of the provision as a clarification to existing regulations<sup>191</sup> and discusses the benefits of this clarification qualitatively.

In July 2009, USCIS started the Administrative Site Visit and Verification Program (ASVVP)<sup>192</sup> as an additional method to verify information in certain visa petitions under scrutiny. Under this program, Fraud Detection and National Security (FDNS) officers were authorized to make unannounced site visits to collect information as part of a compliance review, which verifies whether petitioners and beneficiaries are following the immigration laws and regulations that are applicable in a particular case. This process includes researching information in government databases, reviewing public records and evidence accompanying the petition, interviewing the petitioner and/or beneficiary, and conducting site visits. Once the site visit is completed, the

FDNS officers write a Compliance Review Report, identifying any indicators of fraud or noncompliance to assist USCIS in subsequent final adjudicative decisions (for example, a notice of intent to revoke the petition approval).

Site visits conducted by USCIS have uncovered noncompliance in the H-1B program. From FY 2013 to 2016, USCIS conducted 30,786 H-1B compliance reviews, of which 3,811 (12.4 percent) were found to be noncompliant.<sup>193</sup> From FY 2016 to March 27, 2019, USCIS conducted 20,492 H-1B compliance reviews and found 2,341 (11.4 percent) to be noncompliant.<sup>194</sup> However, when disaggregated by worksite location, the noncompliance rate is found to be higher for workers placed at an off-site or third-party location compared to workers placed at a petitioner’s onsite location (21.7 percent and 9.9 percent, respectively).<sup>195</sup> As a result, starting in 2017, USCIS began conducting more targeted site visits related to the H-1B program, focusing on the cases of H-1B-dependent employers (employers who have a high ratio of H-1B workers compared to U.S. workers, as defined by statute) for whom USCIS cannot validate the employer’s basic business information through commercially available data, and on employers petitioning for H-1B workers who work off-site at another company or organization’s location.

DHS seeks to ensure that the H-1B program is used appropriately and the interests of U.S. workers are protected. Hence, the interim final rule codifies in regulation USCIS’ existing authority to conduct site visits and other compliance reviews and will make clear that inspections and other compliance reviews may include, but are not limited to, worksite visits including petitioners’ headquarters, satellite locations, or third-party worksites, and interviews or review of records, as applicable.

The interim final rule will also clarify the consequences of a petitioner’s or

third party’s refusal or failure to cooperate with these inspections. This interim final rule will make clear that inspections may include, but are not limited to, a visit of the petitioning organization’s facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS considers pertinent to the petitioner’s H-1B eligibility and compliance.<sup>196</sup> The interim final rule also explains the possible scope of an inspection, which may include the petitioning organization’s headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable. Additionally, the new regulation states that if USCIS is unable to verify facts related to an H-1B petition due to the failure or refusal of the petitioner or a third-party to cooperate with a site visit, then such failure or refusal may be grounds for denial or revocation of any H-1B petition for H-1B workers performing services at the location or locations which are a subject of inspection, including any third-party worksites.<sup>197</sup> This provision further strengthens the integrity of the H-1B program and helps to detect and prevent fraud and abuse.

In order to estimate the population impacted by site visits, DHS uses historical site inspection data. The site inspections were conducted at Form I-129 H-1B petitioners’ on-site locations and third-party worksites from FY2015 to FY2019. Table 14 shows the number of worksite inspections conducted each year and the average duration of time for conducting each worksite inspection. During this period, the annual number of worksite inspections has increased each year and ranged from a low of 4,413 in FY2015 to a high of 10,384 in FY2019.

TABLE 14—TOTAL NUMBER OF WORKSITE INSPECTIONS CONDUCTED FOR FORM I-129 H-1B PETITIONERS AND AVERAGE INSPECTION TIME, FY 2015 TO FY 2019

Fiscal year	Number of worksite inspections	Average duration for worksite inspection (hours)
2015 .....	4,413	0.94

this interim final rule will also clarify the possible scope of an inspection, which may include the petitioning organization’s headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable.

<sup>191</sup> See 8 CFR 214.2(h)(11)(iii)(A).

<sup>192</sup> See U.S. Citizenship and Immigration Services—Administrative Site Visit and Verification Program, available at <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program> (last visited Aug. 11, 2020).

<sup>193</sup> See *supra* note 132.

<sup>194</sup> USCIS, Office of Policy and Strategy, Policy Research Division (OP&S PRD), Summary of H-1B Site Visits Data.

<sup>195</sup> *Id.*

<sup>196</sup> See new 8 CFR 214.2(h)(4)(i)(B)(7)(i).

<sup>197</sup> See new 8 CFR 214.2(h)(4)(i)(B)(7)(iii).

TABLE 14—TOTAL NUMBER OF WORKSITE INSPECTIONS CONDUCTED FOR FORM I-129 H-1B PETITIONERS AND AVERAGE INSPECTION TIME, FY 2015 TO FY 2019—Continued

Fiscal year	Number of worksite inspections	Average duration for worksite inspection (hours)
2016 .....	7,046	0.91
2017 .....	7,174	1.04
2018 .....	7,718	1.16
2019 .....	10,384	1.23
Total .....	36,735	5.28

Source: USCIS, Fraud Detection & National Security (FDNS), DS database, May 28, 2020.

The number of worksite inspections does not depend on the number of H-1B petitions received. It depends on DHS resources to conduct the site visits. DHS uses the highest annual number of worksite inspections in past five years (10,384 in FY2019) as the estimated annual population of worksite visits for the next 10 years. DHS also uses 1.23 hours from FY2019 historical data for the estimated duration for worksite inspection, which includes interviewing the beneficiary, the on-site supervisor or manager and other workers, as applicable, and reviewing all records pertinent to the H-1B petitions available to USCIS when requested during inspection.

DHS assumes that a supervisor or manager would be present on behalf of a petitioner while a USCIS immigration officer conducts the worksite inspection in addition to the beneficiary. The beneficiary would be interviewed to verify the date employment started, work location, hours, salary, or other terms of employment, to corroborate the information provided in an approved petition. The supervisor or manager would be the most qualified employee at the location who could answer all

questions pertinent to the petitioning organization and its H-1B nonimmigrant workers. They would also be able to gather and provide the proper records considered pertinent to USCIS immigration officers.

Consequently, for the purposes of this economic analysis, DHS assumes that on average two individuals will be interviewed during each worksite inspection: The beneficiary and the supervisor or manager. DHS uses their respective compensation rates in the estimation of the worksite inspection costs.<sup>198</sup> However, if any other worker or on-site manager is interviewed, the same compensation rates would apply.

DHS uses hourly compensation rates to estimate the opportunity cost of time a beneficiary and supervisor or manager would incur during worksite inspections. Based on data obtained from a USCIS report for Fiscal Year 2019, DHS estimates that an H-1B worker earned an average of \$107,000 per year, or \$51.44 hourly wage in FY 2019.<sup>199</sup> The annual salary does not include non-cash compensation and benefits, such as health insurance and transportation. DHS adjusts the average hourly wage rate using a benefits-to-

wage multiplier to estimate the average hourly compensation of \$75.11 for an H-1B nonimmigrant worker.<sup>200</sup> DHS uses an average compensation rate of \$85.96 for a supervisor or manager in the estimation of the opportunity cost of time he or she would incur during worksite inspections.<sup>201</sup> Of the 1.23 hours of worksite inspection time (see Table 14), DHS has no information on how long a USCIS immigration officer would take to interview a beneficiary, or supervisor, or manager. In this analysis, DHS assumes that it would take 0.49 hours to interview a beneficiary and 0.74 hours to interview a supervisor or manager.<sup>202</sup>

In Table 15, DHS estimates the total annual opportunity cost of time for worksite inspections of H-1B petitions by multiplying the average annual number of worksite inspections (10,384) by the average duration the interview would take for a beneficiary (0.49) or supervisor or manager (0.74) and their respective compensation rates. DHS obtains the total annual cost of the H-1B worksite inspections to be \$1,042,702 for this provision.

<sup>198</sup> Any other USCIS costs associated with the worksite inspections (*i.e.*, travel and deskwork relating to other research, review and document write up) are not estimated here because these costs are covered by fees collected from petitioners filing Form I-129 for H-1B petitions. All such costs are discussed under the Federal Government Cost section.

<sup>199</sup> This is the annual average earning of all H-1B nonimmigrant workers in all industries with known occupations (excluding industries with unknown occupations) for FY 2019. It is what employers agreed to pay the nonimmigrant workers at the time the applications were filed and estimated based on full-time employment for 12 months, even if the nonimmigrant worker worked fewer than 12 months. See Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2019, p.16, Table 10, at *supra* note 21. \$51.44 hourly wage

= \$107,000 annual pay ÷ 2,080 annual work hours. According to U.S. Department of Labor (DOL) that certifies the Labor Condition Application of the H-1B worker, a full-time H-1B employee works 40 hours per week for 52 weeks for a total of 2,080 hours in a year. DOL, Wage and hour Division: Fact Sheet #68—What Constitutes a Full-Time Employee Under H-1B Visa Program? July 2009. See <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdjs68.pdf> (last visited Aug. 11, 2020).

<sup>200</sup> Hourly compensation of \$75.11 = \$51.44 average hourly wage rate for H-1B worker × 1.46 benefits-to-wage multiplier. See section V.A.5. for estimation of the benefits-to-wage multiplier.

<sup>201</sup> Hourly compensation of \$85.96 = \$58.88 average hourly wage rate for Management Occupations (national) × 1.46 benefits-to-wage multiplier. See U.S. Dep't of Labor, Bureau of Labor

Statistics, Occupational Employment Statistics, May 2019 National Occupational Employment and Wage Estimates National, SOC 11-0000—Management Occupations, available at <https://www.bls.gov/oes/current/oes110000.htm> (last visited Aug. 11, 2020).

<sup>202</sup> DHS assumes that an interview with the beneficiary takes 40% of the inspection duration, while an interview with the supervisor or manager takes 60%. In addition to the inspection, DHS assumes the supervisor or manager will need additional time to gather and discuss the records/documents provided to the USCIS Immigration Officer. Duration of interview hours for beneficiaries (0.49) = Inspection duration (1.23) × 40% = 0.42 (rounded). Duration of interview hours for supervisors or managers (0.74) = Inspection duration (1.23) × 60% = 0.74.

TABLE 15—ESTIMATED ANNUAL PETITIONERS’ COST OF WORKSITE INSPECTION FOR H–1B PETITIONS

Cost item	Number of worksite inspections A	Average duration of interview (hours) B	Compensation rate C	Total cost D = A × B × C
Beneficiaries’ opportunity cost of time during worksite inspections .....	10,384	0.49	\$75.11	\$382,172
Supervisors or managers’ opportunity cost of time during worksite inspections .....	10,384	0.74	85.96	660,530
Total .....	.....	1.23	.....	1,042,702

Source: USCIS analysis.

If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition. In this interim final rule, it may be grounds for denial or revocation of any H–1B petition for H–1B workers performing services at the location or locations which are subject of inspection, including any third-party worksites, if USCIS is unable to verify relevant facts due to failure or refusal of the petitioner or third-party worksite parties to cooperate in a site visit.<sup>203</sup>

DHS notes that the site visit provision could create an incentive for employers to cooperate, and to provide further evidence to support the Form I–129 H–1B petition, for an adjudicative decision. The new provision will notify petitioners of the specific consequences for noncompliance, whether by them or by officials at the third-party worksite. If USCIS conducts a site visit in order to verify facts related to the H–1B petition, including whether the beneficiary is being employed consistent with the terms of the petition approval, then DHS believes that it would be reasonable to conclude that the petitioner will not have met its burden of proof and the petition may be properly denied or revoked if USCIS is unable to verify relevant facts to determine compliance or because of failure or refusal to comply with the site inspection. This would be true whether the unverified facts relate to a petitioner worksite or a third-party worksite at which a beneficiary has been or will be placed by the petitioner. It would also be true whether the failure or refusal to

cooperate is by the petitioner or a third-party.

d. Eliminating the General Itinerary Requirement for H–1B Petitions

1. Cost Savings of Itinerary Requirement Exemption

Current regulations require an itinerary with the dates and locations of the services to be provided if a Form I–129 H–1B petition indicates that the beneficiary will be performing services in more than one location.<sup>204</sup> This interim final rule eliminates this requirement for H–1B petitioners. DHS is revising 8CFR 214.2(h)(2)(i)(B) to specify that the itinerary requirement for service or training in more than one location will not apply to H–1B petitions. *See* new 8CFR 214.2(h)(2)(i)(B). DHS is making this revision in response to a recent court decision specific to H–1B petitions.<sup>205</sup> The itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) will still apply to other H classifications. In addition, DHS will still apply the itinerary requirement at 8 CFR 214.2(h)(2)(i)(F) for H–1B petitions filed by agents.

DHS calculates economic impacts of this provision relative to the current regulation. Relative to the current regulation this provision reduces the cost for the petitioners who file on behalf of beneficiaries performing services in more than one location and submitting itineraries. However, due to the absence of detailed data on the number of petitioners who file on behalf of beneficiaries performing services in more than one location, DHS uses the number of petitions filed annually for workers placed at off-site locations as a

proxy for petitioners with beneficiaries performing services in multiple locations. DHS assumes the petitions filed for workers placed at off-site locations are likely to indicate that beneficiaries will be performing services at multiple locations and, therefore, petitioners are likely to submit itineraries. DHS estimates that the number of petitions filed annually for workers placed at off-site locations who may submit itineraries using average number of petitions received annually from FY2015 to FY2019 and the proportion of off-site workers approved petitions. The estimated number of petitions filed annually for workers placed at off-site location is 144,668.<sup>206</sup> DHS estimates the cost savings based on the opportunity cost of time of preparing and submitting an itinerary by multiplying the estimated time burden to gather itinerary information (0.25 hours)<sup>207</sup> by the compensation rate of an HR specialist, in-house lawyer or outsourced lawyer, respectively. Table 16 shows that the estimated annual cost savings due to the elimination of the itinerary requirement, \$4,490,968. Since the itinerary is normally submitted with the Form I–129 H–1B package, there would be no additional postage savings.

To estimate the effect of this provision in conjunction with other provisions that change the forecasted population, DHS calculates the cost savings of this provision on a per-petition-received basis. The annual cost savings of this provision, divided amongst the entire population of received petitions, would average out to approximately \$11 per received petition.<sup>208</sup>

<sup>203</sup> See new 8 CFR 214.2(h)(4)(i)(B)(7)(ii) and (iii).

<sup>204</sup> See current 8 CFR 214.2(h)(2)(i)(B).

<sup>205</sup> See, *ITServe All., Inc. v. Cissna*, No. CV 18–2350 (RMC), 2020 WL 1150186 (D.D.C. Mar. 10, 2020).

<sup>206</sup> DHS uses the proportion of workers placed at off-site location (36 percent from Table 12) as an

approximate measure to estimate the number of petitions received annually for workers performing services in multiple locations from the total number of petitions filed. 144,528 petitions filed for workers performing services in multiple locations = 401,468 total petitions filed annually × 36 percent.

<sup>207</sup> DHS assumes that it would not take more than 0.25 hours (or 15 minutes) because this itinerary

information should be readily available from the petitioners’ records during the time of filing the petitions.

<sup>208</sup> Additional annual cost savings per petition received for itinerary requirement exemption for H–1B petitions (\$11, rounded) = Total baseline cost savings (\$4,490,968)/5-year average petition received annually (401,856).

TABLE 16—ESTIMATED COST SAVINGS TO FORM I-129H1 PETITIONERS DUE TO THE ELIMINATION OF THE ITINERARY REQUIREMENT

	Affected population <sup>a</sup>	Time burden (hours)	Compensation rate	Total annual cost
	A	B	C	A × B × C
Opportunity cost of time to complete Form I-129H1 petitions by:				
HR specialist .....	37,614	0.25	\$47.57	\$447,325
In-house lawyer .....	34,720	0.25	102.00	885,360
Outsourced lawyer .....	72,334	0.25	174.65	3,158,283
Total .....	144,668			4,490,968

Source: USCIS analysis.

<sup>a</sup> The estimated number of petitions filed annually for workers placed at off-site location 144,668.

HR specialist (37,614) = 144,668 × Percent of petitions filed by HR specialist (26%).

In-house lawyer (34,720) = 144,668 × Percent of petitions filed by in-house lawyer (24%).

Outsourced lawyer (72,334) = 144,668 × Percent of petitions filed by outsourced lawyer (50%).

#### e. Limiting Maximum Validity Period for Third-Party Placement

##### 1. Costs of Requesting Authorization To Continue H-1B Employment

DHS is amending the maximum validity period for a petition approved for workers placed at third-party worksites. Under current regulations at 8 CFR 214.2(h)(9)(iii), the maximum validity period an H-1B petition may be approved is “up to three years”. This interim final rule will limit the maximum validity period to 1 year for workers placed at third-party worksites.<sup>209</sup> This provision will result in more extension petitions from petitioners with beneficiaries who work at third-party worksites.

DHS estimates the increase in petitions for FY2021 to FY2030 due to the reduction in maximum validity period. Although the maximum validity period for a specialty occupation worker is 3 years, the average validity period for approved H-1B beneficiaries is 28 months.<sup>210</sup> Since the interim final rule limits the validity period for petitions indicating that the beneficiary will work at a third-party worksite to up to 1 year (12 months), petitioners seeking to continue the employment of beneficiaries placed at third-party worksites will have to file extension petitions more frequently to request authorization to continue such H-1B employment. The reduction in average validity period from 28 months to 12 months or less will increase the frequency of petitions by 28/12 times annually for FY 2023 and onwards. There is a transition period in FY2021 and FY2022, which is explained in detail below.

To determine the number of petitions under the current regulations, DHS uses the historical 5-year average number of

petitions approved for FY2015 to FY2019 (306,898)<sup>211</sup> and the proportion of workers approved for off-site locations petitions (36 percent) as an approximate measure to estimate the number of workers to be placed at third-party worksites.<sup>212</sup> DHS estimates the number of petitions approved annually for workers placed at third-party worksite as 110,483<sup>213</sup> under the 28 month average validity period. DHS assumes that 110,483 petitions are approved uniformly across 12 months, or 9,207<sup>214</sup> petitions per month.

For FY2021 DHS estimates no additional increase in petitions due to this provision because any associated costs would occur at the end of the petition validity period when the petitioner seeks to file an extension petition. Any petition filed in FY2021 under the provision’s maximum validity period of 12 months for workers placed at third party worksites would have otherwise been filed under the current regulations, which is up to 3 years. The baseline population already accounts for these petitions. The reduction in maximum validity period from 3 years to 12 months would increase the number of filed petitions starting 12 months after the effective date of this interim final rule, which would be in FY2022. Those petitions pending or approved prior to the effective date of this interim final rule would still be subject to the current regulation

<sup>211</sup> Table 4. Total Receipts, Approvals, and Denials of Form I-129 Petitions with an H-1B Classification, FY 2015 to FY 2019.

<sup>212</sup> Table 12. Form I-129 H-1B petitions for Workers placed at Off-site Locations.

<sup>213</sup> Calculation: Estimated number of petitions approved annually for workers placed at third-party worksite 110,483 = 5-year average number of petitions approved for FY2015 to FY2019 (306,898) \* Percentage of workers approved for off-site locations petitions 36%.

<sup>214</sup> Calculation: 9,207 = Estimated number of petitions approved annually for workers placed at third-party worksite 110,483/12 months.

maximum validity period of 3 years, unless an amended petition is filed.

For FY2022, DHS estimates an additional 110,483 extension petitions due to this provision. These additional extension petitions would be filed by petitioners who had third-party worksite petitions filed in FY2021 that require an extension under the interim final rule’s 12 month maximum validity period but would not have required an extension under the current 28 month average validity period.

For each year between FY2023 and FY2030, DHS estimates an additional 147,311 extension petitions due to this provision. These additional extension petitions represent the sum of 110,483 petitions filed in the previous fiscal year plus 36,828<sup>215</sup> extension petitions from four months of the fiscal year prior to the previous fiscal year, all of which may have maintained their validity under the current 28 month average validity period.<sup>216</sup> The summary table is presented above in section “Population Affected by the Rule” in Table 7.

DHS estimates the additional costs resulting from the population changes due to the limiting maximum validity period for third-party worksites using the forecasted increase in the number of petitions received as discussed above. The cost per additional petition is the sum of the baseline cost per petition received, additional annual cost per petition received for completing and

<sup>215</sup> For example, in FY2025 extension petitions consist of those petitions filed in FY2024 whose maximum 12 month validity period would expire in FY2025 and 4 month worth of petitions filed in FY2023 that would have had their 28 month average validity period expire in FY2025. Therefore, 4 month worth of petition (36,828, rounded) = 4 months \* (Estimated number of petitions approved annually for workers placed at third-party worksite 110,483/12 months).

<sup>216</sup> Additional 147,311 extension petitions = 110,483 Petitions filed in the previous fiscal year + 36,828 Extension petitions from four months of the fiscal year prior to the previous fiscal year.

<sup>209</sup> See new 8 CFR 214.2(h)(9)(iii)(A)(1).

<sup>210</sup> See *supra* note 11.

filing Form I-129H1 petitions, additional annual cost per petition received for submitting corroborating evidence for H-1B petitions, and the annual cost savings per petition received for itinerary requirement exemption for H-1B petitions. Arithmetically, this is obtained by

adding \$3,314, \$62, \$45, and (\$11) to equal \$3,410 for FY2021 to FY2027. Due to the expiration of the Public Law 114-113 Fee at the end of FY2027, the cost for FY2028 to FY2030 is obtained by adding \$2,274, \$62, \$45, and (\$11) to equal \$2,370.<sup>217</sup>

This provision's estimated annual increase in costs to petitioners is the product of the estimated additional population and estimated cost per petition received, both described above. Table 17 delineates these costs for each fiscal year between FY2021 and FY2030.

TABLE 17—FORECASTING INCREASE IN COST DUE TO POPULATION INCREASE FOR FY2021 TO FY2030

Fiscal year	Estimated increase in number of petitions received A	Cost per petition received B	Estimated increase in cost due to population increase A × B
2021	0	\$3,410	0
2022	110,483	3,410	\$376,747,030
2023	147,311	3,410	502,330,510
2024	147,311	3,410	502,330,510
2025	147,311	3,410	502,330,510
2026	147,311	3,410	502,330,510
2027	147,311	3,410	502,330,510
2028	147,311	2,370	349,127,070
2029	147,311	2,370	349,127,070
2030	147,311	2,370	349,127,070

Source: USCIS Analysis.

f. Familiarization Cost

Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule in order to fully comply with the new regulation(s). To the extent that an individual or entity directly regulated by the rule incurs familiarization costs,

those familiarization costs are a direct cost of the rule. The entities directly regulated by this rule are the employers who file H-1B petitions. There were 48,084 unique employers who filed H-1B petitions in FY2019.<sup>218</sup> DHS assumes that the petitioners require approximately two hours to familiarize themselves with the rule. Using the

average total rate of compensation of HR specialists, In-house lawyer, and Outsourced lawyer from Table 8 and assuming one person at each entity familiarizes his or herself with the rule, DHS estimates a one-time total familiarization cost of \$11,941,471 in FY2021.

TABLE 18—FAMILIARIZATION COSTS TO THE PETITIONERS

Cost items	Total affected population A	Additional time burden to familiarize (hours) B	Compensation rate C	Total cost D = A × B × C
Opportunity cost of time to familiarize the rule by:				
HR specialist	12,502	2	\$47.57	\$1,189,440
In-house lawyer	11,540	2	102.00	2,354,160
Outsourced lawyer	24,042	2	174.65	8,397,871
Total	48,084			11,941,471

Source: USCIS analysis.

<sup>217</sup> Additional annual cost per petition received for each provision is calculated in the relevant section. Sum of cost per petition received for each provision (\$3,410) = Additional annual cost per petition received for completing and filing Form I-129 H-1B petitions (\$62) + Additional annual cost per petition received for submitting corroborating evidence for H-1B petitions (\$45) – Additional annual cost savings per petition received for

itinerary requirement exemption for H-1B petitions (\$11) + Baseline cost per petition received (\$3,314) for FY2021 to FY2027. Sum of cost per petition received for each provision (\$2,370) = Additional annual cost per petition received for completing and filing Form I-129 H-1B petitions (\$62) + Additional annual cost per petition received for submitting corroborating evidence for H-1B petitions (\$45) – Additional annual cost savings

per petition received for itinerary requirement exemption for H-1B petitions (\$11) + Baseline cost per petition received (\$2,274) for FY2028 to FY2030.

<sup>218</sup> Source: Office of Policy and Strategy, Policy Research Division (PRD), Claims 3 and USCIS analysis, August 18, 2020.

5. Total Estimated and Discounted Net Costs of Regulatory Changes to Petitioners

regulatory changes in this interim final rule. Table 19 shows the total annual cost of the rule to be \$55,897,905 in FY2021, \$420,703,464 in FY2022, \$546,286,944 in each of FY2023 to FY2027, and \$393,083,504 in each of FY2028 to FY2030 to the petitioners. DHS also estimates the total annual savings of the rule to petitioners to be \$4,490,968. Therefore, the estimated total annual net costs to petitioners to be \$51,406,937 in FY2021, \$416,212,496 in FY2022, \$541,795,976 in each of FY2023 to FY2027, and \$388,592,536 in each of FY2028 to FY2030.

DHS presents the total annual estimated costs and cost savings annualized over a 10-year implementation period resulting from

TABLE 19—SUMMARY OF ESTIMATED ANNUAL NET COSTS TO PETITIONERS IN THE INTERIM FINAL RULE FOR FY2021 TO FY2030

Costs or cost savings (provision)	Total estimated annual cost FY2021	Total estimated annual cost FY2022	Total estimated annual cost FY2023–FY2027	Total estimated annual cost FY2028–FY2030
(a) Petitioners’ additional cost of filing Form I–129H1 petitions .....	\$24,949,861	\$24,949,861	\$24,949,861	\$24,949,861
(b) Petitioners’ cost of submitting evidence establishing employer-employee relationship and specialty occupation work when the beneficiary will be working at a third-party worksite .....	17,963,871	17,963,871	17,963,871	17,963,871
(c) Petitioners’ cost of worksite inspection .....	1,042,702	1,042,702	1,042,702	1,042,702
(e) Petitioners’ cost of requesting authorization to continue H–1B employment more frequently because of limitation on validity period for third-party worksite petitions .....	0	376,747,030	502,330,510	349,127,070
(f) Petitioners’ cost of familiarization to the rule .....	11,941,471	0	0	0
Total Annual Costs .....	55,897,905	420,703,464	546,286,944	393,083,504
(d) Petitioners’ cost savings due to eliminating general H–1B itinerary requirement .....	4,490,968	4,490,968	4,490,968	4,490,968
Total Annual Cost Savings .....	4,490,968	4,490,968	4,490,968	4,490,968
Total Annual Net Costs .....	51,406,937	416,212,496	541,795,976	388,592,536

Source: USCIS analysis.  
 Calculation: Total annual net costs = Total annual costs – Total annual cost savings.

To compare costs over time, DHS applies a 3 percent and a 7 percent discount rate to the total estimated costs associated with this interim final rule. Table 20 shows the summary undiscounted and discounted total net costs to Form I–129H1 petitioners over a 10-year period. DHS estimates the 10-year total net cost of the rule to petitioners to be approximately \$4,342,376,923 undiscounted, \$3,674,793,598 discounted at 3-percent, and \$2,986,972,052 discounted at 7-percent. Over the 10-year implementation period of the rule, DHS estimates the annualized costs of the rule to be \$430,797,915 annualized at 3-percent, \$425,277,621 annualized at 7-percent.

TABLE 20—TOTAL ESTIMATED NET COSTS OF THIS INTERIM FINAL RULE [FY 2021–FY 2030]

Fiscal year	Total net costs (undiscounted)	Total net costs (discounted at 3 percent)	Total net costs (discounted at 7 percent)
2021 .....	\$51,406,937	\$49,909,648	\$48,043,867
2022 .....	416,212,496	392,320,196	363,536,113
2023 .....	541,795,976	495,820,069	442,266,905
2024 .....	541,795,976	481,378,707	413,333,556
2025 .....	541,795,976	467,357,968	386,293,043
2026 .....	541,795,976	453,745,600	361,021,536
2027 .....	541,795,976	440,529,709	337,403,304
2028 .....	388,592,536	306,758,536	226,164,394
2029 .....	388,592,536	297,823,822	211,368,593
2030 .....	388,592,536	289,149,342	197,540,741
Total .....	4,342,376,923	3,674,793,598	2,986,972,052
Annualized .....	.....	430,797,915	425,277,621

Source: USCIS analysis.

E.O. 13771 directs agencies to reduce regulation and control regulatory costs. This interim final rule is considered an E.O. 13771 regulatory action. DHS estimates the total cost of this rule is \$292,051,988 annualized using a 7

percent discount rate over a perpetual time horizon in 2016 dollars and discounted back to 2016.

#### 6. Costs to the Federal Government

DHS is revising the regulations to require issuance of a brief explanation when an H-1B nonimmigrant petition is approved, but the validity period end date is earlier than the end date requested by the petitioner at the time of filing. The cost for providing a written explanation of the rationale for limiting the approval validity end date in such cases will be borne by USCIS.

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services by DHS, including administrative costs and services provided without charge to certain applicants and petitioners.<sup>219</sup> DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs such as clerical, officers, and managerial salaries and benefits, plus an amount to recover unassigned overhead (such as facility rent, IT equipment and systems, or other expenses) and immigration services provided without charge. Consequently, since USCIS immigration fees are based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS notes the time necessary for USCIS to review the information submitted with the forms relevant to this interim final rule includes the time to adjudicate the benefit request. These costs are captured in the fees collected for the benefit request from petitioners. DHS notes that this rule may increase USCIS' costs associated with adjudicating immigration benefit requests. Future adjustments to the fee schedule may be necessary to recover these additional operating costs and will be determined during USCIS' next comprehensive biennial fee review.

#### 7. Benefits of the Regulatory Changes

This rule specifies the conditions under which DHS intends to implement the changes in the current rule regarding petitions for H-1B specialty occupation workers filed using Form I-129H1. Although the H-1B program was intended to allow employers to fill gaps in their workforce and remain competitive in the global economy, it

has in fact expanded far beyond that, often to the detriment of U.S. workers. As discussed above, the H-1B program has been used to displace U.S. workers, and has led to reduced wages in a number of industries in the U.S. labor market. In this interim final rule, DHS is implementing revisions and clarifications to ensure that each H-1B nonimmigrant beneficiary is working for a qualified petitioner and in a job meeting the statutory requirements of a specialty occupation. The benefits of each provision in the interim final rule is discussed in detail below.

DHS is updating Form I-129H1 for H-1B petitions to incorporate the regulatory changes in this interim final rule. Although this will result in petitioners incurring additional costs while filing H-1B petitions, USCIS can use the additional credible evidence requested in the H-1B petitions to potentially reduce the number of Requests for Evidence (RFEs) sent to petitioners, which ultimately would allow for more efficient and timely adjudication decisions.

Where a beneficiary will be placed at one or more third-party worksites, DHS will require the petitioner to submit evidence such as contracts, work orders, or other similar evidence to establish that the petitioner will have an employer-employee relationship with the beneficiary, and that the beneficiary will perform services in a specialty occupation at the third-party worksite(s). While USCIS already has general authority to request any document it deems necessary, this interim final rule states that USCIS may request copies of contracts, work orders, or other similar corroborating evidence on a case-by-case basis in all cases, regardless of where the beneficiary will be placed. This supporting evidence will allow USCIS to confirm that beneficiaries working at third-party worksites will have a valid employment relationship with the petitioner and will be performing qualifying specialty occupation services while working at the third-party worksite.

Based on the noncompliance uncovered by USCIS site visits,<sup>220</sup> DHS is adding additional requirements specific to the H-1B program to set forth the scope of on-site inspections and the consequences of a petitioner's or third-party's refusal or failure to fully cooperate with these inspections. DHS believes that site visits are important to maintain the integrity of the H-1B program by detecting and deterring fraud and noncompliance. As a result, USCIS can ensure that the H-1B

program is used appropriately and the economic interests of U.S. workers are protected. The ability to detect and deter fraud and noncompliance will strengthen the H-1B program and hence outweigh any overall adjudication delays resulting from the worksite visits. Under this rule, such failure or refusal to cooperate and allow USCIS to verify facts may be grounds for denial or revocation of any H-1B petition for workers performing services at the location or locations which are subjects of inspection, including any third-party worksites. DHS is clarifying that failure or refusal to cooperate with a site visit or other compliance review may be grounds for denial or revocation of a petition.

DHS believes that limiting approvals for third-party placement petitions to a maximum of 1-year would allow the agency to more consistently and thoroughly monitor a petitioner's and beneficiary's continuing eligibility. DHS believes that limiting the validity period for petitions where beneficiaries are placed at third-party worksites, where fraud and abuse is more likely to occur, would also increase compliance with the regulations and improve the program's overall integrity. This general practice will have the added benefit of providing a degree of certainty to petitioners with respect to what validity period to request and to expect, if approved.

DHS will revise the regulations to require issuance of a brief explanation when an H-1B nonimmigrant petition is approved but USCIS grants an earlier validity period end date than requested by the petitioner. Providing a written explanation for limited validity period will help ensure that the petitioner is aware of the reason for shorter validity periods.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 605(b), 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. "Small entities" are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. A regulatory flexibility analysis is not required when a rule is exempt from notice and comment rulemaking. This IFR is exempt from the notice and comment rulemaking, as stated in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* of the preamble.

<sup>219</sup> See INA section 286(m), 8 U.S.C. 1356(m).

<sup>220</sup> See *supra* note 132.

Therefore, a regulatory flexibility analysis is not required for this rule.

#### D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of \$100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI-U) is approximately \$168 million based on the Consumer Price Index for All Urban Consumers.<sup>221</sup>

While this interim final rule may result in the expenditure of more than \$100 million by the private sector annually, the rulemaking is not a “Federal mandate” as defined for UMRA purposes.<sup>222</sup> The cost of preparation of H-1B petitions (including required evidence) and the payment of H-1B nonimmigrant petition fees by petitioners or other private sector entities is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.<sup>223</sup> This interim final rule does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. Therefore, no actions were deemed necessary under the provisions of the UMRA.

<sup>221</sup> See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items*, available at <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf> (last visited Aug. 11, 2020).

Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2019 – Average monthly CPI-U for 1995)/(Average monthly CPI-U for 1995)] \* 100 = [(255.657 – 152.383)/152.383] \* 100 = (103.274/152.383) \* 100 = 0.6777 \* 100 = 67.77 percent = 68 percent (rounded).

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

<sup>222</sup> See 2 U.S.C. 658(6).

<sup>223</sup> See 2 U.S.C. 658(7)(A)(ii).

#### E. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this interim final rule is a major rule as defined by 5 U.S.C. 804, also known as the “Congressional Review Act,” as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868 *et seq.* Accordingly, this rule will be effective at least 60 days after the date on which Congress receives a report submitted by DHS under the Congressional Review Act, or 60 days after the IFR’s publication, whichever is later.

#### F. Executive Order 13132 (Federalism)

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

#### G. Executive Order 12988 (Civil Justice Reform)

This interim final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This interim final rule does not have “tribal implications” because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

#### I. National Environmental Policy Act

DHS analyzes actions to determine whether the National Environmental Policy Act, Public Law 91–190, 42 U.S.C. 4321 through 4347 (NEPA), applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01, *Implementation of the National Environmental Policy Act* (Instruction Manual) establish the policies and procedures that DHS and its components use to comply with NEPA

and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii), 1508.4. Categorical exclusions established by DHS are set forth in Appendix A of the Instruction Manual. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c).

This rule amends regulations governing the H-1B temporary nonimmigrant specialty occupation program to improve the integrity of the program, and more closely conform the regulatory framework to that of the Act. Specifically, DHS is revising the regulatory definition and standards for determining whether an alien will be employed in a “specialty occupation” to align with the statutory definition of the term. The rule is also revising the definition of “United States employer,” and “employer-employee relationship,” to clarify how USCIS will determine whether there is an employer-employee relationship between the petitioner and the beneficiary. In addition, the rule is limiting the validity period for third-party placement petitions to a maximum of 1 year; providing for a written explanation for certain approved petitions where the validity period is limited to 1 year or less; amending the itinerary provision applicable to petitioners of temporary nonimmigrant workers to clarify it does not apply to H-1B petitioners; and codifying USCIS’ H-1B site visit authority, including addressing the potential consequences of refusing a site visit. The primary purpose of these changes is to better ensure that each H-1B nonimmigrant worker will be working for a qualified employer and in a position that meets the statutory definition of a “specialty occupation.” While this rule tightens regulatory eligibility criteria and may result in denials of some H-1B

petitions, this rule does not change the number of H-1B workers that may be employed by U.S. employers; the rule leaves unchanged the statutory numerical limitations and cap exemptions. It also does not change rules for where H-1B nonimmigrants may be employed.

Generally, DHS believes NEPA does not apply to a rule intended to strengthen an immigration program because any attempt to analyze its potential impacts would be largely speculative, if not completely so. DHS cannot reasonably estimate how many petitions will be filed for workers to be employed in specialty occupations following the changes made by this rule or whether the regulatory amendments herein will result in an overall change in the number of H-1B petitions that are ultimately approved, and the number of H-1B workers who are employed in the United States in any fiscal year. DHS has no reason to believe that the amendments to H-1B regulations would change the environmental effect, if any, of the existing regulations. Therefore, DHS has determined that even if NEPA were to apply to this action, this rule clearly fits within categorical exclusion A3(d) in the Instruction Manual, which provides an exclusion for “promulgation of rules . . . that amend an existing regulation without changing its environmental effect.” This rule maintains the current human environment by making improvements to the H-1B program during the economic crisis caused by COVID-19 in a way that will more effectively prevent the employment of H-1B workers from negatively impacting the working conditions of U.S. workers who are similarly employed. This rule is not a part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

#### J. Paperwork Reduction Act

##### 1. USCIS Form I-129<sup>224</sup>

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies

<sup>224</sup> As indicated elsewhere in this rule, DHS estimated the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, final rule (“Fee Schedule Final Rule”), and related form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. See, *Immigrant Legal Resource Center v. Wolf*, No. 4:20-

are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The revised information collection has been submitted to OMB for review and approval as required by the PRA.

DHS invites comment on the impact of this rule to the collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument. Comments are encouraged and will be accepted until November 9, 2020. All submissions received must include the agency name and OMB Control Number 1615-0009 in the body of the submission. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and Public Participation sections of this interim final rule to submit comments. Comments on this information collection should address one or more of the following four points:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

#### Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker.

cv-5883 (N.D. Cal. Sept. 29, 2020). While DHS intends to vigorously defend this lawsuit and is not changing the economic baseline for this rule as a result of the litigation, it is using the currently approved Form I-129, and not the form version associated with the enjoined Fee Schedule Final Rule for the purpose of seeking OMB approval of form changes associated with this rule. Should DHS prevail in the Fee Schedule Final Rule litigation and is able to implement the form changes associated with that rule, DHS will comply with the Paperwork Reduction Act and seek approval of the information collection changes associated with this rule, based on the version of the Form I-129 that is in effect at that time.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I-129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for an alien to temporarily enter as a nonimmigrant in certain classifications. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the alien worker. The form serves the purpose of standardizing requests for certain nonimmigrant workers and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I-129 is 294,751 and the estimated hour burden per response is 2.84 hours; the estimated total number of respondents for the information collection E-1/E-2 Classification Supplement to Form I-129 is 4,760 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I-129 is 3,057 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection H Classification Supplement to Form I-129 is 96,291 and the estimated hour burden per response is 2.5 hours; the estimated total number of respondents for the information collection H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement is 96,291 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I-129 is 37,831 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I-129 is 22,710 and the estimated hour burden per

response is 1 hour; the estimated total number of respondents for the information collection Q-1 Classification Supplement to Form I-129 is 155 and the estimated hour burden per response is 0.34 hours; the estimated total number of respondents for the information collection R-1 Classification Supplement to Form I-129 is 6,635 and the estimated hour burden per response is 2.34 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection of information is 1,268,331 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$70,681,290.

2. USCIS H-1B Registration Tool

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The revised information collection has been submitted to OMB for review and approval as required by the PRA.

DHS invites comment on the impact to the collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument. Comments are encouraged and will be accepted until November 9, 2020. All submissions received must include the agency name and OMB Control Number 1615-0144 in the body of the submission. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and Public Participation sections of this interim final rule to submit comments. Comments on this information collection should address one or more of the following four points:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated,

electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

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

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* OMB-64; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS will use the data collected through the H-1B Registration Tool to select a sufficient number of registrations projected to meet the applicable H-1B cap allocations and to notify registrants whether their registration was selected.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H-1B Registration Tool is 275,000 and the estimated hour burden per response is 0.583 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection of information is 160,325 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is \$0.

K. Signature

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

List of Subjects in 8 CFR Part 214

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

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

PART 214—NONIMMIGRANT CLASSES

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

**Authority:** 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115-218.

- 2. Amend § 214.2 by:
  - a. Revising paragraph (h)(2)(i)(B);
  - b. Adding paragraph (h)(4)(i)(B)(7);
  - c. In paragraph (h)(4)(ii):
    - i. Adding a definition for “Employer-employee relationship” in alphabetical order;
    - ii. Revising the definition of “Specialty occupation;”
    - ii. Adding a definition for “Third-party worksite” in alphabetical order;
    - iii. Revising the definition of “United States employer;” and
    - iv. Adding a definition for “Worksite” in alphabetical order;
  - d. Revising paragraph (h)(4)(iii)(A);
  - e. Adding paragraph (h)(4)(iv)(C);
  - f. Redesignating paragraph (h)(9)(i) introductory text as paragraph (h)(9)(i)(A);
  - g. Adding paragraph (h)(9)(i)(B);
  - h. Revising paragraph (h)(9)(iii)(A)(1); and
  - i. Adding paragraph (h)(24).

The revisions and additions read as follows:

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

\* \* \* \* \*  
 (h) \* \* \*  
 (2) \* \* \*  
 (i) \* \* \*

(B) *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training. The itinerary must be submitted to USCIS with the Petition for a Nonimmigrant Worker, or successor form, as provided in the form instructions. The address that the petitioner specifies as its location on the Petition for a Nonimmigrant Worker must be where the petitioner is located for purposes of this paragraph (h)(2)(i)(B). This paragraph (h)(2)(i)(B) does not apply to H-1B petitions.

\* \* \* \* \*  
 (4) \* \* \*  
 (i) \* \* \*

(B) \* \* \*

(7)(i) The information provided on an H-1B petition and the evidence submitted in support of such petition may be verified by USCIS through lawful means as determined by USCIS, including telephonic and electronic verifications and on-site inspections. Such inspections may include, but are not limited to, a visit of the petitioning organization's facilities, interviews with the petitioning organization's officials, review of the petitioning organization's records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the H-1B petition, such as facts relating to the petitioner's and beneficiary's H-1B eligibility and compliance. An inspection may be conducted at locations including the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable.

(ii) USCIS may conduct on-site inspections or other compliance reviews as described in paragraph (h)(4)(i)(B)(7)(i) of this section at any time after the filing of an H-1B petition. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

(iii) USCIS conducts on-site inspections or other compliance reviews to verify facts related to the adjudication of the petition and compliance with H-1B petition requirements. If USCIS is unable to verify such facts due to the failure or refusal of the petitioner or a third-party worksite party to cooperate in an inspection or other compliance review, then such failure or refusal to cooperate and allow USCIS to verify facts may result in denial or revocation of any H-1B petition for H-1B workers performing services at the location or locations which are a subject of inspection or compliance review, including any third-party worksites.

\* \* \* \* \*

(ii) \* \* \*

*Employer-employee relationship* means the conventional master-servant relationship consistent with the common law. The petitioner must establish that its offer of employment as stated in the petition is based on a valid employer-employee relationship that exists or will exist. In considering whether the petitioner has established that a valid "employer-employee

relationship" exists or will exist, USCIS will assess and weigh all relevant aspects of the relationship with no one factor being determinative.

(1) In cases where the H-1B beneficiary does not possess an ownership interest in the petitioning organization or entity, the factors that USCIS may consider to determine if a valid employment relationship will exist or continue to exist include, but are not limited to:

(i) Whether the petitioner supervises the beneficiary and, if so, where such supervision takes place;

(ii) Where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision;

(iii) Whether the petitioner has the right to control the work of the beneficiary on a day-to-day basis and to assign projects;

(iv) Whether the petitioner provides the tools or instrumentalities needed for the beneficiary to perform the duties of employment;

(v) Whether the petitioner hires, pays, and has the ability to fire the beneficiary;

(vi) Whether the petitioner evaluates the work-product of the beneficiary;

(vii) Whether the petitioner claims the beneficiary as an employee for tax purposes;

(viii) Whether the petitioner provides the beneficiary any type of employee benefits;

(ix) Whether the beneficiary uses proprietary information of the petitioner in order to perform the duties of employment;

(x) Whether the beneficiary produces an end-product that is directly linked to the petitioner's line of business; and

(xi) Whether the petitioner has the ability to control the manner and means in which the work product of the beneficiary is accomplished.

(2) In cases where the H-1B beneficiary possesses an ownership interest in the petitioning organization or entity, additional factors that USCIS may consider to determine if a valid employment relationship will exist or continue to exist include, but are not limited to:

(i) Whether the petitioning entity can hire or fire the beneficiary or set the rules and parameters of the beneficiary's work;

(ii) Whether and, if so, to what extent the petitioner supervises the beneficiary's work;

(iii) Whether the beneficiary reports to someone higher in the petitioning entity;

(iv) Whether and, if so, to what extent the beneficiary is able to influence the petitioning entity;

(v) Whether the parties intended that the beneficiary be an employee, as expressed in written agreements or contracts; and

(vi) Whether the beneficiary shares in the profits, losses, and liabilities of the organization or entity.

\* \* \* \* \*

*Specialty occupation* means an occupation that requires:

(1) The theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor, such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, or the arts; and

(2) The attainment of a U.S. bachelor's degree or higher in a directly related specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. The required specialized studies must be directly related to the position. A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. While a position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, each of those qualifying degree fields must be directly related to the proffered position.

*Third-party worksite* means a worksite, other than the beneficiary's residence in the United States, that is not owned or leased, and not operated, by the petitioner.

*United States employer* means a person, firm, corporation, company, or other association or organization in the United States which:

(1) Engages the beneficiary to work within the United States, and has a bona fide, non-speculative job offer for the beneficiary;

(2) Has an employer-employee relationship with respect to employees under this part; and

(3) Has an Internal Revenue Service Tax identification number.

*Worksite* means the physical location where the work actually is performed by the H-1B nonimmigrant. A "worksite" will not include any location that would not be considered a "worksite" for Labor Condition Application (LCA) purposes.

(iii) \* \* \*

(A) *Criteria for specialty occupation position.* A proffered position does not meet the definition of specialty occupation in paragraph (h)(4)(ii) of this section unless it also satisfies at least one of the following criteria:

(1) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is the minimum requirement for entry into the particular occupation in which the beneficiary will be employed;

(2) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is the minimum requirement for entry into parallel positions at similar organizations in the employer's United States industry;

(3) The employer has an established practice of requiring a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, for the position. The petitioner must also establish that the proffered position requires such a directly related specialty degree, or its equivalent, to perform its duties; or

(4) The specific duties of the proffered position are so specialized, complex, or unique that they can only be performed by an individual with a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent.

\* \* \* \* \*

(iv) \* \* \*

(C) The petitioner must establish, at the time of filing, that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the

petition. When a beneficiary will be placed at one or more third-party worksites, the petitioner must submit evidence such as contracts, work orders, or other similar corroborating evidence showing that the beneficiary will perform services in a specialty occupation at the third-party worksite(s), and that the petitioner will have an employer-employee relationship with the beneficiary. In accordance with 8 CFR 103.2(b) and paragraph (h)(9) of this section, USCIS may request copies of contracts, work orders, or other similar corroborating evidence on a case-by-case basis in all cases, regardless of where the beneficiary will be placed.

\* \* \* \* \*

(9) \* \* \*

(i) \* \* \*

(B) Where the petition is approved with an earlier validity period end date than requested by the petitioner, the approval notice will provide or be accompanied by a brief explanation for the validity period granted.

\* \* \* \* \*

(iii) \* \* \*

(A)(1) *H-1B petition in a specialty occupation.* The maximum validity period for an approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation is 3 years.

However, where the beneficiary will be working at a third-party worksite, the maximum validity period for an approved petition is 1 year. In all instances, the approved petition may not exceed the validity period of the labor condition application.

\* \* \* \* \*

(24) *Severability.* (i) [Reserved]

(ii) The following provisions added or revised by the changes made to the H-1B nonimmigrant visa classification program, as of December 7, 2020, are intended to be implemented as separate and severable from one another: paragraphs (h)(2)(i), (h)(4)(i)(B)(7), (h)(4)(ii) (definitions of employer-employee, specialty occupation, third-party worksite, U.S. employer, and worksite), (h)(4)(iii)(A), (h)(4)(iv)(C), (h)(9)(i)(B), and (h)(9)(iii)(A)(1) of this section. If one or more of the paragraphs in the preceding sentence is not implemented, DHS intends that the remaining paragraphs will remain valid and be implemented to the greatest extent possible.

\* \* \* \* \*

**Chad R. Mizelle,**

*Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.*

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