

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 214

[CIS No. 2326-19; DHS Docket No. USCIS-2008-0014]

RIN 1615-AB71

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

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Department of Homeland Security (“DHS” or “the Department”) regulations governing petitions filed on behalf of H-1B beneficiaries who may be counted toward the 65,000 visa cap established under the Immigration and Nationality Act (“H-1B regular cap”) or beneficiaries with advanced degrees from U.S. institutions of higher education who are eligible for an exemption from the regular cap (“advanced degree exemption”). The amendments require petitioners seeking to file H-1B petitions subject to the regular cap, including those eligible for the advanced degree exemption, to first electronically register with U.S. Citizenship and Immigration Services (“USCIS”) during a designated registration period, unless the registration requirement is temporarily suspended. USCIS is suspending the registration requirement for the fiscal year 2020 cap season to complete all requisite user testing of the new H-1B registration system and otherwise ensure the system and process are operable.

This final rule also changes the process by which USCIS counts H-1B registrations (or petitions, for FY 2020 or any other year in which the registration requirement will be suspended), by first selecting registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption. USCIS will then select from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption. Changing the order in which USCIS counts these separate allocations will likely increase the number of beneficiaries with a master’s or higher degree from a U.S. institution of higher education to be selected for further processing under the H-1B allocations. USCIS will proceed with implementing this change to the

cap allocation selection process for the FY 2020 cap season (beginning on April 1, 2019), notwithstanding the delayed implementation of the H-1B registration requirement.

**DATES:** This final rule is effective April 1, 2019.

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#### I. Executive Summary

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

DHS is amending its regulations to require petitioners seeking to file H-1B cap-subject petitions, which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to first electronically register with USCIS.

This final rule also amends the process by which USCIS selects H-1B petitions toward the projected number of petitions needed to reach the regular cap and advanced degree exemption. Changing the order in which petitions are selected will likely increase the total number of petitions selected under the regular cap for H-1B beneficiaries who possess a master’s or higher degree from a U.S. institution of higher education each fiscal year.

##### B. Legal Authority

The Secretary of Homeland Security’s authority for these regulatory amendments is found in various sections of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* General authority for issuing this final 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 112 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations. Further authority for these regulatory amendments is found in:

- 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; and

- Section 214(g) of the INA, 8 U.S.C. 1184(g), which, *inter alia*, prescribes the H-1B and H-2B numerical limitations, various exceptions to those limitations, and criteria concerning the order of processing H-1B and H-2B petitions.

#### C. Summary of Changes From the Notice of Proposed Rulemaking

Following careful consideration of public comments received, including relevant data provided by stakeholders, DHS has made a few modifications to the regulatory text proposed in the Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on December 3, 2018. See 83 FR 62406.

Those changes include the following:

- *Initial registration period.* In the final rule, DHS is responding to a public comment by revising proposed 8 CFR 214.2(h)(8)(iii)(A)(3), a provision that identifies the initial registration period. In the NPRM, DHS proposed that USCIS would announce the start and end dates of the initial registration period on the USCIS website, but did not specify when these periods would be announced. In response to a comment suggesting that DHS include a 30-day notice requirement prior to the commencement of the initial registration period, DHS is adding that USCIS will announce the start of the initial registration period at least 30 calendar days in advance of such date. In addition, DHS will publish a notice in the **Federal Register** to announce the initial implementation of the H-1B registration process in advance of the cap season in which such process will be implemented.

- *Limitation on requested start date.* In the final rule, DHS is responding to public comment by revising proposed 8 CFR 214.2(h)(8)(iii)(A)(4), a provision that identifies when a petitioner may submit a registration during the initial registration period. In the NPRM, DHS proposed that the requested start date for the beneficiary be the first business day for the applicable fiscal year. A commenter pointed out that this requirement created a mismatch in the date requirement for cap-gap protection and the proposed date requirement for this new registration process, which could make it impossible for H-1B petitioners and beneficiaries to receive the cap-gap protections afforded by 8

CFR 214.2(f)(5)(vi). In order to correct this mismatch, DHS is removing the word “business” and revising the text to refer to the first day for the applicable fiscal year.

- *Filing period.* In the final rule, DHS is responding to public comments by revising proposed 8 CFR

214.2(h)(8)(iii)(D)(2), a provision that indicates the filing period for H-1B cap-subject petitions. In the NPRM, DHS proposed that the filing period will be at least 60 days. In response to public comments stating that 60 days is an insufficient amount of time for a company to gather all the necessary documentation to properly file the petition, DHS is revising the filing period to be at least 90 days.<sup>1</sup>

- *Eligible for exemption.* In this final rule, DHS is making several non-substantive changes to the regulatory text as proposed to ensure that the terminology used is consistent with the statute when describing petitions, and associated registrations, filed on behalf of those who may be eligible for exemption under section 214(g)(5)(C) of the INA, 8 U.S.C. 1184(g)(5)(C). For example, in 8 CFR 214.2(h)(8)(iii)(A)(5), DHS deleted “counted” and replaced it with “eligible for exemption.” Similar changes were made in 8 CFR 214.2(h)(8)(iii)(A)(1), (h)(8)(iii)(A)(6)(i) and (ii), (h)(8)(iii)(D), and (h)(8)(iv)(B)(1).

- *Petitions determined not to be exempt.* In this final rule, DHS is making non-substantive edits in 8 CFR 214.2(h)(8)(iv)(B) to clarify how USCIS may process petitions, when the registration requirement is suspended, that claim exemption from the numerical restrictions but are determined not to be exempt. With the exception of changes discussed in this final rule, DHS is finalizing this rule as proposed.

#### D. Summary of Costs, Benefits, and Transfers

DHS is amending its regulations governing the process for petitions filed on behalf of cap-subject H-1B workers. Specifically, this final rule adds a registration requirement for petitioners seeking to file H-1B cap-subject petitions on behalf of foreign workers. Additionally, this final rule changes the order in which H-1B cap-subject

registrations will be selected towards the applicable projections needed to meet the annual H-1B regular cap and advanced degree exemption in order to increase the odds of selection for H-1B beneficiaries who have earned a master’s or higher degree from a U.S. institution of higher education.

All petitioners seeking to file an H-1B cap-subject petition will have to submit a registration, unless the registration requirement is suspended by USCIS consistent with this final rule. As required under this final rule and the registration requirement, when applicable, only those whose registrations are selected (termed “selected registrant”<sup>2</sup> for purposes of this analysis) will be eligible to file an H-1B cap-subject petition for those selected registrations during the associated filing period. Therefore, as selected registrants under the registration requirement, selected petitioners will incur additional opportunity costs of time to complete the electronic registration relative to the costs of completing and filing the associated H-1B petition, the latter costs being unchanged from the current H-1B petitioning process. Conversely, those who complete registrations that are unselected because of excess demand (termed “unselected registrant” for purposes of this analysis) will experience cost savings relative to the current process, as they will no longer have to complete an entire H-1B cap-subject petition that ultimately does not get selected for USCIS processing and adjudication as done by current unselected petitioners, unless the registration requirement is suspended.

To estimate the costs of the registration requirement, DHS compared the current costs associated with the H-1B petition process to the anticipated costs imposed by the additional registration requirement. DHS compared costs specifically for selected and unselected petitioners because the impact of the registration requirement to each population is not the same. Current costs to selected petitioners are the sum of filing fees associated with each H-1B cap-subject petition and the opportunity cost of time to complete all associated forms. Current costs to unselected petitioners are only the opportunity cost of time to complete forms and cost to

<sup>1</sup> In the NPRM, DHS discussed in the preamble to the proposal to stagger filing periods, such that the initial date after which petitions based on selected registrations could be filed would be spread out over time. However, in response to comments concerning the potential for negative impact for beneficiaries relying on existing cap-gap provisions in 8 CFR 214.2(f)(5)(vi), DHS is not proceeding with staggered filing periods in this final rule.

<sup>2</sup> DHS notes that one entity may submit multiple registrations which could result in a mix of selected and unselected outcomes. For the purpose of this analysis, the terms “selected registrant” and “unselected registrant” refer to the originator of a submission based on its outcome and should not be deemed a unilateral label for a single entity. Using this terminology it is possible for a single entity to experience impacts simultaneously as a selected registrant and as an unselected registrant.

mail the petition since USCIS returns the H-1B cap-subject petition and filing fees to unselected petitioners.

Under this final rule, when registration is required, the opportunity cost of time associated with registration will be a cost to all petitioners (selected and unselected), but those whose registrations are not selected will be relieved from the opportunity cost associated with completing and mailing the entire H-1B cap-subject petitions. Therefore, DHS estimates the costs of this rule to selected petitioners for completing an H-1B cap-subject petition as the sum of new registration costs and current costs. DHS estimates that the costs of this final rule to unselected petitioners, when registration is required, will only result from the estimated opportunity costs associated with registration. Overall, when registration is required, unselected petitioners will experience a cost savings relative to the current H-1B cap-subject petitioning process; DHS estimates these cost savings by subtracting new registration costs from current costs of preparing an H-1B cap-subject petition. These estimated quantitative cost savings will be a benefit that will accrue to only those with registrations that were not selected.

Currently, the aggregate cost for all selected petitioners to complete entire H-1B cap-subject petitions is estimated to be between \$132.9 million and \$165.5 million, depending on who petitioners use to prepare a petition. These current costs to complete and file an H-1B cap-subject petition are based on a 5-year petition volume average and may differ across sets of fiscal years. Current costs are not changing for selected petitioners as a result of this final rule. Rather, the registration requirement under this final rule, except when suspended, would add a new opportunity cost of time to selected petitioners who will continue to face current H-1B cap-subject petition costs. DHS estimates the added opportunity cost of time to selected petitioners to comply with the registration requirement in this final rule would range from \$6.2 million to \$10.3 million, again depending on who petitioners use to submit a registration and prepare a petition. Therefore, under this final rule, and when required to register, DHS estimates the adjusted aggregate total cost for all selected petitioners to complete their entire H-1B cap-subject petitions will be between \$134.7 million and \$171.4 million. Since these petitioners already file Form I-129, only the registration costs of \$6.2 million to \$10.3 million are considered new costs.

When registration is required under this final rule, unselected petitioners will experience an overall cost savings, despite new opportunity costs of time associated with the registration requirement. Currently for unselected petitioners, the total cost associated with the H-1B process is \$53.5 million to \$85.6 million, depending on who petitioners use to prepare the petition. The difference between total current costs for selected and unselected petitioners in an annual filing period consists of fees returned to unselected petitioners. DHS estimates the total costs to unselected petitioners for registration, when required, will range from \$6.2 million to \$10.1 million. DHS estimates a cost savings will occur because unselected petitioners will avoid having to file an entire H-1B cap-subject petition and only have to submit a registration, unless the registration requirement is suspended. Therefore, the difference between total current costs and total new costs for all unselected petitioners when registration is required will represent a cost savings ranging from \$47.3 million to \$75.5 million, again depending on who petitioners use to submit the registration.

The government will also benefit from the registration requirement and process by no longer having to receive, handle, and return large numbers of petitions that are currently rejected because of excess demand (unselected petitions), except in those instances when the registration requirement is suspended. These activities will save DHS an estimated \$1.6 million annually when registration is required. USCIS will, however, have to expend a total of about \$1.5 million in the initial development of the registration website. This cost to the government is considered a one-time cost. DHS recognizes that there could be some additional unforeseen development and maintenance costs or costs from refining the registration system in the future. However, DHS cannot predict what these costs would be at this time and so was not able to estimate these costs. Currently there are no additional costs for annual maintenance of the servers because the registration system will be run on existing servers. Since these costs are already incurred regardless of this rulemaking, DHS did not add any estimated costs for server maintenance.

Assuming that there is no expansion in the number of registrations, the net quantitative impact of this registration requirement is an aggregate cost savings to petitioners and to government ranging from \$43.4 million to \$62.7 million annually. Using lower bound

figures, the net quantitative impact of this registration requirement is cost savings of \$434.2 million over ten years. Discounted over ten years, these cost savings would be \$381.2 million based on a discount rate of 3 percent and \$325.7 million based on a discount rate of 7 percent. Using upper bound figures, the net quantitative impact of this registration requirement is cost savings of \$626.8 million over ten years. Discounted over ten years, these cost savings will be \$550.5 million based on a discount rate of 3 percent and \$470.6 million based on a discount rate of 7 percent.

DHS notes that these overall cost savings result only in years when registration is required and the demand for registrations and the subsequently filed petitions exceeds the number of available visas needed to meet the regular cap and the advanced degree exemption. For years where DHS has demand that is less than the number of available visas, this registration requirement would result in increased costs. For this final rule to result in net quantitative cost savings, at least 110,182 petitions (registrations and subsequently filed petitions under the final rule, unless the registration requirement is suspended) will need to be received by USCIS based on lower bound cost estimates. For upper bound cost estimates, USCIS will need to receive at least 111,137 registrations and subsequently filed petitions for this rule to result in net quantitative cost savings.

The change to the petition selection process under this final rule could result in greater numbers of highly educated workers with degrees from U.S. institutions of higher education entering the U.S. workforce under the H-1B program. USCIS estimates that the change will result in an increase in the number of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education selected by 16 percent (or 5,340 workers each year). If there is an increase in the number of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education, wage transfers may occur. These transfers would be borne by companies whose petitions, filed for beneficiaries who are not eligible for the advanced degree exemption (e.g. holders of bachelors degrees and holders of advanced degrees from foreign institutions of higher education), might have been selected and ultimately approved but for the reversal of the selection order.

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

| <b>Table 1: Summary of Provisions and Impacts</b>   |  |   |
|---|--|---|
| <b>Current and Final Provisions</b>   | <b>Expected Cost of the Final Provision</b>  | <b>Expected Benefit of the Final Provision</b>  |
| <p>Currently, all petitioners who file on behalf of an H-1B worker must complete and file Form I-129 along with a certified DOL Labor Condition Application (LCA). The total current cost for all selected petitioners to file and complete entire H-1B cap-subject petitions ranges from \$132.9 million to \$165.5 million. For unselected petitioners, the total current cost is \$53.5 million to \$85.6 million.</p> <p>This final rule requires all petitioners who seek to hire a cap-subject H-1B worker to register for each prospective H-1B worker for whom they seek to file a cap-subject H-1B petition, unless USCIS suspends the registration requirement. When registration is required, only those petitioners whose registrations are selected may proceed to complete and file an H-1B cap-subject petition.</p> | <p><b>Petitioners -</b></p> <ul style="list-style-type: none"> <li>• For current selected petitioners, when registration is required, the final rule will add an additional annual opportunity cost of time ranging from \$6.2 million to \$10.3 million, depending on who the petitioner uses to submit the registration. Therefore, the total costs of registering and completing and filing H-1B cap-subject petitions will range from \$134.7 million to \$171.4 million to this population annually, depending on the type of petition preparer.</li> <li>• For current unselected petitioners, when registration is required, they will experience an overall cost savings, though the final rule would add an opportunity cost of time ranging from \$6.2 million to \$10.1 million to this population annually, depending on who petitioners use to submit the registration.</li> </ul> <p><b>Government -</b></p> <ul style="list-style-type: none"> <li>• The final rule will cost the government about \$1.5 million to initially develop the registration</li> </ul> | <p><b>Petitioners -</b></p> <ul style="list-style-type: none"> <li>• Petitioners whose registrations are not selected will have cost savings that will range from \$47.3 million to \$75.5 million, when registration is required, from no longer having to complete and file H-1B cap-subject petitions along with mailing costs despite a new opportunity cost of time to submit their registration.</li> </ul> <p><b>Government -</b></p> <ul style="list-style-type: none"> <li>• USCIS will save \$1.6 million annually in processing and return shipping costs, when registration is required, as fewer petitions will be filed with USCIS based on registrations that are not selected.</li> </ul> |

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|  | <p>website. This cost to the government is considered a one-time cost. Annual maintenance, including running the registration website servers and the labor costs associated with server maintenance, are reported as negligible. DHS recognizes that there could be some additional unforeseen development and maintenance costs or costs from refining the registration system in the future. However, DHS cannot predict what these costs would be at this time and thus cannot estimate these costs. Currently there are no additional costs for annual maintenance of the servers because the registration system will be run on existing servers. Since these costs are already incurred regardless of this rulemaking, DHS did not estimate any costs for maintenance.</p> |  |
| <p>Under the current H-1B selection process, if the regular cap and advanced degree exemption are reached in the first five business days that cap-subject petitions can be filed, USCIS randomly selects sufficient H-1B petitions to reach the H-1B 20,000 advanced degree exemption first. Then, USCIS randomly selects</p> | <p><b>Petitioners -</b></p> <ul style="list-style-type: none"> <li>• The selection process under this final rule could decrease the number of cap-subject H-1B petitions for beneficiaries with bachelor’s degrees, advanced degrees from U.S. for-profit universities, or foreign advanced degrees by up to 5,340 workers. This potential decrease could</li> </ul>  | <p><b>Petitioners and Government</b></p> <ul style="list-style-type: none"> <li>• The selection process under this final rule could increase the number of cap-subject H-1B petitions that are selected for beneficiaries with master’s degrees or higher from U.S. institutions of higher education by an estimated 16 percent (or 5,340 workers annually). DHS believes the increase in the</li> </ul> |

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| <p>sufficient H-1B petitions from the remaining pool of beneficiaries, including those not selected in the advanced degree exemption, to reach the H-1B 65,000 regular cap limit. USCIS rejects all remaining unselected H-1B cap-subject petitions.</p> <p>This final rule reverses the selection process so that USCIS will randomly select registrations (petitions if the registration requirement is suspended) for the H-1B regular cap first, including registrations for petitions eligible for the H-1B advanced degree exemption. Then USCIS will randomly select registrations for the H-1B advanced degree exemption.</p> | <p>result in some higher labor costs to petitioners assuming that beneficiaries with bachelor's degrees, advanced degrees from U.S. for-profit universities or foreign advanced degrees are paid less than and replaced by beneficiaries with master's degrees from U.S. institutions of higher education.</p> <ul style="list-style-type: none"> <li>• DHS does not anticipate, as a result of the new selection process, petitioning employers will suffer economic harm from the decreased probability of selecting H-1B petitions eligible only under regular cap.</li> </ul> | <p>number of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education will likely result in more highly educated workers entering the U.S. workforce. This could benefit the U.S. economy if those workers have a higher net value to the economy than the H-1B workers that they replace.</p> |
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This final rule will also allow for the H-1B cap and advanced degree exemption selections to take place in the event that the registration system is inoperable for any reason and needs to be suspended. If temporary suspension of the registration system is necessary, then the costs and benefits described in this analysis resulting from registration for the petitioners and government will not apply during any period of temporary suspension. However, the reverse selection order will still take place and is anticipated to yield a higher proportion of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education being selected.

#### E. Effective Date

This final rule will be effective on April 1, 2019, 60 days from the date of publication in the **Federal Register**.

#### F. Implementation

The changes in this final rule will apply to all Form I-129 H-1B cap-petitions, including those for the advanced degree exemption, filed on or after the effective date of the final rule. The treatment of Form I-129 H-1B cap-petitions filed prior to the effective date

of this final rule will be based on the regulatory requirements in place at the time the petition is properly filed. DHS has determined that this manner of implementation best balances operational considerations with fairness to the public.

USCIS will be suspending the registration requirement until it can complete all requisite user testing of the new H-1B registration system and otherwise ensures the system and process are fully operable, and addresses concerns raised by commenters in response to the proposed rule. DHS will publish a notice in the **Federal Register** to announce the initial implementation of the registration process in advance of the H-1B cap season in which the registration process will be first implemented. USCIS will also engage in stakeholder outreach and provide training to the regulated public on the registration system in advance of its implementation. Consistent with this final rule, USCIS will formally announce the temporary suspension of the registration requirement for FY 2020 on the USCIS website following the effective date of the final rule.

## II. Background

### A. The H-1B Visa Program and Numerical Cap and Exemptions

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

Congress has established limits on the number of workers who may be granted initial H-1B nonimmigrant visas or status each fiscal year (commonly known as the "cap"). See INA section

214(g), 8 U.S.C. 1184(g). The total number of workers who may be granted initial H-1B nonimmigrant status during any fiscal year currently may not exceed 65,000. See INA section 214(g), 8 U.S.C. 1184(g). Certain petitions are exempt from the 65,000 numerical limitation. See INA section 214(g)(5) and (7), 8 U.S.C. 1184(g)(5) and (7). The annual exemption from the 65,000 cap for H-1B workers for those who have earned a qualifying U.S. master's or higher degree may not exceed 20,000 workers.<sup>3</sup> See INA section 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C).

#### B. Current Selection Process

Under the current H-1B cap filing and selection process, USCIS monitors the number of H-1B petitions it receives at each service center in order to manage the H-1B allocations. Petitioners may file H-1B petitions as early as six months ahead of the actual date of need (commonly referred to as the employment start date). See 8 CFR 214.2(h)(9)(i)(B). Because of this, USCIS routinely receives hundreds of thousands of H-1B petitions in early April each year (for visas allocated for the following fiscal year) and this period is informally recognized as an H-1B "cap season." Currently, USCIS monitors the number of H-1B cap-subject petitions received and notifies the public of the date that USCIS received a sufficient number of petitions needed to reach the numerical limit (the "final receipt date"). See 8 CFR 214.2(h)(8)(ii)(B). USCIS then may randomly select from the cap-subject petitions received on the final receipt date the projected number of petitions needed to reach the limit.

If USCIS receives sufficient H-1B petitions to reach the projected number of petitions to meet both the regular cap and the advanced degree exemption for the upcoming fiscal year within the first five business days, USCIS first randomly selects H-1B petitions subject to the advanced degree exemption. *Id.* Once the random selection process for the advanced degree exemption is complete, USCIS then conducts the random selection process for the regular cap, which includes the remaining unselected petitions filed for, but not

<sup>3</sup> The total number of workers who may be issued an initial H-1B visa or provided initial H-1B status in a given year is limited to 85,000 (up to 65,000 under the regular cap plus the 20,000 advanced degree exemption). However, there are various other exemptions that expand this total. Other exemptions from the numerical allocations include those under INA 214(g)(5)(A) and (B), as well as an exemption, with certain exceptions, for those previously counted under the numerical allocations but who are applying for time remaining on their 6-year period of authorized admission.

selected in, the advanced degree exemption. Once the random selection process for the regular cap is complete, USCIS rejects all remaining H-1B cap-subject petitions not selected during one of the random selections. See 8 CFR 214.2(h)(8)(ii)(D).

#### C. Final Rule

Following careful consideration of public comments received, DHS has made a few modifications to the regulatory text proposed in the NPRM (as described above in Section I.C.). The rationale for the proposed rule and the reasoning provided in the background section of that rule remain valid with respect to these regulatory amendments. Section III of this final rule includes a detailed summary and analysis of public comments that are pertinent to the proposed rule and DHS's role in administering the Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens. A brief summary of comments deemed by DHS to be out of scope or unrelated to this rulemaking, making a detailed substantive response unnecessary, is provided in Section III.J. Comments may be reviewed at the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number USCIS-2008-0014.

### III. Public Comments on the Proposed Rule

#### A. Summary of Public Comments

In response to the proposed rule, DHS received 817 comments during the 30-day public comment period. Of these, 11 comments were duplicate submissions and approximately 321 were letters submitted through mass mailing campaigns. DHS considered all of these comment submissions. Commenters consisted of individuals (including U.S. workers), law firms, labor organizations, professional organizations, advocacy groups, nonprofit organizations, and representatives from State and local governments. Some commenters expressed support for the rule and/or offered suggestions for improvement. Of the commenters opposing the rule, many commenters expressed opposition to a part of or all of the proposed rule. Some just expressed general opposition to the rule without suggestions for improvement. For many of the public comments, DHS could not ascertain whether the commenter supported or opposed the proposed rule. A number of comments received addressed subjects beyond those covered by the proposed rule, and were deemed out of scope.

DHS has reviewed all of the public comments received in response to the proposed rule and is addressing relevant comments in this final rule.<sup>4</sup> DHS's responses are grouped by subject area, with a focus on the most common issues and suggestions raised by commenters. DHS is not addressing comments seeking changes in U.S. laws, regulations, or agency policies that are out of scope and unrelated to the changes to 8 CFR part 214 it proposed in the NPRM.

#### B. Statutory and Legal Issues

*Comment:* A few commenters stated that the proposed reversal of selection order was within USCIS's congressional authority under the Immigration and Nationality Act (INA). For example, a company commented that reordering the lottery is within the reasonable discretion of the Department under the INA. The commenter argued that ambiguity and silence in the statute is properly read as Congressional delegation to DHS and USCIS to construct a reasonable H-1B allocation process.

*Response:* DHS agrees with the commenter that the reversal of the selection order is permissible based on the general authority provided to DHS under sections 103(a), 214(a) and (c) of the INA, 8 U.S.C. 1103, 1184(a) and (c), and section 112 of the HSA, 6 U.S.C. 112. As discussed in more detail in response to the next comment, DHS also agrees that the statute is not clear as to how the numerical allocations must be counted, and that reversal of the selection order is a reasonable interpretation of ambiguous statutory text.

*Comment:* Many commenters, including companies, attorneys, professional associations, and trade associations, questioned whether USCIS has the statutory authority to reverse the selection order. Some commenters stated changes to the cap and selection order can only be made through Congress. A form letter campaign and other commenters argued that existing law clearly indicates individuals with a U.S. master's degree or higher are not

<sup>4</sup> DHS published a proposed rule in 2011 which, similar to this rule, proposed to require employers seeking to file H-1B cap-subject petitions to first electronically register with USCIS during a designated registration period. Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations 76 FR 11686 (Mar. 3, 2011)(hereafter the "2011 NPRM"). DHS sought and received public comments on the proposed rule in 2011. However, the 2011 NPRM has been withdrawn, and superseded by the December 3, 2018 NPRM, and comments to the 2011 NPRM will not be addressed here.

subject to the H-1B cap until after 20,000 exempted visas are issued. Many commenters referenced the statutory language in 8 U.S.C. 1184(g)(5) as the basis for their argument that USCIS may lack the statutory authority to conduct the general visa lottery for the 65,000 H-1B visas prior to the lottery for the 20,000 U.S. master's degree petitions that are exempt from the general lottery. For example, an attorney argued that under 8 U.S.C. 1184(g)(5), a U.S. master's degree holder cannot be considered under the regular cap of 65,000 visas until the master's allocation of 20,000 has first been extinguished. Another commenter argued that USCIS is misinterpreting its authority as granted by Congress. The commenter stated that Congress did not mandate an additional 20,000 visas be granted to beneficiaries with a U.S. advanced degree, but rather that up to 20,000 beneficiaries with a U.S. advanced degree would be considered cap-exempt annually. The commenter asserted that any effort to subject a beneficiary with a U.S. advanced degree to the annual regular H-1B cap before the advanced degree visas are allocated is beyond the authority Congress has granted USCIS. In addition, the commenter asserted that the proposed selection method also fails to account for variations in filing levels. Specifically, in years when insufficient filings are made to exhaust the advanced degree exemption allocation, the selection process described could allocate cap visas to advanced degree applicants who would otherwise be considered cap-exempt, thus leaving cap-exemptions available and unused for beneficiaries with a U.S. advanced degree. The proposal also would potentially reserve remaining visas for beneficiaries with a U.S. advanced degree even if their employer filed the petition after an employer filing for a beneficiary who does not have a U.S. advanced degree, which the commenter asserted is also in violation of Congress' directive that visas be allocated to petitions in the order received. A trade association requested that USCIS provide a more robust legal explanation to justify how its proposed changes to the counting of visas is not only consistent with Congress' intentions, but also Congress' action in creating 8 U.S.C. 1184(g)(5)(C).

*Response:* DHS believes that changing the order in which registrations or petitions, as applicable, are selected will result in a selection process that is a reasonable interpretation of the statute and more consistent with the purpose of the advanced degree exemption.

The statute is ambiguous as to the precise manner by which beneficiaries with a master's or higher degree from a U.S. institution of higher education must be counted toward the numerical allocations. The statute states that the 65,000 numerical limitation does not apply until 20,000 qualifying beneficiaries are exempted, but is otherwise silent as to whether they must be exempted prior to, concurrently with, or subsequent to the 65,000 numerical limitation being counted and/or reached, or some combination thereof. This ambiguity was recognized by DHS when it initially determined how the exemption should be administered.<sup>5</sup> According to INA sec. 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C), "The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 1101(a)(15)(H)(i)(b) of this title who . . . has earned a master's or higher degree from a United States institution of higher education (as defined in section 1001(a) of Title 20) until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000." The numerical limitation of paragraph (1)(A) provides the total number of aliens who may be issued an H-1B visa or otherwise provided H-1B status. The numerical limitation, once it has been reached, means that no additional aliens, beyond the 65,000 limit, may be issued an initial H-1B visa or otherwise provided H-1B status unless they are exempt from the numerical limitation. A limited basis for exemption from the numerical limitation, for petitioners who are otherwise subject to the cap, is provided in INA sec. 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C), for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education, until the number of such aliens exempted exceeds 20,000. This final rule, therefore, implements a process for counting petitions towards the numerical allocations in a manner that reasonably interprets the statute. DHS believes this approach is most consistent with the overall statutory framework as it counts all petitions filed by cap-subject petitioners until the numerical limitation is reached, and once that numerical limitation is reached, and otherwise precludes additional petitions, allows for an additional 20,000 petitions consistent

<sup>5</sup> See 70 FR 23,775 (2005) ("Congress did not specify any procedures for implementation or dictate the manner in which USCIS should allocate H-1B numbers made available pursuant to the new exemption.").

with INA sec. 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C).

DHS also disagrees with the assertion that the selection order as proposed in the NPRM and as set forth in this final rule fails to account for variations in filing levels. DHS notes that the H-1B numerical limitation has been met before the end of the applicable fiscal year in each year since 1997.<sup>6</sup> USCIS has also received a sufficient number of petitions to reach the numerically limited exemption under INA sec. 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C) in each year from FY 2008 through FY 2019. While DHS recognizes that it is theoretically possible that a high rate of selection of submissions eligible for the advanced degree exemption under the H-1B regular cap could result in an insufficient number of remaining submissions to meet the projected number needed to reach the advanced degree exemption at the end of the annual initial registration period, the result is that USCIS would continue to allow for submissions through the end of the applicable fiscal year or until such time as USCIS has received enough registrations or petitions, as applicable, to meet the projected number need to reach the numerically limited cap exemption. DHS believes that historical filing rates indicate that such an occurrence (*i.e.* failing to receive enough registrations or petitions to meet the advanced degree exemption) is unlikely to happen at the current numerical allocation amounts. Rather, historical filing rates indicate that USCIS will continue to receive an excess number of H-1B filings to meet the numerical allocations. Further, reversing the selection order, such that all submissions are counted toward the projected number needed to reach the numerical limitation first, and then counting the remaining submissions, if eligible, towards the numerically limited cap exemption, ensures that the chance for selection under the regular cap for beneficiaries with a master's or higher degree from a U.S. institution of higher education is not reduced by the order of selection, as discussed in section IV.A.4.b. of this rule. DHS believes that administering the numerically limited cap exemption in a way that does not reduce the odds of selection for beneficiaries with a U.S. advanced degree under the regular cap is most appropriate and maximizes the overall odds of selection for such beneficiaries under the numerical allocations. Doing so also outweighs the potential that H-1B demand might

<sup>6</sup> See *Walker Macy v. USCIS*, 243 F.Supp.3d 1156, 1163 (D. Or. 2017).



decrease so significantly from that experienced over the course of the last decade to a level where both numerical allocations are not met by the end of the applicable fiscal year.

DHS also disagrees that the statute requires that initial H-1B visas be allocated to petitions in the order received. The statute states that aliens subject to the H-1B cap shall be issued visas or otherwise provided status in the order in which petitions are filed. This statutory provision, and more specifically the term “filed” as used in INA 214(g)(3), 8 U.S.C. 1184(g)(3), is ambiguous.<sup>7</sup> Further, a literal application of this statutory language would lead to an absurd result. The Department of State (“DOS”) does not issue H-1B visas, and USCIS does not otherwise provide H-1B status, based on the order in which petitions are filed. Such a literal application would necessarily mean that processing delays pertaining to a petition earlier in the petition filing order would preclude issuance of a visa or provision of status to all other H-1B petitions later in the petition filing order. The longstanding approach to implementing the numerical limitation has been to project the number of petitions needed to reach the numerical limitation. Under this final rule, USCIS will continue to count submissions towards the projected number needed to generate a sufficient number of petition approvals to reach the numerical limitation but without exceeding the numerical limitation. DHS is not changing the approach to administering the numerical allocations as it relates to the use of projections. As such, under this final rule, unless the requirement is suspended, petitioners will be required to register and USCIS will select a sufficient number of registrations projected as needed to reach the numerical allocations. Only those petitioners with selected registrations will be eligible to file. Once filed, petitions will generally be processed in the order in which they are filed.

*Comment:* A commenter challenged the proposed changes in the cap allocation selection order as contrary to the Congressional intent for the H-1B visa classification. The commenter, relying on general legislative history for the H-1B program, noted that Congress did not intend that H-1B visas be given on a “preferential basis to the most skilled and highest-paid petition beneficiaries,” and that “Congress has never limited use of H-1B visas to the best and brightest.” The commenter

indicated that DHS should ignore E.O. 13788 to the “extent it mandates preference for the ‘best and the brightest’ among H-1B applicants” and said that the “President lacks the authority, through his executive agencies, to implement a change in law that is contrary to legislative intent.”

*Response:* DHS disagrees with the commenter’s views that Congressional intent and legislative history preclude the changes DHS is making to the cap allocation selection order. While DHS agrees that Congress has not limited the H-1B classification to the “best and brightest” foreign nationals, nothing in the statute or legislative history precludes DHS from administering the cap allocation in a way that increases the odds of selection for beneficiaries with a master’s or higher degree from a U.S. institution of higher education. As discussed elsewhere in this final rule, DHS is reversing the cap selection order to prioritize beneficiaries with a master’s or higher degree from a U.S. institution of higher education in accordance with congressional intent, as the numerically limited exemption from the cap for these beneficiaries was created by Congress and appears in the INA. The reversal of the selection order is permissible based on the general authority provided to DHS under sections 103(a), 214(a) and (c) of the INA, 8 U.S.C. 1103, 1184(a) and (c), and section 112 of the HSA, 6 U.S.C. 112. DHS believes that reversing the cap selection order is consistent with E.O. 13788, which instructs DHS to “suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.” The reversal of the selection order will likely have the effect of increasing the total percentage of master’s degree holders in the H-1B population. In the aggregate, master’s degree holders will tend to be more skilled and earn higher wages. Contrary to the commenter’s assertion, this final rule does not limit eligibility for the H-1B classification to the “best and the brightest.”

*Comment:* Some commenters said the proposed selection method would violate the requirement in 8 U.S.C. 1184(g) to process H-1B petitions in the order they are received. A professional association commented that when describing its authority for the proposed rule USCIS had failed to reference 8 U.S.C. 1184(g)(3), which states that cap-subject H-1B nonimmigrants “shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed . . .” The commenter concluded that the proposed H-1B registration system, which would mandate selection of “registrations”

over “petitions,” is arguably unlawful. An individual commenter argued the use of a lottery selection process violates the Immigration and Nationality Act (INA) at 8 U.S.C. 1184(g)(3), which states that aliens who are subject to the numerical limitations shall be issued visas “in the order in which petitions are filed.” Moreover, the commenter stated that the numerical limit refers to the number of visas and status, not the number of petitions. An individual commenter similarly stated that the proposed system would violate this provision because employers would not be able to file a petition unless they have registered and been selected through the registration process. A law institute commented that the use of the new selection process in years when there is no lottery appears to be in excess of DHS’ authority and that DHS should either provide a sufficient legal justification for changing how visas are counted in years where there is no lottery or not use this process in such years.

*Response:* DHS disagrees with the commenter’s assertions. The use of a random selection process has been found to not violate INA 214(g)(3), 8 U.S.C. 1184(g)(3). See *Walker Macy v. USCIS*, 243 F.Supp.3d 1156, 1163 (D. Or. 2017). Further, DHS believes that a similar approach to selection of registrations, whereby USCIS will randomly select registrations submitted electronically over a designated period of time to ensure the fair and orderly administration of the numerical allocations, is defensible under the general authority provided to DHS in INA 214(a), 8 U.S.C. 1184(a).

DHS also disagrees with the commenter’s assertion that use of the new selection process in years of low demand is in excess of DHS’ authority. As stated, DHS is relying on its general authority to implement the registration process as an antecedent procedural requirement that must be met before a petition is deemed to be properly filed. See INA 103(a), 214(a) and (c)(1), 8 U.S.C. 1103(a), 1184(a) and (c)(1). In years where demand is low, and an insufficient number of registrations have been received during the annual initial registration period to meet the number projected as needed to reach the regular H-1B cap, USCIS would select all of the registrations properly submitted during the initial registration period and notify all of the registrants that they may proceed with the filing of the H-1B cap petition. Once H-1B petitions have been properly filed, USCIS would generally process the petitions in the order that they have been filed. Registrations submitted after the initial registration

<sup>7</sup> See *Walker Macy v. USCIS*, 243 F.Supp.3d 1156, 1163 (D. Or. 2017).

period would continue to be selected on a rolling basis until such time as a sufficient number of registrations have been received. To ensure fairness, USCIS may randomly select from among the registrations received on the final registration date a sufficient number to reach the projected number. Contrary to the commenter's assertion, DHS is not changing the way visas are counted, but is merely using its general authority to create a more efficient process for administering the H-1B numerical allocations but otherwise continuing the historical use of projections to estimate the number of petition approvals that will likely be needed to reach, but not exceed, the H-1B numerical limitations. As stated in response to similar comments, a literal application of the statutory language in INA 214(g)(3), 8 U.S.C. 1184(g)(3), as the commenter suggests, would lead to an absurd result. DOS does not issue H-1B visas, and USCIS does not otherwise provide H-1B status, based on the order in which petitions are filed. Such a literal application would necessarily mean that processing delays pertaining to a petition earlier in the petition filing order would preclude issuance of a visa or provision of status to all other H-1B petitions later in the petition filing order.

*Comment:* An individual commenter argued that the use of a lottery selection process is not inconsistent with 8 U.S.C. 1184(g)(5), and that arguments to the contrary are incorrect.

*Response:* DHS agrees with the commenter's assertions that the use of a random selection process is not inconsistent with the existing statute and is a reasonable manner in which to administer the numerical limitations as it ensures that the allocations can be administered in a fair and efficient manner given the excess demand experienced each year for H-1B visas.

### C. General Support for the NPRM

*Comment:* Some commenters expressed general support for the regulation. A few of these commenters stated that the rule should be implemented in time for the upcoming H-1B cap filing season. Other commenters offered additional non-substantive rationale for their support of the rule including: It would help track visas and prevent overstay issues; it would eliminate fraudulent H-1B filings and allow for the best candidates to obtain visas; it would cause an increase in U.S. wages; it would stop visa abuse and flooding of applications by certain companies; it would prioritize students studying in the United States and increase their chances to stay and work

in the U.S.; and it would streamline the H-1B cap-petition process.

*Response:* DHS agrees with the commenters that this rule will streamline the H-1B cap selection process and will increase the likelihood of retaining beneficiaries in the United States who have earned a master's or higher degree from a U.S. institution of higher education. An increase in the overall percentage of H-1B aliens with a master's or higher degree from a U.S. institution of higher education could increase wages assuming that beneficiaries with bachelor's degrees, advanced degrees from U.S. for-profit universities or foreign advanced degrees are paid less than and replaced by beneficiaries with master's or higher degrees from U.S. institutions of higher education. DHS, however, will be suspending the registration requirement for the FY 2020 H-1B cap in order to further test the system. As such, the efficiency gains DHS anticipates will result from the streamlined cap selection process will not be realized until the registration requirement applies and registration prior to the filing of an H-1B cap-petition is required. DHS anticipates that this will occur starting with the FY 2021 H-1B cap.

DHS disagrees with the commenters' assertions that this rule will help to track visas, prevent H-1B nonimmigrants from staying beyond their authorized period of stay, or eliminate fraudulent H-1B petitions. This final rule simply provides for a registration requirement for H-1B cap-petitioners and reverses the order in which USCIS counts submissions toward the annual H-1B numerical allocations. Additional changes to strengthen the H-1B program and prevent fraud and abuse are outside the scope of this final rule.

### D. General Opposition to the NPRM

*Comment:* A few commenters expressed general opposition to the regulation and criticized the H-1B program, arguing it prioritizes low-cost foreign workers over American workers. Some commenters suggested suspending the H-1B program, and a few commenters stated the rule is not merit-based. Some commenters also argued the rule does not do enough to prevent outsourcing, and fraud issues. Another commenter remarked that the rule needed input from lawyers and affected U.S. employers before implementation.

*Response:* DHS believes that this final rule is merit-based in that it will likely increase the number of beneficiaries with a master's or higher degree from a

U.S. institution of higher education to be selected for further processing under the H-1B allocations. DHS disagrees that this rule prioritizes foreign workers. Rather, this final rule simply creates a registration process to streamline the existing H-1B cap selection process, and reverses the order in which submissions are counted toward the H-1B numerical allocations, but does not change the overall number of foreign workers that may be hired under existing statutory authority. Moreover, DHS does not have the statutory authority to suspend the H-1B program. Additional changes to strengthen the H-1B program and prevent fraud and abuse are outside the scope of this final rule but will indeed be pursued in a separate notice of proposed rulemaking. DHS disagrees with the commenter's assertion that implementation should not occur until input has been received from lawyers and affected U.S. employers. Among the commenters, DHS was able to identify numerous lawyers and affected U.S. companies, as well as trade associations, who submitted comments on the proposed rule and DHS has carefully considered their input in this rulemaking. DHS, however, will issue a notice in the **Federal Register** prior to implementation of the registration requirement to provide advance notice to affected stakeholders of the implementation of the registration requirement. This notice, however, would just pertain to the initial implementation of the registration requirement. Once implemented, further details will be provided on the USCIS website consistent with this final rule.

### E. H-1B Registration Requirement

#### 1. Support for Registration Program

*Comment:* Several commenters expressed support for the registration requirement. A few commenters stated the electronic registration process will be easier and more cost-effective. An attorney stated that the proposed system was an improvement as it would reduce waste and increase efficiency. Another commenter asserted that the registration process would relieve uncertainty for employers and employees, and mitigate burdens on USCIS.

*Response:* DHS agrees with the commenters. The registration process, once implemented, will provide petitioners and USCIS with a more efficient and cost-effective way to administer the H-1B cap selection process, and should reduce some of the uncertainty in the petitioning process.

## 2. Opposition to Registration Program

*Comment:* An individual commenter stated that the proposed rule would make it easier for employers to file H-1B petitions and hire foreign workers, which is not in line with the Administration's "Hire American, Buy American[sic]" agenda.

*Response:* This rule is consistent with the goals of Executive Order 13788, Buy American and Hire American, and therefore DHS disagrees with the commenter. This final rule does not alter the substantive requirements for the H-1B nonimmigrant classification, and thus does not make it "easier" to hire foreign workers. The registration process, once implemented, will be a more efficient process for administering the H-1B numerical allocations than the system that is currently in place. Increased governmental efficiency does not conflict with the Buy American and Hire American Executive Order. Further, the reversal of the cap selection order is expected to result in a greater number of beneficiaries with a master's or higher degree from a U.S. institution of higher education being selected and is therefore in line with the executive order's directive to "help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries."

## 3. Announcement and Length of Registration Periods

*Comment:* An individual commenter who supported the rule said it is unclear whether the cut-off time for registration will be announced up-front (e.g., few days earlier). A company stated that the proposed rule introduced uncertainties that must be clarified with specificity, and submitted a list of procedural uncertainties about the proposed registration system. An advocacy group stated that aspects of the new registration system would create timing issues, for which it requested that USCIS issue clarifications. The group asked for clarification regarding:

- The registration count and whether it would always be completed by the end of March and when notification to selected registrants would be provided.
- How frequently the agency will check registration numbers and petition filing numbers and on what dates each year.
- Whether the agency will notify the public as to the number of registrations and associated petitions that have been filed.
- How much advance notice will be provided concerning any reopening of registration.
- How much advance notice will be given concerning the availability of H-

1B numbers allowing further selected registrants during a fiscal year, beyond the initial selection of registrations.

*Response:* USCIS will announce the start date of the initial registration period on the USCIS website for each fiscal year at least 30 days in advance of the opening of the registration period. In each fiscal year, the registration period will begin at least 14 calendar days before the first day of petition filing and will last at least 14 calendar days. USCIS will also separately announce the final registration date in any fiscal year on the USCIS website. If USCIS determines that it is necessary to keep the registration period open at the end of the initial registration period, the final registration date will be determined once USCIS has received the number of registrations projected as needed. USCIS, however, will not be able to identify the final registration date in advance as the date would be contingent on the number of registrations received. Similarly, if USCIS determines that it is necessary to re-open the registration period, it will announce the start of the re-opened registration period on its website before the start of the re-opened registration period. See 8 CFR 214.2(h)(8)(iii)(A)(7). USCIS, however, will not be able to identify the final registration date for the re-opened registration period as that date would also be contingent on the number of registrations received.

*Comment:* Several commenters, including a form letter campaign, stated that USCIS should not be able to announce changes to the program on its website. The commenters asserted this could disrupt the H-1B planning process for businesses, notably smaller companies who do not have the resources to make such changes quickly. Similarly, an attorney stated that the applicable statute and law do not permit USCIS to make announcements on its website substantially changing the way the lottery is run each year so that "applications would need to be filed again".

*Response:* DHS disagrees that making announcements consistent with established regulatory procedure that is being codified through notice and comment rulemaking constitutes making changes (substantive or procedural) to the program. In this rule DHS is codifying the procedure it will use to announce pertinent information regarding the H-1B cap process in the Code of Federal Regulations, and is simultaneously announcing and explaining these procedures in the **Federal Register** publication of this final rule. The regulations codified therein explicitly identify the USCIS

website as the source of this type of information in the future. DHS believes that authorizing USCIS to post H-1B cap related announcements on the USCIS website is consistent with the way in which USCIS has historically communicated with the regulated public about the H-1B cap allocations and provides a timely and efficient method of communication of program-related information to the public as well as transparency. The public frequently turns to the USCIS website for information and routinely uses the USCIS website for general information on immigration benefits, rules, and processes; applicable statutes and regulations; downloadable immigration forms; specific case status information; and processing times at the various Service Centers and district offices. USCIS currently notifies the public when it will begin accepting petitions subject to the cap for a given fiscal year and when numerical limits have been reached through its website. USCIS has historically and also would currently use its website to inform the public of potential re-opening of the cap filing period. Maintaining this practice therefore would be consistent with settled expectations and USCIS' existing legal authority. If USCIS does in the future determine that it is necessary to suspend the registration process, USCIS will make the announcement on its website as soon as practicable, and will take into consideration the possibility that the opening of the petition filing season may need to be temporarily delayed to allow sufficient time for the preparation and orderly filing of H-1B cap-subject petitions.

*Comment:* A trade association noted that no advance notice requirement language is included in the proposed regulatory text. The commenter stated that the 30-day notice prior to the commencement of the initial registration period must be codified in the proposed 8 CFR 214.2(h)(iii)(8)(A)(3), reasoning that without the inclusion of this language, USCIS could announce the initial registration on the day the agency would begin receiving registrations.

*Response:* DHS thanks the commenter for noting the absence of the 30-day minimum timeframe and has made edits in this final rule to the regulatory text as proposed to ensure that the regulated public is provided with at least 30 days advance notice of the first date of the initial registration period. DHS disagrees, however, that 30-days advance notice should be required prior to re-opening the registration period consistent with this final rule. DHS believes that 30-days advance notice

prior to re-opening the registration period is unnecessary and could undermine USCIS's ability to select additional registrations and invite additional petitions in a timely manner, thereby frustrating the purpose of re-opening the registration period. Even though 30-days advance notice will not be provided when USCIS re-opens the registration period, USCIS will ensure that the announcement of the reopening of the registration period in any fiscal year is made as early as practicable to afford maximum advance notice to the regulated public.

*Comment:* Many commenters, including trade associations, a university, a law firm, and individuals expressed concern that the proposed duration of the registration period would be too short. A law firm requested that the registration period be open for at least 30 days, arguing that the proposed 14-day initial registration period is insufficient time for law firms to review a potentially large volume of cases. A form letter campaign suggested 60-day advance notice and a 30-day registration period. An individual commenter recommended a 45-day advance notice and a 30-day registration period. A trade association recommended a 30-day registration period beginning on a scheduled start date announced no later than January 15 each year.

*Response:* The annual initial registration period will last for a *minimum* period of 14 calendar days, but where practicable USCIS will provide more time. See 8 CFR 214.2(h)(8)(iii)(A)(3). DHS believes that 14 calendar days is a sufficient amount of time to complete the registration process. The registration does not require extensive information and will not take a lot of time for completion and submission. Additionally, USCIS will provide at least 30 days advance notice of the opening of the initial annual registration period for the upcoming fiscal year via the USCIS website ([www.uscis.gov](http://www.uscis.gov)). USCIS will conduct stakeholder outreach prior to the initial implementation of the registration system to allow stakeholders the opportunity to familiarize themselves with the electronic registration process. DHS notes that the 30-day period of advance notice of the opening of the initial registration period is the minimum amount of time that USCIS must provide, but USCIS is not precluded from providing notice more than 30 days in advance if USCIS determines that additional notice is needed to adjust to circumstances at that time. DHS believes the minimum 30 days advance notice will give

petitioners sufficient time to prepare registrations given that, once registration is required and implemented, there should be a settled expectation that registration will be required, unless suspended, and most employers or attorneys will have already begun to identify H-1B beneficiaries for the upcoming cap by the time that the announcement is made such that additional preparation to submit registrations should not be overly burdensome.

#### 4. Required Registration Information

*Comment:* A professional services company, multiple business associations, multiple law firms, and an individual commenter said it would be helpful to have a Petitioner account so that petitioners do not have to enter their corporate information for every single beneficiary. A business association said that petitioners should be allowed to submit all of its beneficiaries via a bulk submission process, and that DHS use audits to detect patterns of abuse. An individual commenter requested that USCIS provide a tool for beneficiaries to view their status.

*Response:* As noted, USCIS will be suspending the registration requirement for the FY 2020 cap season (beginning April 1, 2019) to complete all requisite user testing of the new H-1B registration system and otherwise ensure the system and process are operable. As the testing continues, USCIS is exploring a number of options for efficient operation, use, and maintenance of the system. USCIS will not require petitioners to enter their corporate information for every beneficiary.

*Comment:* A business association said that the required registration information specifically enumerated in the preamble is sufficient, and that the regulatory text should be revised to remove the 'catch-all' line referring to 'any additional basic information requested by the registration system' to promote certainty. A company also suggested that the reference to 'any additional basic information' would cause uncertainty, and requested that USCIS provide 90 days' notice of updates to required information prior to the registration period. An advocacy group said that USCIS should not be able to change registration prerequisites, and that USCIS should publish the form that will be used and allow public comment on its contents.

*Response:* As noted, USCIS will be suspending the registration requirement for the FY 2020 cap season (beginning April 1, 2019) to complete all requisite

user testing of the new H-1B registration system and otherwise ensure the system and process are operable. As the testing continues, USCIS is exploring a number of options for efficient operation and maintenance of the system. As indicated in our responses to the comments pertaining to the Paperwork Reduction Act and the information collections impacted by this rule, while USCIS is seeking OMB approval of the new H-1B Registration Tool information collection as currently proposed, if USCIS determines that collecting additional information is necessary for the effective operation of the registration process, USCIS will comply with the PRA and request OMB approval of any material modifications to that information collection. The H-1B Registration Tool information collection instrument for which DHS is currently seeking OMB approval will be posted to [www.reginfo.gov](http://www.reginfo.gov) when the final rule publishes and be available for review by the public.

*Comment:* A few commenters suggested that USCIS require the beneficiary's passport number or Social Security Number and check for duplicates to prevent multiple employers from registering to file an H-1B cap-petition for the same beneficiary. Another individual commenter said there is not enough information required to submit a registration, which could cause the system to be flooded by frivolous registrations. A form letter campaign suggested that the registration should require at least the job title, work site address, and salary offered and employers must attest that the position as described has been offered to the beneficiary being registered. An individual commenter said registration should require at least the job title and SOC code from the LCA, employer address, work site address, LCA Wage Level, and whether the employer is H-1B dependent. Similarly, another commenter suggested that employers should be required to submit a basic application similar to the I-129 application form and certify under penalty of perjury that it has a bona fide job offer to the employee.

A few unions stated that DHS should require employers to disclose any recent or ongoing labor violations or disputes, including EEOC complaints, wage or safety violations, unfair labor practices, or collective bargaining negotiations. A business association suggested that DHS require information related to country of residence and specific educational qualifications (e.g., bachelor's, Master's, Ph.D., date conferred, name and location of institution).

*Response:* DHS agrees that sufficient information should be required to enable USCIS to identify the beneficiary of the registration, check for duplicate registrations submitted by the same prospective petitioner, and to match selected registrations with subsequently filed H-1B petitions, without overly burdening the employer or collecting unnecessary information. This final rule requires that each registration include, in addition to other basic information, the beneficiary's full name, date of birth, country of birth, country of citizenship, gender, and passport number. USCIS intends to check the system for duplicate registrations during the registration phase similarly to how USCIS currently checks for duplicate H-1B petition filings. At this time DHS does not believe that requesting additional information about the beneficiary or the petitioner is necessary to effectively administer the registration system. Some of the additional information proposed by commenters is information that USCIS would require and review to determine eligibility in the adjudication of the H-1B petition. Establishing eligibility is not a requirement for submitting a registration. USCIS believes the current required information is sufficient to identify the registrant and limit potential fraud and abuse of the registration system. If USCIS determines that collecting additional information is necessary for the effective operation of the registration process, USCIS will comply with the PRA and request OMB approval of any material modifications to that information collection. DHS is not amending the regulations to prohibit multiple employers from filing an H-1B cap-petition for the same beneficiary. DHS regulations, however, already preclude the filing of multiple H-1B cap-subject petitions by related entities for the same beneficiary, unless the related petitioners can establish a legitimate business need for filing multiple cap-petitions for the same beneficiary, and that regulation remains unchanged by this final rule. This final rule authorizes USCIS to collect sufficient information for each registration to mitigate the risk that the registration system will be flooded with frivolous registrations. For example, each registration will require completion of an attestation, and individuals or entities who falsely attest to the bona fides of the registration and submitted frivolous registrations may be referred to appropriate federal law enforcement agencies for investigation and further action as appropriate.

*Comment:* Some commenters provided input on addressing errors. A company, multiple business associations, and an advocacy group suggested that non-material errors might occur and should not affect a beneficiary's chances of being selected in the lottery, and that USCIS should allow petitioners to correct these errors for [registrations] that are selected when filing the H-1B petition. A law firm suggested that the only material errors that should result in the rejection of filing are errors in the employer's name and beneficiary's name. The commenter explained that information such as birth date could be accidentally misfiled because of listing conventions in different countries and need not disqualify someone's ability to file. A professional services company said USCIS should make publicly available reasonable remedies to resolve errors made in good faith by petitioning employers.

Similarly, some commenters provided input on editing registrations. A couple of companies said business needs might change, and that employers should be able to edit registrations for errors or changes in business needs prior to the close of the registration period. A law firm requested that USCIS issue clarifications on how to edit registrations, and suggested that withdrawing and re-submitting a registration should not be counted as multiple filings. The firm also suggested that USCIS establish a warning system for when multiple filings are mistakenly submitted, and that the system allow petitioners to identify cap-subject or master's-cap eligible petitions from the outset. However, another attorney questioned whether employers would be stuck with cap designations if such a feature is included, and cautioned that the registration process would force employers and H-1B candidates to make early decisions that may change later on.

*Response:* USCIS is exploring a number of options for efficient operation, use, and maintenance of the system. USCIS is considering ways to allow petitioners to correct typographical errors, and may allow petitioners to contact USCIS where they believe such an error was made on a registration. USCIS will allow petitioners to edit a registration up until the petitioner submits the registration. A petitioner may delete a registration and resubmit it prior to the close of the registration period. USCIS will provide guidance on how to use the registration system and edit registrations prior to opening the registration system for the initial registration period.

*Comment:* A professional association and a law firm said the registration process should include an eligibility assessment for positions and candidates, so that employers who are not well-versed in immigration and H-1B requirements do not take up H-1B cap space. Similarly, an individual commenter stated that the information captured in the current system would not be enough to reduce the burden on USCIS by rejecting non-meritorious petitions.

*Response:* As noted elsewhere in this rule, submission of the registration is merely an antecedent procedural requirement to properly file the petition. It is not intended to replace the petition adjudication process or assess the eligibility of the beneficiary for the offered position. The purpose of the information provided at the time of registration is to allow USCIS to efficiently identify the prospective H-1B petitioner and the named beneficiary, eliminate duplicate registrations, to select sufficient registrations toward the H-1B cap and the advanced degree exemption, and to match selected registrations with subsequently filed H-1B petitions. As such, DHS is declining to adopt the suggestion of including an eligibility assessment as part of the registration process. DHS also declines to adopt the suggestions to collect additional information regarding the petitioner, beneficiary or proffered position that would go beyond these needs. The selection process is intended to impose little burden, as it is a random process that does not assess eligibility. DHS recognizes that submission of non-meritorious petitions, whether under the new registration process or under the current process, creates an additional administrative burden. This rule, however, is not designed to relieve the burden of adjudicating non-meritorious petitions. The registration process under this final rule is designed to relieve the burden of having to receive several hundred thousand H-1B cap petitions in order to administer the cap selection process.

In addition, USCIS may reopen the registration process if necessary to ensure sufficient number of registrations are selected toward the number projected as needed to reach the numerical allocations (as may be the window for filing petitions). Thus, "cap space" will not go unutilized because of the submission of non-meritorious registrations or petitions.

*Comment:* A law firm suggested that the regulation should be amended to allow lawyers to file registrations, as they are in the best position to advise

employers about the qualifications for H-1B status. The commenter also suggested that USCIS should develop adequate protections to ensure that only authorized company representatives are able to file petitions, warning that without such protections, someone could use an employer's easily-discoverable employer identification number to file hundreds of inappropriate submissions or self-register for H-1B slots.

*Response:* As discussed elsewhere in this preamble, the regulation will allow attorneys to submit registrations on behalf of petitioning clients, upon completion of a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, for each petitioning client. USCIS is exploring a number of options for efficient operation, use, and maintenance of the system, as well as additional fraud and abuse prevention measures.

*Comment:* A law firm requested that USCIS ask for beneficiaries' Student and Exchange Visitor Information System (SEVIS) number during registration to ensure that information is updated in SEVIS if an individual is selected in the lottery.

*Response:* The registration system is only a preliminary step towards filing of an H-1B cap petition. As noted previously in this preamble, USCIS is only collecting information that is necessary to identify the beneficiary and petitioner for the purpose of effectively conducting the cap allocation selection process and confirming that H-1B cap-subject petitions are based on a selected registration when registration is required. Because a SEVIS number is not necessary for the cap selection process, USCIS declines to collect it at this time.

##### 5. Timeline for the Implementation of the H-1B Registration Requirement

*Comment:* A number of commenters requested that DHS delay the implementation of the registration process past the FY 2020 cap season, until FY 2021. Most noted that adjusting to a new system so close to the H-1B cap filing season would be difficult and noted the timeframes necessary to prepare petitions and the time, effort, and resources already spent in preparing for the FY 2020 cap season. One commenter also noted that cost-savings would not be achieved for the FY 2020 cap season since petitioners have already begun preparing H-1B cap petitions for the upcoming filing season. Commenters also requested that DHS announce as soon as possible whether it intends to implement or suspend the registration process for the FY 2020 cap

season to remove uncertainty for the regulated public and give petitions an adequate opportunity to prepare H-1B petitions.

*Response:* Based on comments received and ongoing review of the registration system, USCIS will be suspending the registration requirement until such time that the system has been fully tested and modified to address concerns raised by commenters. DHS will publish a notice in the **Federal Register** before the registration requirement is implemented. USCIS will also conduct outreach and training on the new registration system to the regulated public which will be offered in advance of the cap season during which the registration process will be implemented for the first time.

*Comment:* A business association stated that there is inadequate time for USCIS to comply with the requirements of the Administrative Procedure Act and/or evaluate all comments received on the proposed rule in time to make changes that would take effect before the start of the 2020 H-1B cap season. Additionally, several commenters asserted that adopting a new registration process for FY 2020 cap-subject H-1B petitions would insert unnecessary uncertainty, as there simply is not enough time to finalize the registration requirement and system for the FY 2020 H-1B cap, and, if DHS wanted such a system implemented for the FY 2020 cap, it should have published the proposed rule much sooner than it did. A commenter also noted that there is insufficient time for USCIS to substitute a two-step registration system for the current one-step procedure.

*Response:* DHS is publishing this final rule having carefully considered public comments received during the comment period. As a result of considering concerns raised by commenters regarding the short timeframe for the implementation of the registration process in addition to other concerns regarding disruption to petitioners that could be caused by a late announcement of the requirement to register for an upcoming cap season, USCIS will be suspending the registration process until such time that the system has been fully tested to be reliably operable, and, as necessary, modified to address concerns raised by commenters. DHS will publish a notice in the **Federal Register** in advance of the first registration period to announce the implementation of the registration process. Once the registration process has been implemented, if USCIS determines that it needs to suspend the registration process in the future, USCIS will make an announcement of such

suspension as soon as it becomes aware of circumstances necessitating such suspension, and will announce the first date on which petitions may be filed taking into consideration the amount of time needed to facilitate the orderly filing of H-1B cap-subject petitions without prior registration. As indicated elsewhere in this final rule, DHS anticipates that USCIS will use this option rarely and reserve it for circumstances where the registration system is inoperable.

*Comment:* A business association stated that there is inadequate time for a sufficient "debugging" effort that typically takes months or years. Some commenters urged for testing of the registration system prior to implementation or suggested that DHS should postpone implementation until system testing and stakeholder engagement has been conducted. The U.S. Small Business Administration (SBA), Office of Advocacy said USCIS should test the electronic registration system before implementation, to prevent errors and delays in this program. Another commenter said any proposed system should be tested and announced at least 6 to 12 months before implementation. Two business associations said USCIS would be better served to define, test, and implement the proposed registration system over the next 15 months to be operational in March of calendar year 2020. Other commenters, including an advocacy group, a professional association, and business commenters, expressed the following concerns when requesting additional testing of the system prior to implementation:

- Testing is needed to ensure that the system is not flooded with registrations.
- Past automation efforts at USCIS as part of its long-term Transformation Program over the course of the past 13 years have been riddled with glitches, processing inefficiencies, and poor stakeholder involvement, and such negative experiences should dictate to DHS that the proposed H-1B electronic registration process should be thoughtfully and thoroughly tested prior to implementation.

- The agency's track record when it comes to rolling out technology has been disappointing, and USCIS electronic filing initiatives have failed to live up to their promise and were delivered with insufficient testing and feedback.

- Employers and law firms should be active participants in the testing and vetting process, as they will be the front-end users of the system and are best positioned to identify issues that might not be clear on the back end.

Furthermore, to ensure efficiency, employers and law firms should be given the opportunity to see the electronic form and registration portal, and familiarize themselves with them, well in advance of any registration period.

- USCIS needs to give itself adequate time to test and troubleshoot this electronic registration system before it mandates its use and also needs to be transparent with the regulated community about the system and its test results.

- The USCIS Ombudsman 2018 Annual Report warns against implementing untested, deadline-driven electronic programs.

- There is insufficient time to test the online system—based on final system requirements—before the FY20 registration process will begin.

*Response:* The final rule includes the possibility that the registration requirement could be suspended if USCIS experienced technical challenges with the H-1B registration process and/or the new electronic system that would be used to submit H-1B registrations, or where the system otherwise is inoperable for any reason, including if it was not fully operational by April 1, 2019. Based on comments received and ongoing review of the registration system, USCIS will be suspending the registration requirement until such time that the system has been fully tested and modified to address concerns raised by commenters. DHS will publish a **Federal Register** Notice in advance of implementing the registration system to ensure the public has sufficient preparation time to become familiar with and utilize the electronic registration system. USCIS will also conduct outreach and training on the new registration system to the regulated public which will be offered in advance of the cap season during which the registration process will be implemented for the first time.

*Comment:* A business association made the following recommendations relating to timeline for implementation of the registration system: (1) Prioritize the Electronic Immigration System (ELIS) and postpone consideration of a stand-alone, online lottery H-1B registration system until that system can be implemented in closer coordination with ELIS, and (2) allow for adequate time to fully vet, test, and troubleshoot the online registration system and delay finalization of the online registration proposal until the agency is confident that there will not be a need to revert to the current system. Similarly, a professional association urged USCIS to place this proposed rule on indefinite

hold, at least until electronic filing is fully implemented and the administrative costs and burdens can be reassessed under the new system. A business association stated that USCIS should work with stakeholders to develop a workable electronic filing system, and then determine if an electronic registration is necessary. A professional association supported the goal of establishing an electronic filing system for the H-1B cap selection process, and urged that a registration portal and electronic filing process be developed in tandem.

*Response:* USCIS has decided to suspend the registration requirement until such time that the registration system is fully tested to be reliably operable, and, as necessary, modified to address commenters concerns. DHS will publish a notice in the **Federal Register** announcing the implementation of the registration process in advance of the first cap season during which the registration process will be implemented. However, submission of the registration, when registration is required, is merely an antecedent procedural requirement to properly file the petition. It is not intended to replace the adjudication process. USCIS is committed to fully transitioning to a digital environment for processing of immigration benefit requests. As such transition is made, USCIS expects further efficiencies to be realized in the adjudication process. However, because the registration process has distinct benefits for the regulated public as well as USCIS, and because it is on a different development timeline from USCIS efforts to transition filing of all immigration benefit requests to an electronic environment, USCIS plans to implement the registration process independently from electronic filing. As noted earlier in the discussion of public comments, USCIS will be delaying the implementation of the registration process until it is confident that the registration system is reliably operable and with sufficient advanced notice to the regulated public published in the **Federal Register**.

*Comment:* An attorney stated that if USCIS decides to suspend the registration process in March, there is no feasible way companies and law firms can pull together a considerable amount of H-1B petitions for submission during the first five business days of April. While in general agreement with the rule, the commenter disagreed with the ability of USCIS to suspend the registration requirement. Multiple commenters, including companies, individuals, and a form letter campaign stated that allowing

USCIS to suspend the registration process for a given fiscal year would create uncertainty every fiscal year since, from one year to the next, an employer and prospective H-1B beneficiaries could never be sure whether they will need to register or file petitions. The commenters concluded that allowing suspension of the registration process in any given fiscal year will make it even more difficult for businesses to hire necessary talent to meet their business needs and thus remain competitive in the global marketplace. Similarly, another commenter said the ability of USCIS to “suspend” the implementation of the registration process makes the entire process unreliable and unpredictable, which creates chaos within the H-1B Cap process.

*Response:* DHS appreciates the commenter’s concern about the challenges that employers and law firms may face if the registration requirement is not suspended far enough in advance of when the H-1B cap petition process would begin. To provide sufficient advance notice for the upcoming H-1B cap season, DHS is confirming in this final rule that USCIS will be suspending the registration requirement for the FY 2020 cap season to allow potential H-1B petitioners sufficient time to prepare complete petitions for the FY 2020 H-1B cap. DHS, however, believes that it is important to provide USCIS with the flexibility to suspend the registration requirement at any time if the system becomes inoperable for any reason. DHS believes that this flexibility is needed to ensure that employers are not precluded from proceeding with the petition process in the event that circumstances render the system inoperable.

*Comment:* An individual commenter asked whether potential H-1B beneficiaries will continue to have until the filing date to get their degree or if USCIS will instead require that an H-1B beneficiary must be eligible for the H-1B benefit upon registration submission. A company requested that USCIS clarify the date by which a beneficiary must complete degree requirements, by the registration date or complete petition filing date. A law firm also asked if beneficiaries would have to be qualified for a position at the time they are registered.

*Response:* This final rule does not alter the general requirement for establishing eligibility at the time the petition is filed, but merely sets forth an antecedent procedural step that must be followed in order to establish eligibility to file an H-1B cap petition, thereby providing for a more efficient cap selection process for petitioners and

USCIS. Eligibility for H-1B classification does not need to be demonstrated at the time a registration is submitted.

*Comment:* A professional services company suggested that trainings, demonstrations, sample forms and a list of required information should be made available to petitioners before the registration period. A law firm and an individual attorney also requested that training tools, demonstrations, samples or special instructions be made available to H-1B petitioners to ensure that they can properly complete the new registration requirement.

*Response:* As noted, USCIS will be suspending the registration requirement until the registration system is fully tested to ensure that it is reliably operable and, if necessary, to allow time for any system modifications as a result of commenter concerns raised in response to the proposed rule. DHS will publish a notice in the **Federal Register** announcing the initial implementation of the registration process in advance of the cap season in which USCIS will first implement the registration process. As the testing continues, USCIS is exploring a number of options for efficient operation and maintenance of the system. USCIS will also engage in stakeholder outreach and provide training to the regulated public on the new registration system in advance of the initial implementation of the registration process.

*Comment:* One individual commenter recommended conducting two rounds of registrations, with limits in the first registration on the number of registrations that an employer can submit and on the number of registrations that can be selected on behalf of a single beneficiary.

*Response:* DHS thanks the commenter for these suggestions. While the registration process already contemplates the selection of additional registrations if DHS does not select a sufficient number to meet the cap projections, as well as the reopening of the registration process to ensure sufficient number of registrations are selected toward the cap, DHS does not have the authority to place quotas or limits on employers or beneficiaries, beyond what it authorized by Congress in the INA.

*Comment:* An attorney expressed concerns about an electronic filing system, and asserted that there are no forms currently available that can be readily submitted electronically by an attorney on behalf of their client, which can interfere with attorney-client relationships. Another attorney stated that IT complications with government-

run websites forced multiple colleagues out of practice in the past year.

*Response:* As noted, USCIS will be suspending the registration requirement for the FY 2020 cap season (beginning April 1, 2019) to complete all requisite user testing of the new H-1B registration system and otherwise ensure the system and process are operable. As the testing continues, USCIS is exploring a number of options for efficient operation and maintenance of the system. USCIS is confident that this suspension will address concerns related to the electronic filing system.

#### 6. Fraud and Abuse Prevention for Registration Requirement

##### a. Suggestions Related to Fee Collection

*Comment:* Some commenters said DHS should charge a non-refundable fee for the electronic registration or collect the petition processing fee during registration to deter potential abuse of the registration process. Additionally, some commenters said DHS should require all of the H-1B petition filing fees at the time of registration, which could be refunded if not selected. Similarly, a couple of commenters suggested that the fee payment be required as a condition of registration, but only deducted once a registrant is selected (*i.e.*, non-selected registrants would not have payment required).

*Response:* As noted, USCIS will be suspending the registration requirement for the FY 2020 cap season (beginning April 1, 2019) to complete all requisite user testing of the new H-1B registration system and otherwise ensure the system and process are operable. The suspension of the registration process will be formally announced on the USCIS website after this final rule goes into effect. As the testing continues, USCIS is exploring a number of options for efficient operation and maintenance of the system, as well as additional fraud and abuse prevention measures. Under this final rule, DHS will not be charging a fee for registration at this time. DHS recognizes that some employers may be more willing to submit a registration, once the registration process is implemented, than they are willing to submit a complete H-1B cap-petition with filing fees, as well as the potential for employers to submit non-meritorious registrations. DHS has taken steps, however, to prevent speculative or frivolous registrations. As noted elsewhere in this rule, DHS will require registrants to attest that they intend to file an H-1B petition for the beneficiary in the position for which the registration is filed. This attestation is intended to

ensure that each registration is connected with a bona fide job offer and, if selected, will result in the filing of an H-1B petition. DHS may consider charging a fee in the future to recover the costs of processing registrations as well as recover costs of building, operating, and maintaining the registration system. DHS would propose such a fee by publishing a notice of proposed rulemaking in the **Federal Register**. DHS cannot adopt the commenter's suggestion to require petitioners to include petition filing fees at the time of registration due to current system limitations and requirements. In addition, requiring USCIS to refund or hold funds would not be operationally efficient and would require USCIS to incur additional expenses, as USCIS incurs a cost any time it is required to refund a fee to an applicant or petitioner.

*Comment:* Some commenters said any registrant who is selected and chooses not to submit an H-1B petition for its selected registration(s) should be required to pay H-1B petition filing fees. One of these commenters said this situation is no different from one in which a petitioner files the H-1B petition, with all fees and documents, and later requests for a withdrawal of the petition before adjudication, in which case USCIS does not refund the fees. This commenter suggested that the selected registrants pay all the required filing fees, such as the \$460 base filing fee, the \$1,500/\$750 ACWIA fee, as applicable, and the \$4,000 Public Law 114-113 fee, as applicable, even if they do not file a petition. Another commenter said selected registrants who do not submit an H-1B petition should be fined 2-3 times the amount of the filing fee. A business association stated that, to the extent a penalty is imposed, there should be an avenue for appeal. However, another commenter said petitioners should be eligible for a refund of all fees if they file but subsequently withdraw the petition, but they should be required to submit reasons and detailed information in the withdrawal.

*Response:* DHS declines to adopt the commenters' suggestions to collect petition filing fees at time of registration. DHS does not view registration as the same as filing a petition. Submission of the registration is merely an antecedent procedural requirement to properly file the petition. DHS also declines to include a fine in the rule, to the extent it has such authority, for petitioners who do not file subsequent petitions given that there may be legitimate reasons why a petition is not filed following



registration (e.g. the beneficiary may have decided to pursue other employment opportunities or the business environment has changed). However, DHS notes that there may be monetary fines/criminal penalties under 18 U.S.C. 1001(a)(3) which apply generally to statements/representations made to the Federal Government, and registrants that engage in a pattern and practice of submitting registrations for which they do not file a petition following selection may be referred for investigation of potential abuse of the system. However, as discussed elsewhere in this rule, DHS may consider charging a separate registration fee in the future.

*Comment:* One commenter expressed concern that DHS would return the petition filing fees on un-selected H-1B petitions. The commenter asserted that, in order to cut down on temptation to game the system with redundant registrations for the same job, the Fraud Prevention Fee and the appropriate ACWIA fees should be forfeited for any registration, petition, or application.

*Response:* DHS will not be collecting fees at the time of registration, but rather when the petition is filed, consistent with current practice. Although DHS currently will not be requiring any fees at the time of registration, DHS is looking at other ways to prevent potential fraud and abuse of the registration system and process. DHS may consider charging a fee in the future, and will notify stakeholders by publishing a notice in the **Federal Register** if and when a fee is proposed.

#### b. Suggestions To Deter Fraud Related to Employers/Petitioners

*Comment:* One commenter stated that, since the current I-129 form does not require any unique identification of a proposed alien beneficiary unless the alien is in the United States already, employers may enter fictitious H-1B petitions into the lottery, and then create fraudulent documents to transform an actual alien into the “person” named in the lottery. The commenter supported the inclusion of passport number as required information, but said DHS should go even further and require the employer to submit a photograph of the proposed beneficiary when submitting a registration.

*Response:* As stated elsewhere in this rule, DHS does not believe that requesting additional information about the beneficiary or the petitioner is necessary to effectively administer the registration system. USCIS believes the current required information is sufficient to identify the registrant and

limit potential fraud and abuse of the registration system. If USCIS determines that collecting additional information is necessary for the effective operation of the registration process, USCIS will comply with the PRA and request OMB approval of any material modifications to that information collection. This final rule authorizes USCIS to collect sufficient information for each registration to mitigate the risk of fraud and abuse. Each registration requires completion of an attestation, and individuals or entities who falsely attest to the bona fides of the registration and submit frivolous registrations may be referred to appropriate federal law enforcement agencies for investigation and further action as appropriate. DHS further notes that selected registrants who subsequently file an H-1B petition will be required to make additional attestations, under penalty of perjury, when signing and submitting the Form I-129 petition. The existing attestation on Form I-129 requires the petitioner to attest that the petition and documents submitted in support of the petition are true and correct. If a petitioner submits fraudulent documents to establish the identity of the beneficiary, the petitioner will be investigated and referred for further action, as appropriate.

*Comment:* Some commenters expressed general concern that the rule cannot prevent fraudulent employers and “body shops” from potentially abusing the registration system. Several commenters said USCIS should limit the allowed registrations per employer to deter against USCIS being flooded with registrations when there are not an equivalent number of jobs, particularly by staffing companies or large employers in industries where labor is fungible. One commenter expressed similar concerns about employers registering for lots of prospective workers, stating that once their registrations are selected, these employers with a registration in hand can carry out their original speculation much more effectively. Another commenter asked how USCIS would protect against the unauthorized practice of law by “notorio’s,” [sic] and how USCIS could know if the registration system would crash causing all submissions to be lost.

*Response:* This final rule requires registrants to attest that they intend to file an H-1B petition for the beneficiary in the position for which the registration is filed. This attestation is intended to ensure that each registration is connected with a bona fide job offer and, if selected, will result in the filing of an H-1B petition. If USCIS finds that petitioners are registering numerous

beneficiaries but are not filing petitions for selected beneficiaries at a rate indicative of a pattern and practice of abuse of the registration system, USCIS will investigate those practices and hold petitioners accountable for not complying with the attestations, consistent with its existing authority to prevent and deter fraud and abuse. See *DHS Delegation 0150.1(II)(I)*. For example, USCIS may refer the matter to a law enforcement agency for further review and enforcement action. See *Id.* Finally, USCIS has robust anti-fraud measures in place and will act appropriately should it notice abuse or other issues, such as the unauthorized practice of law.

*Comment:* Multiple commenters, some of whom supported the goal of moving to an electronic registration process, expressed general concern that the reduced paperwork burden and absence of fees would create a low bar for entry to the registration system, which could lead to a flood of (potentially non-meritorious) H-1B petitions, thus increasing burden and defeating the purpose of selecting skilled advanced degree holders selected. A company asserted that the registration process must necessarily impose a low burden in order to achieve the cost benefits and efficiencies the rule seeks to achieve, but the ease of that process is in direct tension with the goal of ensuring that only legitimate registrations are made. Several commenters, including companies, a business association, and SBA Office of Advocacy, said small businesses are particularly concerned about the potential that other registrants, particularly large companies that are H-1B dependent or rely heavily upon the H-1B program, could flood the registration system to the detriment of small businesses. A professional association stated that a very small number of companies that can employ economies of scale and utilize systems to file a large number of registrations to generate a higher yield, could effectively force small employers out of the H-1B program altogether.

*Response:* To address potential issues of “flooding the system” with non-meritorious registrations, the final rule prohibits a petitioner from submitting more than one registration for the same beneficiary during the same fiscal year, prohibits the substitution of beneficiaries, and requires each registrant to make an attestation in the system indicating their intent to file an H-1B petition for the beneficiary in the position for which the registration is submitted. This attestation is intended to ensure that each registration is

connected with a bona fide job offer and, to the extent selected, will result in the filing of an H-1B petition. Once the registration system is implemented, it is possible that DHS may receive more registrations than it would have received petitions for the cap filing season; however, this is not a certainty and DHS does not anticipate a significant increase in overall petitions due to the registration requirement. DHS anticipates that the registration requirement will result in a more streamlined process of receiving and processing H-1B cap-subject petitions.

Further, the registration requirement provides for an initial registration period that will last for at least 14 days, which is intended to, among other things, ensure that the process is fair and orderly and doesn't unfairly disadvantage small businesses who might not be as well-positioned as a large company or experienced H-1B petitioner to submit registrations immediately upon the opening of the registration period.

*Comment:* A law firm said the current proposal does not indicate what precisely will happen in the case of duplicate registrations (*i.e.*, petitioners that submit more than one registration for the same beneficiary). The commenter expressed concern that the second registration may be submitted to "correct" an error discovered in the first registration, and suggested that users discard the first registration and proceed with the subsequent registration. An individual commenter said all duplicate registrations must be filtered out before conducting the lottery.

Referencing the requirement barring employers from submitting two petitions for the same beneficiary, a couple of companies asked how petitioners are supposed to avoid inadvertently submitting a petition for a beneficiary who also is a beneficiary under an affiliate company's petition. The commenter asserted that, while appropriate, this requirement increases the burden on employers and will be difficult for employers to meet. An individual commenter said employers will not be able to prevent a single beneficiary accepting multiple job offers with several petitioners who unknowingly filed H-1B petitions for the same beneficiary.

*Response:* Under this final rule, if a specific petitioner submits more than one registration per beneficiary in the same fiscal year, all registrations filed by that petitioner relating to that beneficiary for that fiscal year will be considered invalid. *See* 8 CFR 214.2(h)(8)(iii)(A)(2). The current regulations also prohibit a petitioner

from filing more than one H-1B petition in the same fiscal year on behalf of the same beneficiary if the beneficiary is subject to either the regular cap or advanced degree exemption, *see* 8 CFR 214.2(h)(2)(i)(G). USCIS will continue to apply the regulatory prohibition on the filing of multiple H-1B cap petitions for the same beneficiary. If the petitioner (including related entities, such as a parent, company, subsidiary or affiliate) files more than one H-1B cap petition for the same beneficiary in the same fiscal year, all of the H-1B cap petitions filed for that beneficiary by the related entities would be denied or revoked, unless the petitioner is able to demonstrate a legitimate business need for filing multiple petitions. USCIS notes that there is no prohibition on a prospective H-1B beneficiary considering job opportunities with multiple employers which may seek to extend a job offer. A petitioner will be able to edit a registration up until the petitioner submits the registration. A petitioner may delete a registration and resubmit it prior to the close of the registration period.

*Comment:* Other commenters expressed concern about the influx of registrations for unqualified or cap-exempt beneficiaries. An individual commenter expressed concerns that some employers who are not familiar with H-1B eligibility requirements might submit registrations without regard as to whether the beneficiaries are likely to qualify for the H-1B classification, thereby flooding the system with registrations that, if selected, are likely to result in a denial of a subsequently filed petition. The commenter stated that, in the current system, these same employers are likely to consult with counsel prior to incurring the time and expense of submitting an H-1B petition with filing fees, and during such consultation those employers would become aware of the eligibility requirements such that they would be less likely to file a petition that may be selected under the H-1B numerical allocations. A law firm and a professional association said none of the information required to submit a successful registration requires the employer to even minimally evaluate whether the position in question is of "H-1B caliber," or whether the employee has the proper education and credentials to qualify for H-1B status. By not forcing employers to go through an initial eligibility assessment, there is no incentive for employers who are not well-versed in H-1B law to abstain from randomly registering any position that they believe might qualify for an H-1B.

In addition, these commenters said there are no regulations or clear guidance to assist employers in determining whether they would qualify for cap-exemption as a nonprofit organization "related to or affiliated with" an institution of higher education, so if a petitioner has any doubt as to its cap-exempt status, it will elect to proceed with caution and register.

*Response:* DHS recognizes that some employers may be more willing to submit a registration, once the registration process is implemented, than they are willing to submit a complete H-1B cap-petition with filing fees. DHS has taken steps, however, as described in more detail above, to prevent speculative or frivolous registrations. However, because the registration system is not intended to replace the petition system, DHS will not have a means for up-front determining whether a registration is meritorious until after it is selected and a petition resulting from such registration is properly filed. DHS recognizes that some registrations will not lead to approved H-1B cap-petitions, and will therefore hold unselected registrations in reserve and will conduct additional selections if necessary.

*Comment:* An individual commenter said DHS should build a database to link the identity of the beneficiaries and the petitioners to determine whether multiple petitioners share the same set of beneficiaries. The commenter said these petitioners should be required to submit additional information to prove they are not abusing the system and be notified that H-1B transfers would not be processed between these petitioners for these beneficiaries, unless further evidence is provided. This commenter also said DHS should closely monitor, analyze, and require more information from companies with less petitioning history, high petition denial ratios, and relatively low prevailing wages in their respective industries.

*Response:* The regulations do not currently restrict multiple unrelated employers from petitioning for the same beneficiary or beneficiaries, and DHS does not intend to impose such a limitation in the registration process in this final rule. As described elsewhere, DHS will be putting measures in place to discourage non-meritorious registrations, and taking appropriate action against those who do file non-meritorious registrations, but will not adopt the commenter's suggestion of requiring additional evidence at the time of registration because doing so is inconsistent with creating a streamlined

process for administering the H-1B allocations.

*Comment:* Some commenters, including a form letter campaign, said the labor condition application (LCA), which is a critical source of data on employers who seek to hire H-1B workers and what positions and wages they are offering, requires third-party placement disclosure up front and includes the location of the end client, should be required when filing the registration to deter staffing companies from filing registrations based on purely speculative employment. A union stated that the LCA is the primary tool that exists within the H-1B program, and it would be counterproductive to further undermine the utility of the LCA, and by extension the role of the DOL in overseeing the program, by allowing pre-registration without requiring that this basic threshold be met. Another union similarly stated that, while understanding DHS rationale for a more efficient administrative process for the agency, removing the LCA filing from the initiation of the H-1B petitioning process is not a productive trade off, as this information is essential to maintaining the integrity of the H-1B petition filing process and the overall H-1B program.

*Response:* The period of employment on an LCA may not exceed three years for an LCA issued on behalf of an H-1B nonimmigrant. Thus, if an LCA is required with the electronic registration, and the registration is submitted prior to April 1, a petitioner would not be able to request a full three years of H-1B classification for the beneficiary. DHS has decided not to require an LCA with the filing of a registration so that petitioners can, if appropriate, request the full three years in H-1B status. DHS believes that the measures described above are sufficient to deter companies from filing registrations based on purely speculative employment.

*Comment:* To deter abuse of an electronic system, an individual commenter suggested that, during registration, every petitioner must provide evidence of a certified LCA, degree certificate, a bona fide job offer letter and a client job offer letter if the beneficiary would be placed with a third-party client.

*Response:* DHS is not adopting this recommendation. For the reasons stated above, a certified LCA will not be required prior to submission of a registration. DHS believes that requiring the evidence listed by the commenter at the registration stage would significantly increase costs to both USCIS and employers, and would therefore significantly reduce the overall

benefit of the electronic registration system.

*Comment:* An attorney suggested that failing to submit a petition upon selection should result in USCIS refusing to consider any other H-1B candidates selected for processing for that employer.

*Response:* The rule requires registrants to attest that they intend to file an H-1B petition for the beneficiary in the position for which the registration is filed. However, USCIS recognizes that there may be some legitimate reasons that a petitioner cannot ultimately file for the beneficiary once a registration is selected and therefore, USCIS is not imposing a ban on accepting other petitions from that employer. If USCIS finds that petitioners are registering numerous beneficiaries but are then not filing petitions for selected beneficiaries, USCIS will investigate those practices and could hold petitioners accountable for not complying with the attestations and may refer the matter to a law enforcement agency for further review and possible enforcement action.

*Comment:* A business association stated that, even if the government observes manipulation of the online registration system, USCIS will not be able to prevent those employers from flooding the system to improve their chances of being selected under the H-1B allocations. The commenter therefore requested that USCIS (1) provide additional information to the public about the effectiveness of the government's legal authorities and operational tools to prevent such abuses, and (2) then allow the public additional time to analyze and submit comments on whether the benefits of the proposal outweigh potential unintended consequences.

*Response:* As noted, USCIS will be suspending the registration requirement for the FY 2020 cap season (beginning April 1, 2019) to complete all requisite user testing of the new H-1B registration system and otherwise ensure the system and process are operable. As the testing continues, USCIS is exploring a number of options for efficient operation and maintenance of the system. To mitigate the potential for abuse of the system, and to ensure that the benefits of the system are not outweighed by the potential that unscrupulous registrants may try to game the system, this final rule requires registrants to attest that they intend to file an H-1B petition for the beneficiary in the position for which the registration is filed. This attestation is intended to ensure that each registration is connected with a bona fide job offer

and, if selected, will result in the filing of an H-1B petition. If USCIS finds that petitioners are registering numerous beneficiaries but are not filing petitions for selected beneficiaries at a rate indicative of a pattern and practice of abuse of the registration system, USCIS will investigate those practices and hold petitioners accountable for not complying with the attestations, consistent with its existing authority to prevent and deter fraud and abuse. *See DHS Delegation 0150.1(II)(I)*. For example, USCIS may refer the matter to a law enforcement agency for further review and enforcement action. *See Id.*

*Comment:* Some commenters said there are insufficient safeguards and clarity in the rule to adequately address system fraud and abuse. An industry association stated that, while the NPRM mentions the possibility of investigations if USCIS detects patterns of abuse, the rule does not clarify what enforcement mechanism can be used to protect the integrity of the registration system.

A few industry associations supported attestation requirements requiring a petitioner to affirmatively declare or certify that there is a bona fide opportunity for each entry submitted, as well as the intent to file H-1B petitions that are selected.

Referencing the NPRM statement that USCIS will monitor whether selected registrations are corresponding with actual H-1B visa petition filings, some commenters requested additional clarity on how this data will be tracked, the criteria the agency will use to determine whether there is potential abuse of the program, and the threshold for penalties.

A company provided the following suggestions for an integrity-based incentives structure to prevent abuse of the registration system: (1) Base such a structure on an investigative trigger point, such as where an employer fails to submit petitions for more than ten percent of its accepted registrations, (2) consider bars to future filings for employers who cannot provide legitimate business or other valid reasons for a pattern of registrations for beneficiaries for whom it does not submit a petition after acceptance, and (3) establish notice and a mechanism for pursuing civil and criminal penalties for knowingly false statements in the registration process.

A couple of companies said it is unclear how USCIS will enforce the rule barring parent companies, subsidiaries, and affiliate companies from submitting a petition for the same beneficiary.

A union stated that such investigation and enforcement cannot be undertaken

without adequate resources and staff, and no revenue source has been stipulated for this essential work. Similarly, an attorney stated that the proposal only makes fraud detection more difficult by requiring investigators to weed out fraudulent cap registrations from innocent ones. Another union suggested that compliance and enforcement efforts should be funded through a registration fee and any fines collected.

*Response:* DHS does not believe that further changes are needed at this time but may consider further revisions in a future rulemaking action. DHS has explained, in response to other comments in this rule, its authority to investigate and refer matters to law enforcement agencies for further action, as appropriate. DHS does not believe that it is necessary or prudent to set a benchmark, such as 10 percent as the commenter suggested, before investigating or suspecting that a petitioner violated the attestation or otherwise abused the system. Cases of potential abuse will involve a case-by-case review of the facts involved, including any mitigating facts or circumstances. For example, a small business that only submits two registrations, both of which are selected, but only files one petition for valid reasons would have a fifty percent failure to file rate, but the relevance of that percentage would be vastly different than a large petitioner with hundreds of selected registrations but a similar fifty percent failure to file rate. Lastly, DHS notes that this final rule does not change how USCIS will enforce the existing rules prohibiting a petitioner (including related entities) from filing multiple H-1B cap-petitions for the same beneficiary in the same fiscal year, absent a legitimate business need to do so. USCIS will continue to enforce the existing prohibition, codified at 8 CFR 214.2(h)(2)(i)(G). If a petitioner (including related entities) files multiple petitions in violation of 8 CFR 214.2(h)(2)(i)(G), USCIS will deny or revoke all petitions filed on that beneficiary's behalf by the petitioner.

*Comment:* A labor union commented that registration will only be effective in protecting workers from fraud and abuse of the system if it allows for public access to employer information at the initial registration phase, and also creates an active mechanism for public objection and comment that will be taken into consideration by those ultimately approving H-1B petitions. Similarly, another labor union suggested that DHS make the information in the proposed registration system public and

available as registrations are filed, selected, and "H-1B visas are awarded."

*Response:* DHS appreciates the commenters' concerns and suggestions but will not be adopting the suggestions given that the amount of information gathered as part of this streamlined registration process would not be sufficient to provide for meaningful consideration of the issues raised by the commenters. For example, the employer will not be required to provide information regarding the wage offered, or other details regarding the terms or conditions of the offered employment. Additionally, the registration process will not involve an adjudication of eligibility, but merely a random selection of registrations submitted. DHS will, however, consider making available to the public data collected through the registration system. Further, DHS is considering a separate notice of proposed rulemaking to strengthen the H-1B program, and some of the commenters' concerns and suggestions may be more within the scope of that separate rulemaking.

*Comment:* Two commenters urged that, before a final rule is promulgated, USCIS needs to develop meaningful solutions that will guarantee the integrity of the registration process. Similarly, a professional organization stated that USCIS should reach out to U.S. employers and immigration attorneys to obtain feedback and workable solutions to address these issues and better ensure the integrity of the system.

*Response:* USCIS will be suspending registration for FY 2020 as we seek to ensure that the system is secure, efficient for both stakeholders and USCIS, and the integrity of the H-1B program is maintained. We are considering all comments in this regard. If comments or issues raised warrant further public review, DHS will seek it via standard administrative procedures, which may include future rulemaking. Note that DHS will continuously seek improvements to the system, both prior to and after it is required for use by the public. Whether such improvements require a future rulemaking depend on the changes or efficiencies sought. Therefore, future rulemaking on this issue is a possibility even after full implementation for use.

*Comment:* SBA Office of Advocacy and a trade association expressed concern that USCIS is seeking feedback from the public on "ways to enhance the integrity of the registration system and reduce potential for abuse," but is only giving the public 30 days to recommend solutions to fix this proposal and may implement this

proposal in the upcoming season despite these concerns.

*Response:* USCIS will be suspending registration as we seek to ensure that the system is secure, efficient for both stakeholders and USCIS, and the integrity of the H-1B program is maintained. We are considering all comments in this regard. If comments or issues raised warrant further public review, DHS will seek it via standard administrative procedures, which may include future rulemaking. Note that DHS will continuously seek improvements to the system, both prior to and after it is required for use by the public. Whether such improvements require a future rulemaking depend on the changes or efficiencies sought. Therefore, future rulemaking on this issue is a possibility even after full implementation for use.

#### c. Suggestions To Deter Fraud Related to Beneficiaries

*Comment:* Several commenters said DHS should limit the number of applications filed per beneficiary to deter flooding of the registration system with multiple applications sponsored by different companies for one beneficiary. Similarly, another commenter said a beneficiary should be counted as only "one person" in the selection process regardless of the number of H-1B registrations or petitions filed for that beneficiary, and if any one of the registrations or petitions filed on behalf of that beneficiary is found to be invalid/fraudulent, all applications for that beneficiary should be rejected and the number made available to other candidates. A law firm said employers would like to avoid a situation in which a beneficiary gets two cap cases selected and chooses a different employer and suggested that USCIS create a process to catch duplicates from different companies. However, the commenter expressed concern that USCIS might err and reject the registration for a beneficiary who has the same name as another beneficiary but is actually a different person, concluding that the registration system should control for this possibility. Some commenters stated that, should the beneficiary wish to accept a different job offer, USCIS should allow for a change of employer petition to be filed that is not subject to the cap. Another suggestion was to alert the beneficiary that they are associated with multiple petitions, require the beneficiary to choose one within a specified period of time (e.g., 30 days), and revoke the un-used registrations to allow more cases to be selected.

Another commenter asked if the necessary precautions have been

considered to ensure that a beneficiary does not submit a registration on behalf of the petitioner to avoid having duplicate registrations. One commenter said limiting a beneficiary to one registration will make it easier for DHS to complete its data mining and monitor filing rates of individual employers, and another commenter said there should be direct denial of petitions that have multiple filings for the same beneficiary. A professional association stated that it is unclear whether protections are in place to prevent sabotage of the system and ensure that only authorized company representatives and attorneys can submit registrations, and without such protections, the system is open to abuse. A law firm stated that USCIS should ensure a password protected and employer-verified "Employer Profile" in which either the employer and/or their authorized representatives are given protected and confidential access with a username and password.

*Response:* DHS notes that under the current process, with limited exceptions, multiple unrelated employers presently may file H-1B cap petitions for the same beneficiary. DHS believes that the registration process should similarly not preclude more than one unrelated employer from registering for the same beneficiary. DHS believes that such a limitation could disadvantage employers, such as small businesses, who might be unable or not as well-positioned to submit a registration before another employer seeking to hire the same beneficiary. If USCIS does a sweep for duplicate petitions, it will only look for registrations from the same employer for the same beneficiary. DHS believes that the information collected at the time of registration is sufficient to control for the possibility that a petitioner might submit registrations in the same fiscal year for two different beneficiaries that have the same name. As petitioners or authorized representatives will be required to complete registration on behalf of beneficiaries, USCIS does not anticipate duplicate registrations from both the petitioner and the beneficiary. As described elsewhere, DHS will be putting measures in place to discourage non-meritorious registrations, and will take appropriate action against those who do file non-meritorious registrations. USCIS is exploring a number of options for efficient operation, use, and maintenance of the system.

*Comment:* A commenter said employers should be required to attest that they have not submitted H-1B petitions based on false resumes, fake experience, and/or fake training. The

commenter said that fraud has plagued the H-1B process and this is good first step but there needs to be more scrutiny.

*Response:* DHS notes that petitioners are already required to certify, under penalty of perjury, when completing the Form I-129 petition that any supporting documents submitted with the petition are complete, true and correct. During the course of an H-1B petition adjudication, USCIS will review the beneficiary's qualifications. Any attempts to submit fraudulent evidence will be handled and reviewed under the current adjudication process and in coordination with the USCIS Fraud Detection and National Security Directorate. Additionally, as stated in the Unified Agenda, in a separate proposed rulemaking, DHS will propose to revise the definition of employment and employer-employee relationship to better protect U.S. workers and wages.

#### 7. Other Comments on H-1B Registration Program

*Comment:* A business association stated that the final rule should acknowledge that USCIS has no authority to determine which employers can submit registrations.

*Response:* DHS agrees with this commenter and has neither proposed in the NPRM nor included any limitation in this final rule regarding which employers can submit registrations.

#### F. Selection, Notification, and Filing

##### 1. Annual Cap Projections, Reserve Registrations, Registration Re-Opening

*Comment:* An individual commenter stated that any "application" rejected or withdrawn after the H-1B selection process should be subtracted from the selected cap petitions count and the numbers be made available for wait-list candidates. Another individual commenter said that more H-1B petitions would be filed under the electronic submission process, and that many would be weak or non-meritorious and rejected. In that case, the commenter asked if USCIS would allow more unselected petitions into the system, or whether fewer H-1B visas would be granted in the end. An individual commenter suggested that unselected H-1B petitions should be granted the chance to apply for an open spot if a cap-selected case is denied on merits.

*Response:* USCIS randomly selects a certain number of H-1B cap-subject petitions projected as needed to meet the numerical limitation. USCIS makes projections on the number of H-1B cap-subject petitions necessary to meet the numerical limit, taking into account

historical data related to approvals, denials, revocations, and other relevant factors.<sup>8</sup> USCIS uses these projections to determine the number of petitions to select to meet, but not exceed, the 65,000 regular cap and 20,000 advanced degree exemption, although the exact percentage and number of petitions may vary depending on the applicable projections for a particular fiscal year. Similarly, in years when USCIS uses the registration system, it will project how many registrations need to be selected in order to meet, but not exceed the numerical limitations. Unselected registrations will remain on reserve for the applicable fiscal year. If USCIS determines that it needs to increase the number of registrations projected to meet the regular cap or advanced degree exemption, and select additional registrations, USCIS would select from among the registrations that are on reserve a sufficient number to meet the cap or advanced degree exemption, or re-open the registration period if additional registrations are needed to meet the new projected amount.

*Comment:* A business association requested that USCIS provide additional clarity on how it will select extra registrations in years of high demand. A law firm identified issues regarding availability, allocation and wait lists, and submitted several specific questions with a request that USCIS address the concerns therein. For example, if the registration period is closed, and the H-1B petition is denied, how quickly will the number go back into the pool for the next person on the wait list, e.g., after the period for appeal has passed? Will there be a prohibition against the petitioner filing a new H-1B petition on behalf of the named beneficiary under that registration until the next fiscal year? If the registration period is still open, and the H-1B petition is denied, resulting in the number going back into the pool, may the petitioner submit a second registration for the named beneficiary, and file a new H-1B petition if the new registration is selected?

*Response:* As stated above, if USCIS determines that it needs to increase the number of registrations projected to meet the regular cap or advanced degree exemption, and select additional registrations, USCIS would select from among the registrations that are on reserve a sufficient number to meet the cap or advanced degree exemption, or re-open the registration period if additional registrations are needed to meet the new projected amount. Although USCIS has not determined the

<sup>8</sup> See 8 CFR 214.2(h)(8)(ii)(B).

specific amount of time it will take to go to the reserve pool for additional registrations, USCIS intends to monitor the selected number of registrations closely to determine if more registrations will need to be selected such that a sufficient number of petitions are filed to meet the number of petitions projected as needed to reach the regular cap or advanced degree exemption. As stated elsewhere, DHS is prohibiting petitioners from submitting more than one registration for the same beneficiary during the same fiscal year.

## 2. Notification

*Comment:* A law firm requested that USCIS notify selected petitioners by mail, noting the importance of establishing a reliable method of reaching and informing those on the reserve list. Another law firm suggested that the filing notification should be accessed online, similar to the CBP I-94 system. Since proof of selection must be submitted with the petition filing, the commenter argued that an email notification could be easily lost or deleted, the commenter urged that users have online access to get a copy of the notification. An individual commenter suggested that an electronic notification of selection should be issued to the employer, attorney and beneficiary to ensure that all parties are aware of, and prepared for, the appropriate next steps. Two companies argued that the proposed requirement to submit a copy of the registration information with a filed petition is unnecessary and burdensome. A law firm urged USCIS to provide additional means to obtain copies of selection notices because of the unreliability of email, and the possibility that a company's authorized representative might change. The commenter suggested that selection notices should be accessible via a secure portal on the USCIS website, or USCIS should provide a method for requesting a duplicate copy of the selection notice. Alternatively, USCIS should include a field for attorney or accredited representative in the registration, so that multiple parties receive the selection notice. Finally, a law firm requested that USCIS provide guidelines indicating the time period for notifying petitioners.

*Response:* As noted, USCIS will be suspending the registration requirement for the FY 2020 cap season (beginning April 1, 2019) to complete all requisite user testing of the new H-1B registration system and otherwise ensure the system and process are operable. Petitioners and their representatives will be able to login and see registrations and/or selection notices and print a copy of these selection

notices if needed. USCIS will not be separately notifying the beneficiary and DHS does not believe that it is necessary to do so given that the petitioner is the affected party in the administrative proceeding. DHS believes that requiring petitioners to submit a copy of the registration with the associated petition is necessary to ensure efficient and timely processing and adjudication of the petition. Otherwise, there may be substantial delay in verifying and matching a filed petition with a specific registration. As the testing continues, USCIS is exploring a number of additional options for efficient operation and maintenance of the system and may consider further revisions in a PRA or future rulemaking action.

## 3. Filing Time Periods

*Comment:* A number of commenters stated that, once a case is selected, there will be little time to actually prepare the case and file it within the deadline USCIS will set. The commenters asserted that 60 days will not always be enough time, and employers and their counsel with large volumes to file will be overwhelmed. Many commenters, including business or trade associations, advocacy organizations, professional associations, companies, and attorneys, commented that 60 days will be an insufficient amount of time for a company to gather all the necessary documentation to properly file the petition. For large companies that have several hundred registrations selected and must file all of those petitions within a 60-day period, those companies could easily be overwhelmed with such a large workload in a very compressed time period. The commenter also stated that the filing periods could cause uncertainty for their business because it could potentially produce a situation where even more petitions are not approved by the time the company expected the worker to commence employment. Additionally, a few commenters, including a trade association, a professional association, a law firm, and an attorney, argued that 90 days will be a more sufficient amount of time to complete a filing. The professional association further recommended that USCIS should allow for a 30-day extension of filing periods if, for whatever reason, the petitioner is unable to meet a filing deadline. Some commenters, including trade or business associations, advocacy groups, a professional association, and a company, recommended a 120-day period to file an H-1B visa petition after a registration is selected. SBA Office of

Advocacy said USCIS should set a timeline with specific dates for this H-1B visa registration and petition process so that businesses can plan their workforce and budgets properly. A trade association commented that the petition preparation process, which includes filing a LCA with the U.S. Department of Labor and a prevailing wage determination, can take up to 6-months for some employers. A business association argued the compressed 60-day filing period could cause processing delays associated with outstanding petitions, which could make it difficult for companies to anticipate projected staff and workforce needs because of uncertainty if a petition will be approved or not. A law firm expressed concern with the variable nature of the length of filing period, reasoning that USCIS designation of a filing period on a case-by-case basis would cause unnecessary confusion for employers with multiple H-1B filings.

A company commented that because it would be difficult to complete the large number of H-1B visa petitions that it submits annually in a 60-day period, the company would be forced to prepare all potential cases in advance of finding out which registrants had been selected. The company argued that having to prepare all of its petitions due to the brief filing window defeats one of the main goals of the registration process, which is eliminating wasted preparation work. Other commenters, including trade associations, advocacy groups, professional associations, and a company, expressed similar concerns about the proposed filing period negating the promised benefits of the rule because companies would have to perform preparation work prior to finding out which registrants had been selected.

An advocacy group argued that the proposed 60-day filing window is aggravated by USCIS' recent policy memoranda, including the policy memo "Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM), Chapter 10.5(a), Chapter 10.5(b)." The commenter stated that the policy memoranda updates guidance to adjudicators, granting them both broad discretion to deny cases without first issuing request for evidence (RFE) or notices of intent to deny (NOID). The commenter went on to say that, if this rule were to become final as proposed, petitioners who neglect to provide certain evidence due to the rushed proposed timelines could be outright denied, instead of issued an RFE and given an opportunity to address whatever deficiency the officer found.

*Response:* DHS appreciates these comments and has reconsidered the period of time that will be granted for filing a petition. DHS is changing the timeframe for the filing of petitions in response to these comments and will provide for at least 90 days to file a petition for which a registration has been selected. After such selection, petitioners will be notified by USCIS of the exact amount of time allowed for filing the petition, which will in all cases be at least 90 days, but may be longer at the discretion of USCIS. In addition, in response to certain concerns raised, including cap-gap relief as further explained below, USCIS will not implement the staggered filing system as detailed in the proposed rule. If their registration is selected, petitioners may file the relevant H-1B as allowed under current regulations, no more than 6 months prior to the date of need (commonly referred to as the employment “start date” indicated on the petition). Therefore, petitioners filing a petition based on a selection from the initial registration period may file such petitions on April 1 (if a business day) or the first business day thereafter, as is allowable under current regulations. DHS notes that the period of at least 90 days to file an H-1B cap-subject petition after registration selection also applies to those selections that occur outside of initial registration selection (e.g. selections following a re-opening of the registration period). In each instance, following selection of the registration, the employer will be given at least 90 days to file the H-1B cap-subject petition on the basis of that registration selection.

*Comment:* A few commenters stated that the proposed registration requirement and filing window significantly shifts the timetable for submitting and receiving decisions on H-1B petitions later into the year. The commenters asserted that the extended filing deadline significantly pushes the timeline for submitting H-1B petitions later into the year and shrinks the period of time USCIS has to adjudicate the petitions before the start of the fiscal year on October 1. The commenters argued that this would almost certainly cause petition filings to be postponed and adjudication of petitions to be delayed, forcing a greater number of U.S. employers and prospective H-1B employees to wait beyond the start of the fiscal year on October 1 for decisions on their petitions. A few commenters, including a law firm and advocacy group, stated that the proposal to allow staggered filing windows would further exacerbate delays in the

adjudication of petitions beyond October 1. A trade association commented that the proposed filing windows beginning in April would only cause further delay since the current processing time is around 9 months. Two trade associations recommended that USCIS conduct the lottery as early as January or February. A trade association noted that, if USCIS is unable to move the date of the lottery, then the agency should verify that the lottery and the confirmation of its corresponding results will occur on April 1 (or the next business day if April 1 falls on a weekend).

*Response:* As noted above, petitioners will have at least 90 days to file a petition for which a registration has been selected. After such selection, petitioners will be notified by USCIS of the exact amount of time allowed for filing the petition, which will in all cases be at least 90 days but may be longer at the discretion of USCIS. Further, USCIS will not implement the staggered petition filing system as detailed in the proposed rule. Petitioners filing a petition based on a selection from the initial registration period may file such petitions beginning on April 1 (if a business day) or the first business day thereafter, as is allowable under current regulations. Based on a concern from the SBA Office of Advocacy, and other commenters that extending the registration period too far in advance may be detrimental to small businesses that are not able to project and identify potential beneficiaries as early as larger businesses, USCIS believes that the current timeframe of opening the registration period at least 14 calendar days before the earliest date on which H-1B cap-subject petitions may be filed for a particular fiscal year is an appropriate time for the registration and lottery.

*Comment:* An individual commenter stated 60 days is plenty of time to gather documents, create the petition, and file. Another commenter asserted that 60 days is too much time, as an LCA only takes a week to be certified, and said that 30 days would be a reasonable time.

*Response:* While USCIS agrees with the commenter that 60 days would likely be sufficient, it understands that many commenters do not share this viewpoint and have requested a longer period. Therefore, USCIS has extended the filing period to at least 90 days.

*Comment:* A business association asserted that a 4-month filing period after registration is selected and delaying implementation of the regulation would allow for sufficient time for employers to gather proper documentation and allow the

government time to adjudicate H-1B Petitions before the beginning of the next fiscal year. The commenter also argued the proposed filing windows beginning in April would only cause further delay since the current processing time is around 9 months.

*Response:* As noted above, USCIS is not implementing the staggered filing aspect of the proposed regulation at this time. USCIS will announce in the **Federal Register** when the registration process will be implemented for the first time in advance of the cap season in which it will be operationalized. In addition, petitioners may file the petition based on a selected registration up to six months before to the employment start date, as is already allowable under current regulations. Further, the filing window will be at least 90 days for all petitions. This should provide sufficient time for petitioners to gather necessary documents and file their petitions. It further allows for USCIS to better manage and resource the adjudications process so that such adjudications are done as efficiently as possible. Importantly, it also allows those requiring “cap gap protection” (as explained further below) to file the petitions and have beneficiaries continue work authorization as allowed under current regulations.

*Comment:* Many commenters expressed concerns about how the proposed filing time period would impact cap-gap beneficiaries. A few commenters, including a law firm and a company, commented that the foreseeable delays in H-1B visa petition adjudication that is likely to result because of the proposed filing time periods would cause many prospective H-1B employees not to receive a decision by October 1 when their cap-gap extension and employment authorization would expire. Specifically, the commenters argued that F-1 students relying on the cap-gap extension until October 1 will face many difficulties, such as financial loss, interruption to their lives, and uncertainty about their ability to remain in the country, as of a result of anticipated delays in the adjudication process. An individual commenter said that the proposed rule overlooked the interaction between the new registration requirement and “cap gap” currently provided to international student graduates with expiring F-1 status and Optional Practical Training (“OPT”) provided under 8 CFR 214.2(f)(5)(vi). The commenter urged DHS to clarify in the regulations which document will trigger “cap gap” relief: the notice that the electronic registration has been

selected or the actual H-1B petition receipt notice. The commenter recommended that the electronic registration notice trigger the “cap gap” relief to provide predictability and peace of mind for students and their employers who may have to wait at least 60 days after April 1 in order to file their H-1B petition in order to qualify for “cap gap” relief. The commenter also suggested that the regulations could be revised to terminate “cap gap” if the selected employer ultimately fails to file the H-1B petition. Another commenter expressed concern over how the regulation would impact international students on an F-1 visa authorized to work under the Optional Practical Training (OPT) program. Another commenter warned that the H-1B start-date would affect OPT status, and requested that USCIS remove the OPT extension cap in the event of a delay to the H-1B start date. A law firm addressed uncertainty around how F-1 students will claim cap-gap extensions, including which documents to use to prove cap-gap eligibility. The firm notes that under the established system, proper filing of H-1B petitions and I-797 receipt notices from USCIS were used to extend F-1 status, and the new proposed system does not address this issue. The firm questioned whether students can use selection notices to claim cap-gap extensions, and whether students with applications on reserve are eligible for cap-gap extensions. The firm cautioned that the lack of clarity around the effect of the proposed change on cap-gap extension timelines and eligibility puts F-1 students with pending H-1B petitions at risk of inadvertently accruing unlawful presence in the United States. Accordingly, the firm requested that USCIS amend the rules governing the cap-gap extension before, or concurrent with, the rollout of the proposed changes. Finally, an attorney stated that the rule does not address how the system will interface with cap-gap work authorization, raising questions about whether cap-gap extensions will be granted upon registration or selection in the lottery, whether cap-gap extensions will be granted if registration is suspended, and whether cap-gap extensions will be granted if processing is not completed by the start of the fiscal year.

Various potential solutions were recommended to deal with this issue, including the following:

- A trade association and a professional association requested that USCIS extend the cap-gap work authorization through the date that a

decision is issued on a beneficiary’s H-1B visa petition.

- A trade association urged USCIS to ensure that cap-gap protections take effect once a pre-registration is filed, preceding the official petition filing, on behalf of the student beneficiary.

- An advocacy group requested that the rule be revised to add text establishing that in the case of an F-1 nonimmigrant on either post completion 12-month OPT or a STEM OPT extension that the petition filing date be deemed to be the earlier of the practical training end date or the filing date.

- A couple companies commented that employers need cap-gap to apply to selected registrations as well as properly filed petitions if USCIS implements this rule.

*Response:* DHS appreciates these thoughtful comments and observations and will not be implementing the staggered filing process as proposed. Therefore, as is allowed under current regulations, petitioners will be able to file a petition based on a selected registration as much as 6 months prior to the start date even in years where USCIS uses the registration system. Accordingly, petitioners will be able to avail the beneficiary of any applicable cap gap protection of 8 CFR 214.2(f)(5)(vi) upon the filing of the H-1B cap-petition, as they currently may under the existing regulations. DHS believes that the timing of the annual initial registration period, which will occur before April 1 each year, allows for selection to occur prior to when H-1B cap-petitions may be filed, such that petitioners, if their registration is selected, have the ability to file as soon as eligible (*i.e.* April 1 or the next business day if April 1 falls on the weekend or a holiday). Petitioners with selected registrations will not have to wait for an applicable staggered filing window to begin. Removing the staggered filing concept will effectively maintain the status quo as it relates to cap-gap relief and provide petitioners with selected registrations with the flexibility to choose to file the associated H-1B cap-petition as soon as eligible to file or to wait to file at any other point during the applicable filing period.

DHS believes that the elimination of the staggered filing window concept moots out commenters’ suggestions to revise the cap-gap provisions to provide cap-gap relief based on the selection of a registration rather than the filing of a petition. To the extent that such suggestions are not moot, DHS declines to revise the cap-gap provisions to rely upon the submission of a registration request or registration selection because

DHS does not believe that extending the authorized period of stay or employment authorization of an F nonimmigrant should be based on submission of a registration or registration selection. Registration is designed to be a streamlined process to make the H-1B cap-selection process more efficient, and relying upon this process to extend immigration benefits is inconsistent with the narrow purpose of the requirement. Further, DHS believes that relying on registration to extend immigration benefits, such as those provided by cap-gap, would increase the risk for fraud and abuse of the system given that unscrupulous individuals could seek to submit fake, abusive or frivolous registrations simply to obtain such benefits.

Regarding the suggestion that current regulations be amended to allow for cap gap relief beyond October 1 due to lengthy adjudications, USCIS believes the new registration process and 90-day filing window will afford USCIS the ability to adjudicate the cap-subject H-1B petitions more efficiently. DHS believes, however, that comments related to cap-gap relief generally, such as suggestions to revise the cap-gap provisions to allow for cap-gap relief beyond October 1 and to the date of adjudication are outside the scope of this rulemaking. As noted above, future rulemakings are under consideration, including possible changes to the cap-gap relief regulations.

*Comment:* An individual commenter asked whether USCIS would be in charge of parsing through applications, if they were randomly selected, or if there was an algorithm which would judge the quality of each application.

*Response:* USCIS will have a random registration selection process. USCIS will not evaluate the “quality” of the registration other than as discussed in this rule (*e.g.*, to eliminate duplicate submissions). USCIS has experience in conducting a random selection in administering the H-1B cap and will continue to use a random selection process when selecting registrations.

*Comment:* An organization stated April 1 should be the first day to submit LCAs, not to file H-1B petitions. The commenter argued that, according to a Department of Labor regulation (20 CFR 655.730 (b)), an LCA should be submitted to ETA no earlier than 6 months before the date of the period of intended employment, so April 1 would allow for H-1B visas to begin October 1, the start of the fiscal year.

*Response:* The period of employment on a certified LCA may not exceed three years. DHS will not require the submission of an LCA with a



registration so that petitioners can, if appropriate, request the full three years in H-1B status. Thus, a petitioner will be able to register prior to April 1, then if selected, may request the certification of an LCA by DOL prior to filing an H-1B petition. As noted above, petitioners will have at least 90 days to file a petition based on a registration selection. Therefore, petitioners could choose to submit an LCA to DOL on or after April 1, which would allow for an LCA validity period beginning October 1 under DOL regulations. Note that the LCA must be submitted and certified before the H-1B petition is filed in accordance with the registration selection notice with USCIS.

*Comment:* Some commenters, including a trade association, a professional association, an advocacy group, a company, and a law firm, encouraged USCIS to reinstate premium processing for H-1B petitions to mitigate the effects of the anticipated delays caused by the proposed changes. An advocacy group and professional association commented that the proposed rule should be revised to codify mandatory access to premium processing for all H-1B petitions other than those that are extension requests to continue employment with the same employer. A trade association requested that the regulatory text explicitly provide employers with access to premium processing for any H-1B petition that is subject to the numerical limitations in either the H-1B cap or the advanced degree exemption.

However, because of the significant cost of premium processing, a few commenters, including a trade association and a company, expressed hesitation for relying on premium processing as the solution to the timing issues created by the proposed filing window.

*Response:* Mandatory access to premium processing would impede USCIS' ability to manage workloads across all benefit types as needed and as filing surges arise. Therefore, DHS is not adopting this suggestion.

*Comment:* An advocacy group encouraged USCIS to consult with DOL, reasoning in part that DOL's insight and involvement could help craft clearer, more realistic timelines for filing.

*Response:* DOL reviewed and commented on the proposed rule as part of the inter-agency clearance process and was consulted during the process of drafting the proposed rule.

*Comment:* A law firm requested that the filing period be split into at least two periods similar to the H-2B program to allow petitioners adequate time to prepare and file H-1B petitions

for selected registrants. An individual commenter in support of the proposed rule encouraged USCIS to take this opportunity to implement a quarterly registration system that provides U.S. employers with access to H-1Bs throughout the year and eliminates the de facto blackout period resulting from the current annual lottery system.

*Response:* As noted above, the registration system will be suspended for FY 2020 to allow petitioners sufficient time to prepare for registration. In addition, DHS is finalizing a filing window of at least 90 days to provide petitioners with adequate time for preparation and filing of petitions once a registration has been selected. Regarding the requests for semi-annual or quarterly cap allocation, the commenter appears to promote greater access to H-1B workers throughout the fiscal year. Unlike in the H-2B semi-annual visa cap, DHS does not have the statutory authority to do a semi-annual or quarterly cap allocation in order to distribute the visas throughout the fiscal year. H-1B visas become available for the new fiscal year on October 1 and are available until they have been used. Therefore, USCIS cannot implement a quarterly or semi-annual registration system without additional statutory authority. Note also that as the H-1B visa cap does not apply to all H-1B petitions, employers may hire H-1B workers at any time during the fiscal year if particular employment circumstances do not warrant a count against that fiscal year's annual limitation.

### G. Advanced Degree Exemption Allocation Amendment

#### 1. Support for the Reversal of Selection Order

*Comment:* Many commenters expressed support for the reversal of the selection order because it prioritizes applicants who invested in advanced degrees from U.S. institutions. Several commenters said the rule could help reduce or prevent jobs from being outsourced. A few commenters said the reversal will reduce the probability of selection of applicants with fake work experience.

*Response:* DHS agrees with the commenters that this rule will prioritize beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education. Although it is unclear how this rule would assist in preventing outsourcing or prevent beneficiaries from submitting fraudulent work experience, as the commenters suggested, DHS strives to enforce the existing H-1B regulations

and prevent fraud in all program aspects.

#### 2. Opposition to Reversal of Selection Order

*Comment:* A few commenters expressed opposition to the selection order reversal, stating individuals with U.S. advanced degrees should maintain their own selection pool.

*Response:* Reversing the cap selection order is expected to result in a greater number of beneficiaries with master's or higher degrees from U.S. institutions of higher education being selected under the numerical allocations and is in line with the executive order's directive to "help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." Furthermore, master's or higher degree holders still maintain their own selection pool.

#### 3. Changed Order of Selecting Registrations or Petitions To Reach the Cap Allocations

*Comment:* Several commenters stated the change in selection order will ensure more higher-skilled workers become H-1B beneficiaries and reward international students who have invested time and money into a U.S. education. A trade association and a company asserted several industries require advanced degrees and this reversal is crucial ensure employers are hiring a competitive workforce. A company further noted the congressional support to facilitate high skilled STEM occupations with advanced degrees, and cited research studies showing the economic benefit of reversing the selection order to prioritize advanced degree applicants. A company and an attorney commented that the potential increase of master's students from the proposed rule would provide benefits to the U.S. economy at large. An individual commenter wrote that master's students will have a better chance of selection for a visa. A trade association argued the potential of up to 16% more H-1B beneficiaries with advanced degrees would greatly benefit companies hiring for technical and other advanced positions.

*Response:* DHS agrees with the commenters that this rule will prioritize beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education. It was clearly Congress's intent to prioritize such workers by creating a 20,000 cap exemption only for them.

*Comment:* Some commenters, including a business association, argued the reversal would disadvantage applicants with advanced degrees and

higher skill-sets. Several commenters, including several companies and a business association, asserted the reversed selection order will not ensure the highest skilled workers are filling these jobs because not all occupation fields require an advanced degree. A few companies said this is particularly burdensome to OPT workers. A commenter asserted that the majority of the workforce for some occupations, especially computer science, only hold a bachelor's degree, and suggested allowing flexibility to petition for the candidate with the education needed for their workforce (e.g., bachelor's only, master's, etc.). One company recommended the rule provide a more advanced analysis on how the proposed change will impact the aggregate mix of talent and skills that will be available to meet the nation's workforce needs.

*Response:* DHS is not restricting a petitioner's flexibility to petition for the candidate with the education needed for their workforce through this rule. DHS believes that changing the order in which USCIS counts these prospective beneficiaries toward the applicable cap projections will likely increase the probability for beneficiaries with a master's or higher degree from a U.S. institution of higher education to be selected each fiscal year, and in turn, increase the number of individuals with a master's or higher degree from a U.S. institution of higher education who are issued H-1B visas or otherwise provided H-1B status.<sup>9</sup> Thus, DHS is not imposing any additional restrictions on petitioners through this rule, but reversing the order in which cap-subject petitions are selected under the caps. DHS further notes that eligibility for the advanced degree exemption, and thus an increased chance for selection under this final rule, is not based on the education requirements for the position in which the beneficiary will be employed. Rather, eligibility for the advanced degree exemption is based on whether the beneficiary has earned a master's or higher degree from a U.S. institution of higher education. Thus, the fact that the employer doesn't require an advanced U.S. degree for the particular position does not preclude the employer from petitioning for a worker with an advanced U.S. degree for that position and improving the chance of selection for their petition. This, however, may result in that

employer paying more for that worker, despite the worker not being any more valuable to the employer than the worker who does not qualify for the advanced degree exemption but who might have been selected under the current process and, if approved for the classification and granted status, ultimately employed in the position.

*Comment:* Various commenters suggested that DHS consider other factors to prioritize cap allocation. An individual commenter stated that the reverse selection order does not make the system merit-based and that other advanced skills should be considered beyond a degree. Some commenters suggested that DHS also evaluate what type of job the H-1B worker will be performing; prioritize technical and skilled positions, and wage levels, give preference or equal opportunity to small companies or companies that are not H-1B dependent employers, increase the cap limit for advanced degree holders, create a different model of selection for non-advanced degree holders based on merit, prioritize selection of petitions for H-1B beneficiaries with STEM degrees, prioritize selection of petitions for H-1B beneficiaries who will not be performing work at a third-party worksite, and implement a quota by region, similar to that used in the immigrant visa context, such that talented people from countries with high literacy rates (European continent, and some parts of the Asian continent, according to the commenter) can have a higher chance of being selected. A few commenters offered a suggestion to place more emphasis on educational background and salary in the cap selection. Several professional associations argued there should be special consideration given to applicants who are healthcare providers, especially physicians, occupational and physical therapists, which require more advanced schooling and licensing. Other commenters, including a company and a business association, stated USCIS should assess an applicant's skill based on other factors beyond U.S. advanced degree, such as foreign graduate degree equivalent, degree field of study, years of experience, and salary. One commenter suggested priority should be given to U.S. advanced degrees, then U.S. bachelors, then foreign advanced degrees.

*Response:* DHS believes that reversing the cap selection order to prioritize beneficiaries with a master's or higher degree from a U.S. institution of higher education is a permissible interpretation of the existing statute, as explained in detail in response to other comments in

this preamble. DHS believes, however, that prioritization of selection on other bases such as those suggested by the commenters would require statutory changes. DHS believes that implementing a quota would be inconsistent with the existing statute, as Congress has implemented quotas in other contexts when it has intended to do so, and the absence of a quota as it pertains to H-1B petitions is an indication that implementing such a limitation by regulation would be inconsistent with congressional intent.

*Comment:* A few commenters suggested the cap amount be increased, with one commenter elaborating that only applicants with U.S. degrees should be considered for H-1B eligibility. Another commenter suggested increasing the quota for candidate with a U.S. degree. Another commenter stated that applicants with U.S. advanced degrees should not be subject to a quota at all.

*Response:* DHS is not able to increase the H-1B cap allocations, as the cap allocations are statutory and set by Congress. DHS does not have the statutory authority to only accept petitions for those beneficiaries with U.S. degrees. In addition, DHS is not considering placing additional restrictions on the H-1B degree requirement, to the extent it may do so through regulation, in this rule. Similarly, DHS cannot exempt all U.S. advanced degrees holders from the numerical limitations, as this would be in violation of current statutory authority at INA 214(g)(5)(C).

*Comment:* One commenter said that the registration process may lead to a higher number of submissions than under the current petition process as multiple employers may submit registrations on behalf of the same individual, but that the number of submissions for advanced degree holders may not increase, and as a result the change in order of selection will not alter the likelihood an applicant with a U.S. master's or higher degree will get selected.

*Response:* DHS disagrees with the commenter and believes changing the order in which registrations or petitions are selected will likely increase the total number of registrations or petitions selected toward the projected number needed to reach the regular cap allocation for H-1B beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education each fiscal year. The commenter did not provide any data or sources to indicate why the process would lead to a higher number of submissions for beneficiaries that do not

<sup>9</sup> For clarification, the selection of a number of registrations that USCIS projects would be sufficient to meet the regular cap and advanced degree exemption is distinct from the fulfillment of the cap or exemption through "issu[ance] of visas or otherwise provid[ing] H-1B] nonimmigrant status." See INA 214(g)(1)(A).

qualify for the advanced degree exemption. Thus, as explained elsewhere, DHS believes that the use of a five-year historical average is reasonable and, based on that average, estimates an increase in the probability that an H-1B beneficiary who has earned a master's or higher degree from a U.S. institution of higher education each fiscal year.

*Comment:* One commenter said the change in order of selection will create a higher priority for U.S. Master's students and lower priority for foreign Ph.D. holders with years of experience.

*Response:* As previously mentioned, the change in selection order will likely increase the odds of selection under the H-1B regular cap allocation for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education. DHS believes that Congress, by limiting the exemption to those beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education, intended to prioritize the granting of H-1B status to foreign workers with advanced degrees from U.S. universities over other foreign workers (including those with Ph.D.s from foreign universities). This rule is only changing the probability of selection. While the commenter may be correct that the rule may result in more visas being granted to beneficiaries with a master's or higher degree from a U.S. institution of higher education and fewer foreign Ph.D. holders with years of experience, it is unclear which group has more value to the economy because so many factors need to be considered. For instance, how do foreign degrees compare in wages to U.S. degrees? In what industries are respective workers (certain industries could have high wages despite lower educational attainment)?

*Comment:* One commenter said prioritizing U.S. Master's degrees encourages applicants to provide falsified resumes.

*Response:* The commenter did not submit any data or evidence to support this assertion, and DHS does not believe that the change in the selection order will encourage petitioners to submit falsified resumes. A petitioner is not required to submit a beneficiary's resume in support of the H-1B petition, and even in cases where a resume is submitted, USCIS relies upon other objective evidence, such as copies of educational certificates and transcripts, experience letters, or evidence of licensure, to determine if the beneficiary is qualified for the H-1B classification. Any attempts to submit fraudulent evidence will be handled and reviewed

under the current adjudication process and in coordination with the USCIS Fraud Detection and National Security Directorate.

*Comment:* One commenter stated that the change disadvantages students obtaining bachelor's degrees from U.S. institutions.

*Response:* DHS acknowledges that those students with only bachelor's degrees from U.S. institutions may have a slightly decreased chance of securing an H-1B cap number based on this final rule, but that merely reflects the policy goal, based on the congressional exemption, of increasing the chances more students with advanced degrees from U.S. institutions secure H-1B visas.

*Comment:* One commenter asserted that an advanced degree does not equate to a higher-skilled beneficiary, so USCIS should assess LCA wage levels (along with degree level) on the LCA in ranking selections (*i.e.*, wage levels under 3 are indicative of cheap labor). The commenter states that failure to do so will result in advanced degree holders who do not have the skills to be hired by major companies and will be paid low prevailing wages as a result.

*Response:* DHS is reversing the cap selection order to prioritize beneficiaries with a master's or higher degree from a U.S. institution of higher education in accordance with congressional intent, as the numerically limited exemption from the cap for these beneficiaries was created by Congress and appears in the INA. DHS believes, however, that prioritization of selection on other factors, such as salary, would require statutory changes.

*Comment:* One commenter states that USCIS should not accept petitions where the beneficiary's degree is from a "for profit" university.

*Response:* Note that the advanced degree exemption only pertains to such degrees earned from a U.S. institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965, as amended. For-profit universities do not meet this statutory definition.

*Comment:* One individual commenter argued the reverse selection order does not make the system merit-based and that other advanced skills should be considered beyond a degree.

*Response:* DHS does not have the statutory authority to prioritize H-1B beneficiaries based on their skills. This final rule, however, will increase the odds of selection under the H-1B regular cap allocation for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education.

*Comment:* A business association said reversing the selection order is inconsistent with Executive Order 13788, which directs USCIS to award more H-1B visas to the most skilled or the highest paid beneficiaries.

*Response:* DHS disagrees with this assertion. Reversing the selection order will likely have the effect of increasing the total percentage of U.S. master's degree holders in the H-1B population. As discussed in further detail in the economic analysis, typically, individuals with a master's degree earn more in wages than individuals with a bachelor's degree. Additionally, workers with a master's degree in selected STEM occupations earn more than workers with a bachelor's degree in those same occupations.<sup>10</sup> While the reversal of the selection order does not guarantee that the selected registrant will be the most skilled or highest paid beneficiary, it increases the probability that a beneficiary with a U.S. master's degree will be selected. And if a U.S. master's degree beneficiary typically earns more in wages, that beneficiary may earn a higher wage than a non-selected beneficiary.

*Comment:* Several commenters stated work experience and an equivalent degree from a non-US institution should be considered in equal merit to a U.S. master's degree.

*Response:* DHS cannot adopt this suggestion as it does not have statutory authority to prioritize work experience and advanced foreign degrees. Prioritizing the possible selection of beneficiaries holding a U.S. master's or equivalent degree is consistent with Congressional intent. See INA section 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C).

*Comment:* One commenter stated that USCIS should release data on previous years' selected H-1B applicants, including education level, so the public can assess the need for a new selection process and, if implemented, fairly evaluate its effectiveness.

*Response:* It is not clear what data the commenter is requesting that USCIS release, and DHS notes that data was provided in the Notice of Proposed Rulemaking. DHS also notes that additional data regarding H-1B petitions is available on the USCIS web page "Buy American and Hire American: Putting American Workers

<sup>10</sup> Source: Bureau of Labor Statistics, Department of Labor, "Measuring the Value of Education April 2018": <https://www.bls.gov/careeroutlook/2018/data-on-display/education-pays.htm>. Visited November, 2018. Bureau of Labor Statistics, Department of Labor, "Should I Get a Master's Degree?": <https://www.bls.gov/careeroutlook/2015/article/should-i-get-a-masters-degree.htm#STEM>. Visited November, 2018.

First.”<sup>11</sup> USCIS will continue to provide information about the hiring practices of employers who petition for H-1B workers through this web page.

*Comment:* One commenter stated that USCIS data suggests an increasing number of individuals with U.S. advanced degrees are seeking cap-subject H-1Bs, so concerns that the advanced degree exception candidate pool is being diluted is unfounded.

*Response:* Although data shows an increase in the number of H-1B beneficiaries with advanced degrees in recent years, this is not specific to individuals with U.S. advanced degrees. Also, even assuming beneficiaries with U.S. advanced degrees have increased in recent years, DHS still believes that prioritization for U.S. advanced degree holders is beneficial.

#### H. Other Issues Relating to the Rule

##### 1. Request To Extend the Comment Period

*Comment:* A few commenters, including some business associations, requested the comment period be extended by 60 days to give stakeholders an adequate amount of time to determine how the proposal could impact their businesses. Some commenters generally expressed concern that the comment period was insufficient to solicit meaningful feedback and fell over the holidays.

*Response:* DHS believes that the 30-day comment period was sufficient and declines to extend the comment period. The rule is narrow in scope and 30 days was sufficient time for the public to determine the impacts of the proposed rule, if any, and to prepare and submit comments. The sufficiency of the 30-day comment period is demonstrated by the number of high quality comments received from the public, including individuals, attorneys, corporations and organizations. In addition, DHS notes that the proposed rule had been listed in the publicly available Unified Agenda of Federal Regulatory and Deregulatory Actions since the Fall 2017 publication. Given the narrow scope of the rule, the quantity and quality of comments received in response to the proposed rule, and other publicly available information regarding the rule, DHS believes that the 30-day comment period has been sufficient.

##### 2. Miscellaneous

*Comment:* A form letter campaign stated that, given that a major goal of this NPRM is to allow USCIS to more

efficiently process cap-subject H-1B petitions, USCIS should be required to complete all adjudications of cap-subject H-1B petitions by September 30 of the given year, if visa numbers are used up before the fiscal year begins. The commenters concluded that if employers are required to go through an extra registration procedure for the convenience of USCIS, the agency must commit to reasonable processing times for all cap-subject petitions. An individual commenter similarly stated that USCIS should make the adjudication process faster. An advocacy group supported the decision to digitize the H-1B process, and argued that the funding saved by not having to process thousands of ultimately unsuccessful filings could be redirected towards streamlining the adjudication process. An individual commenter stated that USCIS should commit to reasonable processing times for cap-subject petitions if it was going to require employers to go through an extra registration. A business association stated that employers are concerned about USCIS' ability to adjudicate applications by October 1. A company recommended that USCIS commit to adjudicating all H-1B cap petitions before the beginning of the government's fiscal year. An individual commenter asked if the time period after the H-1B registration is selected, and before the petition is filed, would be long enough for DOL to process a flood of LCAs. A trade association said USCIS should delay the implementation of the proposed regulation until premium processing is fully reinstated and the agency can guarantee the timely adjudication of all H-1B visa petitions in a given fiscal year.

*Response:* USCIS cannot commit by regulation to adjudicating all cases by September 30, as USCIS must first and foremost be committed to making a proper adjudication under the law and regulations. That said, the registration system is being implemented to foster greater efficiency in the adjudication process and to avoid, to the extent possible, adjudicatory backlogs. USCIS will continue to review the adjudicatory process and make additional improvements as necessary both within and without the rulemaking process. In addition, USCIS is committed to fully transitioning to a digital environment for processing of immigration benefit requests.<sup>12</sup> As such transition is made,

USCIS expects further efficiencies to be realized in the adjudication process.

#### I. Public Comments on Statutory and Regulatory Requirements

##### 1. Costs of the Registration Requirement

*Comment:* Multiple commenters, including multiple business associations, SBA Office of Advocacy, a company, a law firm, and a form letter campaign, requested that the registration requirement not be implemented for the FY 2020 H-1B cap season. These commenters explained that preparation to file an H-1B cap petition requires extensive resource commitments around the collection and analysis of required materials, and that they have already expended resources to petition under the current process and will not experience any of the estimated cost savings if registration is required for the FY 2020 H-1B cap. Similarly, multiple immigration lawyers associated with a form letter campaign wrote that their firms had already incurred opportunity costs associated with the preparation of petitions for the FY 2020 H-1B cap. One company argued the proposed rule's costs do not consider resources committed towards petitions not selected in the lottery. One business stated uncertainty related to potential issues with timing and implementation will lead to increased costs, with employers assuming the new process may not be operational for the upcoming fiscal year. Similarly, a company argued the potential risk for issues related to implementation and operation of the registration system could outweigh the estimated cost savings. A professional association stated USCIS's option to reserve the right to delay implementation of the proposed changes would result in significant costs for employers and USCIS. SBA Office of Advocacy highlighted uncertainty around whether FY2020 or FY2021 will be the first "cap season" affected by the new process as a significant disruption impacting employer costs. One individual commenter and a law firm suggested the proposed rule adds another layer of bureaucracy to the process for users, and predicted USCIS will spend even more time administering the registration process.

*Response:* DHS appreciates the concerns raised by these commenters. As already described in the preamble of this final rule, USCIS will be suspending the registration requirement for the FY 2020 H-1B cap season. Therefore, DHS does not anticipate that employers would have expended resources to comply with the current H-

<sup>11</sup> <https://www.uscis.gov/legal-resources/buy-american-hire-american-putting-american-workers-first>.

<sup>12</sup> Please see Regulation Identification Number (RIN) 1615-AC20, "Electronic Processing of Immigration Benefit Requests," in the Fall 2018 Unified Regulatory Agenda at [reginfo.gov](https://www.reginfo.gov).

1B petition process unnecessarily. DHS will publish a notice in the **Federal Register** to announce the initial implementation of the registration process in advance of the H-1B cap season in which the registration process will be first implemented. DHS reiterates that the cost savings from the registration requirement will be realized after the provision becomes effective, which will occur after the FY 2020 H-1B cap season.

DHS disagrees with the commenter that the rule would impose costs from resources committed towards petitions not selected in the lottery. In the discussion of Executive Orders 12866 and 13563 of both the NPRM and this final rule, DHS recognizes that unselected petitions would still have to submit a registration. However, DHS further analyzes the cost-savings that would accrue to unselected petitioners by no longer having to fill out the lengthy Form I-129 H-1B petition in its entirety. By considering the cost-savings to the unselected petitioners, DHS also took into consideration both current costs and those imposed as a result of this rulemaking. Any costs expended by entities to consider eligibility for beneficiaries would be expended in either the current or new process.

DHS disagrees that the risk issues related to implementation and operation of the registration system could outweigh the estimated cost savings. DHS plans to implement and test the system before it is released. DHS also disagrees that delaying implementation of the proposed changes would result in significant costs for employers and USCIS. A later effective date for the registration requirement would allow more time for entities to get acquainted with and prepared to file a registration rather than the full Form I-129 H-1B petition.

Additionally, DHS disagrees with the commenters that this rulemaking will increase the administrative burdens for USCIS. DHS believes that this rulemaking will reduce the administrative burden that USCIS currently spends on the processing of H-1B petitions as described further in the Executive Orders 12866 and 13563 and further in this comment section.

*Comment:* A commenter stated that the costs to the government associated with handling and shipping of unselected petitions could be reduced by shredding those petitions rather than returning them.

*Response:* DHS disagrees with the commenter's assertion that shredding unselected petitions would reduce costs to the government. Even assuming arguendo that the government would

save some costs by shredding rather than returning unselected petitions, DHS declines to adopt that alternative as it would still be less efficient and more burdensome than the registration requirement. Shredding the petitions would just address how to handle the hundreds of thousands of petitions at the end of the cap-selection process, but would not address the costs and inefficiencies associated with the receipt and processing of the petitions in order to administer the cap selection process. Further, if USCIS shredded unselected petitions, in addition to incurring the costs associated with shredding, USCIS would still incur additional costs necessary to notify unselected petitioners of the rejections (e.g. printing and mailing rejection notices). Petitioners would also still incur the costs associated with preparing and submitting the petitions, and the shredding of unselected petitions would not provide any cost savings for unselected petitioners. As discussed elsewhere, DHS believes that the registration system will benefit the government by no longer having to receive, handle and return large numbers of petitions that are currently rejected because of excess demand (unselected petitions), except in those instances when the registration requirement is suspended.

## 2. Benefits of the Registration Requirement

*Comment:* Several commenters expressed support for this rulemaking, particularly in terms of time and cost savings. These commenters stated that the registration process will save USCIS in postage costs by no longer having to return unselected petitions. Some commenters asserted that the decreased burden on USCIS will enable USCIS to adjudicate cases in a more timely manner. Multiple individual commenters, a law firm, and an advocacy group argued that petitioners would realize significant benefits related to a reduction in time spent preparing petitions, while USCIS would significantly reduce administrative costs. Multiple commenters agreed that the registration process would reduce the cost and burden of participation and also alleviate administrative burdens on users. One commenter also approved of the expected cost savings and praised the decision by USCIS to forgo any registration application fee at this time.

*Response:* DHS agrees with the commenters that the registration process will reduce overall costs for petitioners and help to alleviate administrative burdens on USCIS Service Centers that process H-1B petitions. In this final

rule, DHS estimates a cost savings will occur because unselected petitioners will avoid having to file an entire H-1B cap petition and, when registration is required, will instead only have to submit a registration. Therefore, the difference between current costs and the new costs for unselected petitioners when registration is required will represent a cost savings ranging from \$47.3 million to \$75.5 million, again depending on who petitioners use to submit the registration. The government will also benefit from the registration requirement and process by no longer having to receive, handle and return large numbers of petitions that are currently rejected because of excess demand (unselected petitions), except in those instances when the registration requirement is suspended. These activities will save DHS an estimated \$1.6 million annually when registration is required. DHS also agrees with the commenters that the government will save on postage costs by no longer having to mail unselected petitions back to petitioners, when registration is required, and accounts for such cost-savings in the Executive Orders 12866 and 13563 analysis.

## 3. Labor Market Impacts on the Reversal of Selection Order

*Comment:* Commenters argued that this regulation will have a more serious impact on certain industries where job training is performed in the United States, or foreign education is an asset, such as medicine and language education. One commenter states that employers already have a shortage of workers at all levels. They went on to state that schools with language-immersion programs have been forced to look outside the United States multiple times for native speakers with education degrees but that the teachers found did not have advanced degrees. This commenter wrote that the proposed changes will negatively impact these schools in their goal of producing globalized adults. Another commenter stated that the chance of a registration or petition for a non-U.S. advanced degree beneficiary to be selected will fall by about 5 percent for years with approximately 172,000 total initial registrations or petitions. The commenter stated that this percentage decrease is significant and that employers rely on non-U.S. advanced degree holders, including those who are trained in the United States, particularly in medicine. A medical association also argued the changed order for selecting registrations would make it more difficult for non-U.S. citizen international medical graduates and

those completing their education under a graduate medical examination (GME) to obtain an H-1B visa. The commenters said this would exacerbate physician workforce shortages throughout the U.S. and reduce access to care in underserved communities. One individual commenter argued the rule does not go far enough in favoring healthcare workers who would have the most immediate impact in addressing labor shortages throughout the country. Additionally, a trade association suggested the prioritization of those with master's degrees would exacerbate ongoing talent gaps and make it difficult for companies to effectively hire talent. Similarly, multiple trade associations argued that many highly skilled jobs in STEM fields do not necessarily require an advanced degree. As a result, the reversed order of selection in the proposed rule will disadvantage such applicants and negatively impact the workforce.

*Response:* DHS appreciates the commenters' concerns of the impact this rule will have on beneficiaries under certain industries. DHS agrees there may be a probability for a decline in the number of petitions for beneficiaries who do not have a master's or higher degree from a U.S. institution of higher education or that have a master's or higher degree from a foreign institution. However, DHS believes that reversing the selection process more closely aligns with the intent of Executive Order 13788. DHS used historical submissions to base its economic impact and estimates a 3 percent decline to those beneficiaries with only a bachelor's degree from a U.S. institution of higher education or a master's or higher degree from a foreign institution. The commenter did not provide further sources or show how it concluded that there would be a 5 percent decrease in non-U.S. advanced degree beneficiaries. The commenter asserting that employers have a shortage of workers at all levels also does not provide any sources. DHS reiterates that this rulemaking does not add new workers into the labor market, though it might shift from one pool of H-1B workers to another. Therefore, any hypothesized shortage of workers will not be alleviated by this final rule. Additionally, because the selection process typically involves a random lottery and there is substantial year-to-year variation in the composition of the pool of recipients of H-1B visas, DHS cannot reliably estimate how changing the order of selection may impact specific industries, such as those in medicine or education. Finally, DHS recognizes that there may be many

industries, STEM included, in which a master's degree from a U.S. higher educational institution may not be required. However, DHS still believes that reversing the selection order best aligns with the Executive Order 13788 and congressional intent.

*Comment:* The rule received support from a trade association that argued an increase in master's students would allow its member companies to better meet their workforce needs. Similarly, a company argued an increase in master's students based on the reversed selection order of H-1B submissions would allow it to retain top talent and increase American competitiveness. An individual commenter and advocacy group suggested the proposed rule would increase the number of high skilled foreign-born workers and wages throughout the country. However, an advocacy group suggested USCIS work with the Department of Labor to further analyze the potential wage impact of the proposed rule.

*Response:* DHS appreciates the commenters' support and agrees that there is a probability for an increased number of selected beneficiaries who will have a master's or higher degree from a U.S. institution of higher education that may be selected under this new selection process. DHS agrees that the reversal of the selection process could help employers meet their workforce needs and help retain talent. DHS reiterates that it is changing the pool of workers to increase the probability of selecting H-1B beneficiaries with a master's degree from a U.S. institution. DHS also recognizes that there are potential wage increases for those that earn a master's degree compared to those with only a bachelor's degree. These comments are also in agreement with DHS' efforts to meet E.O. 13778 to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.

#### 4. Other Costs and Benefits of the Reversal of Selection Order

*Comment:* A commenter argued that the five-year average used by DHS to estimate the increased likelihood of selection of an H-1B cap subject petition with a master's degree or higher from a U.S. institution is incorrect. The commenter states that petitions for the advanced degree category increased over the past five years and will not decrease in any future year.

*Response:* DHS methodology uses a five-year historical average in its estimates of the impacted advanced degree exemption population because various factors outside of this rulemaking could result in either a

decline or continued rise of petitions received. Therefore, DHS believes it is reasonable to use an average rather than forecast the number of master's beneficiaries in the future. Additionally, the commenter does not provide any data or data sources that are clear and verifiable, and therefore DHS is unable to comment on its validity. The commenter summarizes that the use of the five-year average for the reversal of the selection process does not comply with the Executive Order to hire the most-skilled or highest-paid petition beneficiaries. DHS clarifies that our analysis states that the probability of this increase could result in greater numbers of workers with advanced degrees from U.S. institutions of higher education entering the U.S. workforce under the H-1B program.

*Comment:* A commenter stated that the change will have the potential for unintended consequences that could occur if the proposed rule is enacted, as a change to one aspect of the higher education ecosystem rarely occurs in isolation. The commenter questioned how the proposal may impact the pool of individuals who have less than a master's degree as well as graduate degree holders from foreign higher education institutions.

*Response:* DHS believes that this final rule is likely to increase the probability that H-1B workers with a master's degree or higher from a U.S. institution of higher education would get selected during the new process in this final rule. DHS provides an explanation of this probability in the Executive Orders 12866 and 13563 sections of this final rule.

*Comment:* A commenter also questioned how the proposal would impact U.S. institutions who employ graduate degree holders from foreign institutions, many of whom currently serve as faculty or researchers on U.S. campuses.

*Response:* DHS believes that the commenter is referring to work performed by faculty or researchers at U.S. institutions of higher education (as defined in section 101(a) of the Higher Education Act of 1965, as amended). USCIS does not believe the final rule will impact foreign graduate degree holders that are employed at an U.S. institution of higher education since those petitioners are exempt from the H-1B cap under INA Section 214(g)(5)(A). Because such institutions are cap-exempt, they would not have to register before filing an H-1B petition to employ a specialty occupation worker at the U.S. institution of higher education.

*Comment:* A commenter stated that the change should be delayed until

proper research is done to understand the potential economic impact.

*Response:* DHS appreciates the commenter's concerns of the rule on the economy. However, DHS reiterates that it has considered the impact to the economy in both the NPRM and in the Executive Orders 12866 and 13563 sections of this final rule.

#### *J. Public Comments and Responses to Paperwork Reduction Act*

*Comment:* An attorney suggested that the estimated 5 to 7 hours to complete an H-1B petition is inaccurate, and the actual time requirement is double that figure. Another attorney suggested that in order to register only those individuals who would conceivably qualify for H-1B status, an initial preliminary analysis would need to be conducted by an attorney and that the work required for this results in a gross understatement of the paperwork burden.

*Response:* USCIS has published multiple information collection notices in the **Federal Register** as recently as 2016–2018 and received no comments on the estimated time burden per response for USCIS Form I-129. The current Form I-129 instructions indicate the breakdown of the time burden estimate that respondents for the H-1B process would spend on the submission of the form. Also, USCIS is not making any changes to the form or instructions that would require an adjustment to the estimated time burden per response. Based on USCIS review and analysis there is no change required to the estimated time burden per response for Form I-129, OMB Control Number 1615-0009. In response to the comment regarding analysis that an employer may choose to conduct to preliminarily determine whether the beneficiary may qualify for H-1B classification, USCIS has analyzed the work required to submit the limited amount of information collected for an H-1B registration through the H-1B registration tool and maintains that the estimated time burden per response reported for this information collection accurately reflects the process as presented. At this time, USCIS is retaining the current estimated time burden per response.

This rule did not propose changes to the time burden estimate for completing an H-1B petition, which is covered under the Form I-129 information collection, only to the estimated number of respondents to reflect an estimated smaller number of respondents in years in which the registration process will be in place. USCIS notes that the time burden estimate for the Form I-129 is an

estimate based on the average amount of time it would take to complete the form. The instruments currently approved under the I-129 information collection that are relevant to this proposed rule, and their estimated time burdens, are: 2.34 hours for Form I-129, 2 hours for the H Classification Supplement, and 1 hour for the H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement. USCIS did not receive public comments on these time burden estimates during either.

#### *K. Out of Scope*

DHS received many comments that were unrelated to the proposed revisions regarding the electronic registration system and the cap selection process. Many of these comments would require Congressional action or additional regulatory action by DHS. Although DHS has summarized the comments it received below, DHS is not providing substantive responses to those comments as they are beyond the scope of this rulemaking. To the extent that comments are seeking further revisions to the H-1B program, DHS recognizes that additional regulatory changes could improve the H-1B program and intends to propose a separate rule to strengthen the H-1B visa classification. As stated in the Unified Agenda, DHS will propose to revise the definition of specialty occupation to increase focus on obtaining the best and the brightest foreign nationals via the H-1B program, and revise the definition of employment and employer-employee relationship to better protect U.S. workers and wages. In addition, DHS will propose additional requirements designed to ensure employers pay appropriate wages to H-1B nonimmigrant workers.

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

- Some commenters said that Congress should take further action to reform immigration law in a manner that addresses the “core structural problems” within the current immigration system. Some suggested USCIS explore reforms similar to the H-1B reform bills in congress that incentivize employers to hire skilled graduates and offer competitive wages.

- Commenters relayed concerns about the difficulty of hiring H-1B workers and the need for comprehensive immigration reform in order to acquire and retain top talent and fulfill business needs that are being unmet because there are not sufficient U.S. workers to meet their demands. Commenters suggested that the H-1B program helps U.S. companies and had a positive impact on wages for college graduates

and non-college graduate natives.

- While some commenters acknowledge the need for this rule, they argued that more H-1B reform was necessary to ensure that U.S. workers were being protected and the H-1B visas were only being given to those beneficiaries who are the most skilled and the highest paid workers. They suggested that reform was necessary to prevent fraud and abuse in the H-1B system.

- Some commenters suggested priority should be given to petitioners who seek to hire guest-workers at the highest possible salary, and that DHS should raise the salary minimum for individuals to ensure the H-1B program isn't abused by overseas companies that underpay their employees.

- Some commenters made suggestions to improve other immigration programs, such as suggesting DHS make the F-1 visa dual intent, and that DHS review EB-1 and L-1/L-2 visa programs.

- One commenter suggested DHS streamline the review and the renewal of H-1B extension petitions and put forth additional proposals that support the goal to streamline the process of the H-1B program. Some commenters said Congress should raise the H-1B cap and make it responsive to market demands, particularly in the tech and start-up sector. One commenter said Congress should create an additional specialty occupation visa specifically for individuals working in IT fields.

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

As discussed previously, with the exception of changes discussed in this final rule, DHS is finalizing this rule as proposed.

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

### *A. Executive Orders 12866 and 13563*

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. The Office of Information

and Regulatory Affairs has determined that this rule constitutes an “economically significant” regulatory action under section 3(f) of E.O. 12866. Accordingly, the rule has been reviewed by the Office of Information and Regulatory Affairs.

### 1. Summary

DHS is amending its regulations governing the process for filing H-1B cap petitions. Specifically, DHS is adding a registration requirement for petitioners seeking to file H-1B cap subject petitions on behalf of foreign workers. DHS will be suspending the registration requirement for the FY2020 H-1B cap in order to further test the system. DHS anticipates the registration requirement will be implemented starting with the FY 2021 H-1B cap. Additionally, DHS is changing the order in which H-1B cap-subject petitions will be selected towards the applicable projections needed to meet the annual H-1B allocations in order to increase the odds for selection for H-1B beneficiaries who have earned a master’s or higher degree from a U.S. institution of higher education.

All petitioners seeking to file an H-1B cap-subject petition will have to submit a registration, unless the registration requirement is suspended by USCIS consistent with this final rule. However, under the final registration process, when applicable, only those whose registrations are selected (termed “selected registrant”<sup>13</sup> for purposes of this analysis) will be eligible to file an H-1B cap-subject petition for those selected registrations and during the associated filing period. Therefore as selected registrants under the registration requirement, selected petitioners will incur additional opportunity costs of time to complete the electronic registration relative to the costs of completing and filing the associated H-1B petition, the latter costs being unchanged from the current H-1B petitioning process. Conversely, those who complete registrations that are unselected because of excess demand (termed “unselected registrant” for purposes of this analysis) will experience cost savings relative to the current process, as they will no longer have to complete an entire H-1B cap-subject petition that ultimately does not

<sup>13</sup> DHS notes that entities may submit multiple registrations which could result in a mix of selected and unselected outcomes. For the purpose of this analysis, the terms “selected registrant” and “unselected registrant” refer to the originator of a submission based on its outcome and should not be deemed a unilateral label for a single entity. Using this terminology it is possible for a single entity to experience impacts simultaneously as a selected registrant and as an unselected registrant.

get selected for USCIS processing and adjudication as done by current unselected petitioners.

To estimate the costs of the registration requirement, when it is applicable, DHS compared the current costs associated with the H-1B petition process to the costs imposed by the additional registration requirement. DHS compared costs specifically for selected and unselected petitioners because the impact of the registration requirement to each population is not the same. Current costs to selected petitioners are the sum of filing fees associated with each H-1B cap-subject petition and the opportunity cost of time to complete all associated forms. Current costs to unselected petitioners are only the opportunity cost of time to complete forms and cost to mail the petition since USCIS returns the H-1B cap-subject petition and filing fees to unselected petitioners.

The opportunity cost of time associated with registration, when it is required, will be a cost to all petitioners (selected and unselected), but those whose registrations are not selected will be relieved from the opportunity cost associated with completing and mailing an entire H-1B cap-subject petition. Therefore, DHS estimates final costs of this rule to selected petitioners for completing an H-1B cap-subject petition as the sum of the registration costs and current costs. DHS estimates that the costs of this final rule to unselected petitioners will only result from the estimated opportunity costs associated with the registration requirement, when applicable. Overall, unselected petitioners will experience a cost savings relative to the current H-1B cap-subject petitioning process; DHS estimates these cost savings by subtracting new registration costs from current costs of preparing an H-1B cap-subject petition. These estimated quantitative cost savings will be a benefit that will accrue to only those with registrations that were not selected.

Currently, for selected petitioners the aggregate total costs to complete H-1B cap-subject petitions ranges from \$132.9 million to \$165.5 million, depending on who petitioners use to prepare petitions. These current costs to complete and file H-1B cap-subject petitions are based on a 5 year petition volume average and may differ across sets of fiscal years. Current costs are not changing for selected petitioners as a result of this registration requirement. Rather, this registration requirement will add a new opportunity cost of time to selected petitioners who will continue to face current H-1B cap-subject petition costs. DHS estimates the added aggregate

opportunity cost of time to all selected petitioners under this registration requirement would range from \$6.2 million to \$10.3 million, again depending on who petitioners use to submit registrations and prepare petitions. Therefore, under the registration requirement, DHS estimates an adjusted total cost to complete H-1B cap-subject petitions will range from \$134.7 million to \$171.4 million. Since these petitioners already file Form I-129, only the registration costs of \$6.2 million to \$10.3 million are considered as new costs. Again, it is important to note that USCIS will be suspending the registration requirement for the FY 2020 cap season. DHS anticipates the impacts of the registration requirement will be realized when registration is required.

Unselected petitioners will experience an overall cost savings, despite new opportunity costs of time associated with the registration requirement. Currently for unselected petitioners, the total cost associated with the H-1B process is \$53.5 million to \$85.6 million, depending on who petitioners use to prepare the petition. The difference between total current costs for selected and unselected petitioners in an annual filing period consists of fees returned to unselected petitioners. DHS estimates the total costs to unselected petitioners from the registration requirement will range from \$6.2 million to \$10.1 million. DHS estimates a cost savings occurs because under the requirement unselected petitioners will avoid having to file entire H-1B cap-subject petitions and will have only had to submit registrations. Therefore, the difference between current costs and the new costs for unselected petitioners will represent a cost savings ranging from \$47.3 million to \$75.5 million, again depending on who petitioners use to submit the registration, when the registration is required.

The government will also benefit from the registration provision by no longer having to receive, handle and return large numbers of petitions that are currently rejected because of excess demand (unselected petitions). These activities will save DHS an estimated \$1.6 million annually.<sup>14</sup> USCIS will, however, have to expend a total of \$1,522,000 in the initial development of the registration website. This cost to the government is considered a one-time cost. DHS recognizes that there could be some additional unforeseen

<sup>14</sup> Although DHS does not estimate the impact of the proposed registration provision to DOL processes, DHS recognizes DOL may have some cost savings due to fewer LCA submissions.



development and maintenance costs or costs from refining the registration system in the future. However, DHS cannot predict what these costs would be at this time. Currently there are no additional costs for annual maintenance of the servers because the registration system will be run on existing servers. Since these costs are already incurred regardless of this rulemaking, DHS did not calculate additional costs.

The net quantitative impact of the new registration step, when it is required, is an aggregate cost savings to petitioners and to government ranging from \$43.4 million to \$62.7 million annually. Using lower bound figures, the net quantitative impact of this registration requirement is cost savings of \$434.2 million over ten years. Discounted over ten years, these cost savings will be \$381.2 million based on a discount rate of 3 percent and \$325.7 million based on a discount rate of 7 percent. Using upper bound figures, the net quantitative impact of this registration requirement is cost savings of \$626.8 million over ten years. Discounted over ten years, these cost savings will be \$550.5 million based on a discount rate of 3 percent and \$470.6 million based on a discount rate of 7 percent.

DHS notes that these overall cost savings result only in years when the

demand for registrations and the subsequently filed petitions exceeds the number of available visas needed to meet the regular cap and advanced degree exemption allocation. For years where DHS has demand that is less than the number of available visas, this registration requirement will result in costs. For this final rule to result in net quantitative cost savings, at least 110,182 petitions (registrations and subsequently filed petitions under the final rule) will need to be received by USCIS based on lower bound cost estimates. For upper bound cost estimates, USCIS will need to receive at least 111,137 registrations and subsequently filed petitions for this rule to result in net quantitative cost savings.

The change to the petition selection process is likely to increase the probability that H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education will be selected. As a result, the probability of selecting H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education will increase by an estimated 16 percent (or 5,340 workers each year). This could result in greater numbers of highly educated workers with degrees from U.S. institutions of higher education entering the U.S. workforce under the H-1B program. If there is an increase in

the number of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education, wage transfers may occur. These transfers would be borne by companies whose petitions, filed for beneficiaries who are not eligible for the advanced degree exemption (*e.g.* holders of bachelor's degrees and holders of advanced degrees from foreign institutions of higher education), might have been selected and ultimately approved but for the reversal of the selection order. DHS recognizes there could be a wage differential across industries, but due to the variance in the composition of the beneficiaries subject to the cap and their associated differences in educational level, whether any advanced degrees are from U.S. or foreign institutions of higher education, and the location of the ultimate job opportunity, DHS cannot reliably estimate the impact on wages under this final rule. Under an assumption that the change to the petition selection process resulted in 5,000 workers with an average fully loaded wage of at least \$20,000 transferring from one market or industry to the other, then the rule will meet the \$100 million threshold for economic significance.

Table 2 provides a detailed summary of the final changes and their impacts.

| <b>Table 2: Summary of Provisions and Impacts</b>  |   |   |
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| <b>Current and Final Provisions</b>  | <b>Expected Cost of the Final Provision</b>   | <b>Expected Benefit of the Final Provision</b>  |
| <p>Currently, all petitioners who file on behalf of an H-1B worker must complete and file H-1B cap-subject petitions along with a certified DOL Labor Condition Application (LCA). The total current cost for all selected petitioners to file and complete entire H-1B cap-subject petitions ranges from \$132.9 million to \$165.5 million. For unselected petitioners, the total current cost is \$53.5 million to \$85.6 million.</p> <p>The final rule requires all petitioners who seek to hire a cap-subject H-1B worker to register for each prospective H-1B worker for whom they seek to file a cap-subject H-1B petition, unless USCIS suspends the registration requirement. When registration is required, only those petitioners whose registrations are selected may proceed to complete and file an H-1B cap-subject petition.</p> | <p><b>Petitioners -</b></p> <ul style="list-style-type: none"> <li>• For current selected petitioners, the rule will add, when registration is required, an additional annual opportunity cost of time ranging from \$6.2 million to \$10.3 million, depending on who the petitioner uses to submit the registration. Therefore, the total costs of registering and completing and filing H-1B cap-subject petitions will range from \$134.7 million to \$171.4 million to this population annually, depending on the type of petition preparer.</li> <li>• For current unselected petitioners, when registration is required, they will experience an overall cost savings, though the final rule would add an opportunity cost of time ranging from \$6.2 million to \$10.1 million to this population annually, depending on who petitioners use to submit the registration.</li> </ul> <p><b>Government -</b></p> <ul style="list-style-type: none"> <li>• The final rule will cost the government about \$1.5 million to initially develop the registration website. This cost to the</li> </ul> | <p><b>Petitioners -</b></p> <ul style="list-style-type: none"> <li>• Petitioners whose registrations are not selected, when registration is required, will have cost savings ranging from \$47.3 million to \$75.5 million from no longer having to complete and file H-1B cap-subject petitions along with mailing costs despite new opportunity cost of time to submit registration</li> </ul> <p><b>Government -</b></p> <ul style="list-style-type: none"> <li>• USCIS will save \$1.6 million annually in processing and return shipping costs, when registration is required, as fewer petitions will be filed with USCIS based on registrations that were not selected.</li> </ul> |

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|  | <p>government is considered a one-time cost. Annual maintenance, including running the registration website servers and the labor costs associated with server maintenance, are reported as negligible. DHS recognizes that there could be some additional unforeseen development and maintenance costs or costs from refining the registration system in the future. However, DHS cannot predict what these costs would be at this time and thus cannot estimate these costs. Currently there are no additional costs for annual maintenance of the servers because the registration system will be run on existing servers. Since these costs are already incurred regardless of this rulemaking, DHS did not estimate any costs for maintenance.</p> |   |
| <p>Under the current H-1B selection process, if the regular cap and advanced degree exemption are reached during the first five business days that cap-subject petitions can be filed, USCIS randomly selects sufficient H-1B petitions to reach the H-1B 20,000 advanced degree exemption first. Then, USCIS randomly selects sufficient H-1B petitions from the remaining pool of beneficiaries, including</p> | <p><b>Petitioners -</b></p> <ul style="list-style-type: none"> <li>• The selection process under this final rule could decrease the number of cap-subject H-1B petitions for beneficiaries with bachelor’s degrees, advanced degrees from U.S. for-profit universities, or foreign advanced degrees by up to 5,340 workers. This potential decrease could result in some higher labor costs to petitioners assuming that</li> </ul>   | <p><b>Petitioners and Government</b></p> <ul style="list-style-type: none"> <li>• The selection process could increase the number of cap-subject H-1B petitions that are selected for beneficiaries with master’s degrees or higher from U.S. institutions of higher education by an estimated 16 percent (or 5,340 workers annually). DHS believes the increase in the number of H-1B beneficiaries with a master’s degree or higher from a U.S. institution of</li> </ul> |

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| <p>those not selected in the advanced degree exemption, to reach the H-1B 65,000 regular cap limit. USCIS rejects all remaining unselected H-1B cap-subject petitions.</p> <p>This final rule reverses the selection process so that USCIS will randomly select registrations (petitions if the registration requirement is suspended) for the H-1B regular cap first, including registrations for petitions eligible for the H-1B advanced degree exemption. Then USCIS will randomly select registrations for the H-1B advanced degree exemption.</p> | <p>beneficiaries with bachelor's degrees, advanced degrees from U.S. for-profit universities or foreign advanced degrees are paid less than and replaced by beneficiaries with master's degrees from U.S. institutions of higher education.</p> <ul style="list-style-type: none"> <li>• DHS does not anticipate, as a result of the new selection process, petitioning employers will suffer economic harm from the decreased probability of selecting H-1B petitions eligible only under regular cap.</li> </ul> | <p>higher education will likely result in more highly educated workers entering the U.S. workforce. This could benefit the U.S. economy if those workers have a higher net value to the economy than the H-1B workers that they replace.</p> |
|---|--|--|

As discussed previously in the preamble, this rule will also allow for the H-1B regular cap and advanced degree exemption selections to take place in the event that the registration system is inoperable for any reason and needs to be suspended. If temporary suspension of the registration system is necessary, then the cost and benefits described in this analysis resulting from registration for the petitioners and government will not apply during any period of temporary suspension. However, this selection reversal process will still take place and is anticipated to yield a higher proportion of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education being selected.

## 2. Background and Purpose of the Final Rule

The H-1B program allows U.S. employers to temporarily employ foreign workers in occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor's degree or higher in the specific specialty or its equivalent. As the preamble explains, Congress limits the number of H-1B visas to 65,000 new visas annually ("regular cap"), with certain exemptions including a limited exemption for beneficiaries who have earned a master's or higher degree from

a U.S. institution of higher education.<sup>15</sup> The annual exemption from the 65,000 cap for H-1B beneficiaries who have earned a qualifying U.S. master's or higher degree is limited to 20,000 beneficiaries ("advanced degree exemption").<sup>16</sup>

Currently, when an employer wants to hire an H-1B worker who is subject to the regular cap or advanced degree exemption, the petitioner must first obtain a certified Labor Condition Application (LCA) from the U.S. Department of Labor (DOL) and then complete and file a Petition for a Nonimmigrant Worker (Form I-129) with USCIS during the H-1B cap filing period. The first day on which petitioners may file H-1B petitions can be as early as 6 months ahead of the projected employment start date.<sup>17</sup> For example, a U.S. employer seeking an H-1B beneficiary for a job beginning October 1 (the first day of the next fiscal year) can file an H-1B petition no earlier than April 1 of the current fiscal year. Thus, an H-1B employer requesting a beneficiary for the first day of Fiscal Year (FY) 2020, October 1, 2019, would be allowed to file an H-1B petition as early as April 1, 2019.

<sup>15</sup> See INA section 214(g)(1) and (g)(5), 8 U.S.C. 1184(g)(1) and (g)(5).

<sup>16</sup> *Id.*

<sup>17</sup> See 8 CFR 214.2(h)(9)(i)(B).

Therefore, the cap filing period begins on or shortly after April 1 each year and generally ends when USCIS has received enough petitions projected as needed to fill the H-1B numerical limitations.

Each year USCIS monitors the number of H-1B cap-subject petitions it receives at its Service Centers. When USCIS determines that it has received a sufficient number of petitions projected as needed to reach the H-1B allocations, it announces on its website the final receipt date on which petitioners may file an H-1B cap-subject petition for that fiscal year.<sup>18</sup> USCIS then may randomly select from the cap-subject petitions received on the final receipt date the number of petitions projected as needed to reach the H-1B allocations. If the final receipt date falls on any of the first five business days on which cap petitions may be filed, USCIS randomly selects the requisite number of petitions from among all petitions received on any of those five business days.<sup>19</sup> USCIS rejects all H-1B cap-subject petitions received after the final receipt date.<sup>20</sup>

Each year, to administer the H-1B cap and advanced degree exemption, USCIS expends resources towards opening and sorting mail, identifying properly filed

<sup>18</sup> See 8 CFR 214.2(h)(8)(ii)(B).

<sup>19</sup> *Id.*

<sup>20</sup> See 8 CFR 214.2(h)(8)(ii)(D).

petitions, and removing duplicate petitions before proceeding with the petition selection process. In years of high petition volume, these duties present operational challenges for USCIS, including greater labor needs and limited space at Service Centers where petitions are stored, sorted, and selected.

Once the petitions have been sorted and assigned a case identification number, if USCIS determines that a lottery should be conducted, USCIS randomly selects a certain number of H-1B cap-subject petitions projected as needed to meet the numerical limitation. USCIS makes projections on the number of H-1B cap-subject petitions necessary to meet the numerical limit, taking into account historical data related to approvals, denials, revocations, and other relevant factors.<sup>21</sup> USCIS uses these projections to determine the number of petitions to select to meet, but not exceed, the 65,000 regular cap and 20,000 advanced degree exemption, although the exact percentage and number of petitions may vary depending on the applicable projections for a particular fiscal year. USCIS begins the H-1B cap and advanced degree selection process by first randomly selecting petitions that will apply to the projections needed to reach the 20,000 advanced degree exemption.<sup>22</sup> Once the selection process for the 20,000 advanced degree exemption is complete, USCIS then randomly selects petitions that apply to the projections needed to reach the 65,000 regular cap limit. USCIS then rejects all remaining H-1B petitions and returns the petition and associated fees to the petitioners. For petitions selected during the selection process, USCIS enters petition information into its database and notifies the petitioner of their selection, which includes receipting and depositing associated petition fees.

### 3. Changes Made by This Final Rule

DHS is establishing a mandatory electronic registration requirement that will address some of the current operational challenges associated with the H-1B cap-subject petition process.

The electronic registration, unless suspended by USCIS consistent with this final rule, will commence before the H-1B cap filing season, which currently begins on April 1 each year (or the next business day if April 1 falls on Saturday, Sunday or a legal holiday). This rule will require petitioners to create an account and electronically register through the USCIS website each prospective H-1B worker on whose behalf the petitioner seeks to file an H-1B cap-subject petition. DHS estimates that each unique account creation by a petitioner will take 0.17 hours and each electronic registration for a unique beneficiary will take 0.5 hours to complete.<sup>23</sup> DHS describes in further detail how the electronic registration process will work in the preamble of the Notice of Proposed Rulemaking (83 FR 62406).

Only those with a selected registration will be eligible to submit an associated H-1B cap-subject petition on behalf of a cap-subject H-1B worker to USCIS. As described previously in the preamble of the Notice of Proposed Rulemaking (83 FR 62406), registrants will receive notification of selection and could then proceed to obtaining a certified LCA from DOL and afterward proceed to preparing and filing H-1B cap-subject petitions with USCIS. Those with registrations that are not selected will not have to complete and file H-1B cap-subject petitions for the H-1B cap-subject worker named in the unselected registration, as they will be ineligible to file an H-1B cap-subject petition for that beneficiary in that fiscal year.

Additionally, DHS is changing the H-1B random selection process to increase the probability that H-1B visas will be issued, or status otherwise provided, to beneficiaries with master's degrees or higher from U.S. institutions of higher education. DHS is changing the H-1B

<sup>23</sup> DHS assumes petitioners would not need to expend additional funds to procure computer equipment or acquire internet connections since DOL already requires employers to electronically file Labor Condition Applications (LCAs), and an approved LCA is a requisite for requesting an H-1B employee. This assumption was made in the 2011 proposed rule, "Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations" and USCIS received no comments regarding this assumption.

selection process by first selecting H-1B registrations towards the projected number of petitions needed to meet the 65,000 regular cap limit, which will include all cap-subject beneficiaries, including those with a master's degree or higher from a U.S. institution of higher education. Then USCIS will select registrations that are eligible for the 20,000 advanced degree exemption, which are those with master's degrees or higher from U.S. institutions of higher education, towards the projected number needed to reach the advanced degree exemption. This process will allow those petitions with beneficiaries who have a master's degree or higher from U.S. institutions of higher education a greater chance to be selected.

### 4. Population

The population impacted by this rule includes those petitioners who file on behalf of H-1B cap-subject beneficiaries (*i.e.* beneficiaries who will be subject to the regular cap, and beneficiaries on whose behalf an H-1B petition asserting an advanced degree exemption will be filed). These petitioning entities are typically referred to as H-1B petitioners in DHS regulations and in this preamble. When discussing the registration requirements, DHS refers to this same population as both registrants and petitioners for purposes of this analysis. Those terms refer to the same petitioning entities in the H-1B process.

#### a. Estimated Population Impacted by Registration Requirement

In order to estimate the population impacted by the registration requirement, DHS uses historical filing data of H-1B cap-subject petitioners. These petitioners complete and file Form I-129. Petitioners may also choose or be required to complete and file the following USCIS forms:

- Request for Premium Processing Service (Form I-907), if seeking expedited petition processing, and/or
- Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28), if the petition is completed and filed by a lawyer or accredited representative.

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<sup>21</sup> See 8 CFR 214.2(h)(8)(ii)(B).

<sup>22</sup> *Id.*

Table 3 shows historical filings of Form I-129 for H-1B cap-subject petitions.

| Fiscal Year    | Total Number of H-1B Cap-Subject Petitions Filed | Total Number of Selected Petitions                |   |  |
|----------------|--|---|---|--|
|                |  | Number of Forms I-129 Petitions Randomly Selected | Number of Petitions Filed with Form I-907 | Number of Petitions Filed with Form G-28 |
| 2013           | 124,130  | 98,318  | 24,731                                    | 72,959                                   |
| 2014           | 172,581  | 98,034  | 25,860                                    | 74,424                                   |
| 2015           | 232,973  | 97,714  | 26,502                                    | 71,959                                   |
| 2016           | 236,444  | 95,622  | 30,622                                    | 68,503                                   |
| 2017           | 198,460  | 96,301  | 12,324                                    | 78,517                                   |
| 5-year average | 192,918  | 97,198  | 24,008                                    | 73,272                                   |

Source: Total Number of H-1B Cap-Subject Petitions Filed FY 2013-2017, USCIS Service Center Operations (SCOPS), June, 2017. Total Number of Selected Petitions data, USCIS Office of Performance and Qualify (OPQ), Performance Analysis and External Reporting (PAER), January 2018.

<sup>a</sup> Premium processing service was suspended during FY 17 until September. The FY 17 count for premium processing requests (12,324 Form I-907) does not reflect requests accepted initially with Form I-129 during the suspension, rather it reflects premium processing requests received after the suspension was lifted for any pending petitions. This is because from September onward, petitioners could submit premium processing requests for petitions with a pending status.

In FY 2017, USCIS received 198,460 H-1B petitions in the first five days that cap-subject petitions could be filed, a 16 percent<sup>24</sup> decline in H-1B cap-subject petitions from FY 2016. Though the receipt of H-1B cap-subject petitions fell in FY 2017, the petitions received still far exceeded the numerical limitations, continuing a trend of excess demand since FY 2010.<sup>25</sup> DHS uses the five-year average of H-1B cap-subject

<sup>24</sup> Calculation:  $(236,444 \text{ FY16 H-1B cap-subject petitions} - 198,460 \text{ FY17 H-1B cap-subject petitions}) / 236,444 \text{ Form I-129 petitions} = 16 \text{ percent (rounded)}$ .

<sup>25</sup> For H-1B filing petitions data prior to FY 2013, see USCIS Reports and Studies, retrieved at <https://www.uscis.gov/tools/reports-studies/reports-and-studies>. Visited March 3, 2018.

petitions received from FY 2013 to FY 2017 (192,918) as the estimate of H-1B cap-subject petitions that will be received annually. DHS uses the historical five-year average of 192,918 as seen in Table 3 as a reasonable proxy for the number of registrations that will be submitted in an annual filing period. DHS recognizes that the use of this historical average does not include the possibility that the registration's lower barrier to entry will result in an increase in the number of registrations. Currently, DHS does not have data to estimate the likelihood of that occurrence. As discussed previously, this rule incorporates measures to minimize the number of petitioners who

might try to flood the registration system in order to increase the chances of their petition being selected. Nevertheless, if these mitigation measures are not fully successful, the estimates based on historical averages may underestimate the actual numbers of registrations, and thus underestimate the costs of the rule. In addition to possible increases in fraudulent registrations, the lower initial cost of registration may induce an increase in the number of legitimate registrations. This, too, will increase the cost of the regulation, but USCIS was unable to estimate the likely increase in registrations and associated costs. Table 3 also shows historical filings for Form I-907 and Form G-28 that

accompanied selected H-1B cap-subject petitions. DHS uses this data to obtain the numbers of H-1B cap-subject petitions that are filed with a Form I-907 and/or Form G-28. DHS notes that these forms are not mutually exclusive. Based on the five-year average, DHS estimates 25 percent<sup>26</sup> of selected petitions will include Form I-907 and 75 percent<sup>27</sup> of selected petitions will include Form G-28. Based on operational resource considerations, USCIS has announced temporary suspensions of the premium processing service in the past.<sup>28</sup> For the purposes of this analysis, DHS assumes that Form I-907 will not be suspended and includes eligibility for petitioners to

voluntarily incur such costs in both the baseline and costs analysis.

Table 4 summarizes the population under the current filing process for selected petitions versus unselected petitions because the impact of the registration requirement is not the same for selected and unselected petitioners. DHS estimates 95,720 unselected petitions by subtracting selected petitions from the total petitions filed.<sup>29</sup> DHS also distinguishes the number of petitions with premium processing fees (Form I-907) and the number of petitions filed by a lawyer or other accredited representative (Form G-28). Historical filings for Form I-907 and Form G-28 that accompanied selected petitions were estimated to be 25

percent and 75 percent respectively. DHS reasonably applies those percentages to the number of total petitions and estimates 47,651<sup>30</sup> Form I-907 and 145,431<sup>31</sup> Form G-28 were submitted with total petitions filed. Since DHS uses the five-year average of total petitions received (192,918) as the estimate of petitions that will be received annually, DHS also assumes the five-year average of Form I-907 (24,008) and Form G-28 (73,272) that accompany selected petitions is a reasonable annual estimate for each form. For unselected petitions, DHS estimates 23,643<sup>32</sup> Form I-907 and 72,158<sup>33</sup> Form G-28 by subtracting the estimated selected petitions from estimated total petitions.

**Table 4: Annual Population of the H-1B Filing Process (Based on 5 Year Average).**

| <b>Registrations</b>    |                              |                           |                             |
|-------------------------|------------------------------|---------------------------|-----------------------------|
| Not Applicable          |                              |                           |                             |
| <b>Petitions</b>        |                              |                           |                             |
|                         | <b>Total Petitions Filed</b> | <b>Selected Petitions</b> | <b>Unselected Petitions</b> |
| Form I-129              | 192,918                      | 97,198                    | 95,720                      |
| Form I-907              | 47,651                       | 24,008                    | 23,643                      |
| Form G-28               | 145,431                      | 73,272                    | 72,158                      |
| Source: USCIS analysis. |                              |                           |                             |

<sup>26</sup> Calculation: 24,008 Form I-907/97,198 Form I-129 petitions = 25 percent (rounded).

<sup>27</sup> Calculation: 73,272 Forms G-28/97,198 Form I-129 petitions = 75 percent (rounded).

<sup>28</sup> DHS notes USCIS temporarily suspended premium processing of all H-1B petitions on March 20, 2018. USCIS News Releases. "USCIS Will Temporarily Suspend Premium Processing for Fiscal Year 2019 H-1B Cap Petitions." March 3,

2017. <https://www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-fiscal-year-2019-h-1b-cap-petitions>. Visited April 13, 2018.

<sup>29</sup> Calculation: 192,918 total petitions filed - 97,198 selected petitions = 95,720 unselected petitions.

<sup>30</sup> Calculation: 192,918 \* 25 percent = 47,651 Form I-907.

<sup>31</sup> Calculation: 192,918 \* 75 percent = 145,431 Form G-28.

<sup>32</sup> Calculation: 47,651 Forms I-907 - 24,008 Forms I-907 = 23,643 Forms I-907 received with unselected petitions.

<sup>33</sup> Calculation: 145,431 Forms G-28 - 73,272 Forms G-28 = 72,158 Forms G-28 received with unselected petitions.

| <b>Table 5: Estimated Annual Population Under the Registration Requirement.</b>  |                                  |                               |                                 |
|--|----------------------------------|-------------------------------|---------------------------------|
| <b>Registrations</b>   |                                  |                               |                                 |
|  | <b>Total Registrations Filed</b> | <b>Selected Registrations</b> | <b>Unselected Registrations</b> |
|  | 192,918                          | 97,198                        | 95,720                          |
| <b>Petitions</b>   |                                  |                               |                                 |
|  | <b>Total Forms Filed</b>         | <b>Selected Petitions</b>     | <b>Unselected Petitions</b>     |
| Form I-129   | 97,198                           | 97,198                        | 0                               |
| Form I-907   | 24,008                           | 24,008                        | 0                               |
| Form G-28*   | 73,272                           | 73,272                        | 0                               |
| Source: USCIS analysis.  |                                  |                               |                                 |
| *Refers specifically to Form G-28 submitted with a Form I-129 petition. DHS notes that under the registration requirement, accredited representatives will be required to upload Form G-28 during registration and provides more detail later on in this analysis. |                                  |                               |                                 |

Table 5 presents populations DHS anticipates for the registration process based on comparable historical data from Table 4. DHS assumes the historical five-year average of 192,918 (Table 4) as a reasonable estimate for the number of total registrations that will be submitted in an annual filing period.<sup>34</sup> DHS also assumes that the historical five-year averages of selected and unselected petitions will be a reasonable estimate for the total number of registrations that are selected and not selected.

DHS estimates that 192,918 H-1B cap-subject registrations will be submitted annually and USCIS will select 97,198 registrations. Those with selected registrations will then be eligible to file, during an associated filing period, the H-1B cap-subject petition on behalf of

<sup>34</sup> DHS acknowledges the possibility that certain employers who currently decide against filing an H-1B petition may choose to file a registration under this final rule since the cost is much less. However, at this time DHS is not able to forecast this scenario with statistical validity. Therefore, for this purpose of this analysis DHS has estimated the registration population that would parallel the current petitioner population.

the specific beneficiary named in the selected registration for that fiscal year. Therefore, DHS assumes under the registration process, 97,198 petitions will result from the 97,198 selected registrants. Of the petitions resulting from selected registrations, DHS anticipates 24,008 (25 percent) petitions will include premium processing (Form I-907) and 73,272 (75 percent) petitions will include representation by a lawyer or accredited representative (Form G-28).<sup>35</sup> Those registrants who are not selected will not be eligible to file an H-1B cap-subject petition and therefore DHS does not estimate any petition volume for unselected registrations under the registration requirement.

<sup>35</sup> Based on the five-year averages from Table 3, DHS estimates 24 percent of selected petitions would include Form I-907 and 76 percent of selected petitions would include Form G-28.

b. Estimated Population Impacted by the Selection Process

i. Selected Advanced Degree Exemption Petitions in the Current Selection Process

As discussed in section 4, DHS uses historical filing data of H-1B cap-subject petitions to estimate future registration populations. Table 6 shows historical filing data for H-1B cap-subject petitions categorized by regular cap and advanced degree exemption receipts. USCIS received an annual average of 192,918 H-1B cap-subject petitions. DHS calculates 71 percent<sup>36</sup> of petitions (137,017) were filed under the regular cap and 29 percent<sup>37</sup> of petitions (55,900) were filed under the advanced degree exemption. Therefore, DHS estimates that USCIS will receive a total of 192,918 registrations annually consisting of 137,017 registrations under the regular cap and 55,900 registrations under the advanced degree exemption.

<sup>36</sup> Calculation:  $137,017 \text{ regular} / 192,918 \text{ Form I-129 petitions} * 100 = 71 \text{ percent (rounded)}$ .

<sup>37</sup> Calculation:  $55,900 \text{ advanced degree} / 192,918 \text{ Form I-129 petitions} * 100 = 29 \text{ percent (rounded)}$ .



**Table 6: H-1B Petitions Received by Regular Cap and Advanced Degree Exemption, FY 2013 - 2017.**

| Fiscal Year           | Number of All Petitions Filed | Number of Petitions Received (Regular Cap) | Number of Petitions Received (Advanced Degree Exemption) |
|-----------------------|-------------------------------|--|--|
| 2013                  | 124,130                       | 93,489                                     | 30,641   |
| 2014                  | 172,581                       | 132,063                                    | 40,518   |
| 2015                  | 232,973                       | 182,249                                    | 50,724   |
| 2016                  | 236,444                       | 166,206                                    | 70,238   |
| 2017                  | 198,460                       | 111,080                                    | 87,380   |
| <b>5-year average</b> | <b>192,918</b>                | <b>137,017</b>                             | <b>55,900</b>  |

Source: USCIS Service Center Operations (SCOPS), June, 2017.

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Additionally, DHS uses 55,900 petitions in this analysis as a volume estimate of beneficiaries who have a master's degree or higher from a U.S. institution of higher education. Anecdotal evidence suggests that very few petitions incorrectly identify whether the beneficiary has a qualifying degree such that they may be eligible for the advanced degree exemption. As such, we believe this is a reliable estimate.

Under the current process, when the number of cap-subject petitions filed with USCIS during the first five days that such petitions may be filed exceeds the numerical limits, a certain number of petitions projected as needed to meet the 20,000 advanced degree exemption are randomly selected first from the 55,900 advanced degree petitions eligible for the advanced degree exemption.<sup>38</sup> Of the remaining 172,918 petitions, 35,900 (21 percent) of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education remain in the pool to be

<sup>38</sup> DHS uses the mandated numerical limitations (65,000 for regular cap and 20,000 for advanced degree exemption) to demonstrate the statistical validity in the descriptions of selected advanced degree petitions in the current and new selection process.

selected in the 65,000 regular cap limit.<sup>39</sup> Then, USCIS randomly selects a certain number of petitions projected as needed to meet the 65,000 regular cap limit from the remaining pool, which includes H-1B beneficiaries with bachelor's degrees and beneficiaries with a master's or higher degree from a U.S. institution of higher education not selected under the advanced degree exemption. DHS estimates that an additional 13,495 petitions otherwise eligible for the advanced degree exemption but not selected under the advanced degree exemption would be randomly selected in the regular cap.<sup>40</sup> Therefore, USCIS currently selects an estimated total of 33,495 petitions filed for beneficiaries with a master's or higher degree from a U.S. institution of higher education, which accounts for 17 percent of the 192,918 Form I-129 petitions.<sup>41</sup>

<sup>39</sup> Calculation: 192,918 Form I-129 H-1B cap-subject petitions - 20,000 advanced degree = 172,918 advanced degree and regular; Calculation: 55,900 advanced degree - 20,000 advanced degree = 35,900 advanced degree; Calculation: 35,900 advanced degree / 172,918 Form I-129 H-1B cap-subject petitions \* 100 = 21 percent (rounded).

<sup>40</sup> Calculation: 65,000 regular cap limit \* 21 percent = 13,495 advanced degree petitions.

<sup>41</sup> Calculation: 33,495 advanced degree / 192,918 Form I-129 H-1B cap-subject petitions \* 100 = 17 percent (rounded).

ii. Selected Advanced Degree Exemption Petitions in the New Selection Process

Under the new change to the H-1B cap-subject selection process, those seeking to file an H-1B cap-subject petition will have to submit an electronic registration for each beneficiary, unless the registration requirement is suspended. Only those with selected registrations will be eligible to file an H-1B cap-subject petition during an associated filing period for that fiscal year. As previously stated, DHS continues to assume 192,918 registrations will be received annually. Under the new selection process, when registration is required, USCIS would first select a certain number of registrations projected as needed to meet the 65,000 regular cap limit from the 192,918 registrations. All 55,900 H-1B beneficiaries with a master's or higher degree from a U.S. institution of higher education (29 percent) will therefore be included in the pool for selection. DHS estimates that up to 18,835 advanced degree registrations that could be selected during the selection for the regular cap.<sup>42</sup>

<sup>42</sup> Calculation: 65,000 regular cap limit \* 29 percent = 18,835 advanced degree petitions.

Next, USCIS will select a certain number of registrations projected to meet the 20,000 advanced degree exemption from the remaining pool of 37,065 advanced degree registrations.<sup>43</sup> In total, USCIS is likely to select an estimated 38,835 registrations for petitioners seeking to file H-1B petitions under the advanced degree exemption.<sup>44</sup> These registrations account for 20 percent of the 192,918 registrations.<sup>45</sup> Therefore, DHS estimates USCIS could accept up to 5,340 (or 16 percent)<sup>46</sup> more H-1B cap-subject petitions annually for beneficiaries with a master's or higher degree from a U.S. institution of higher education.<sup>47</sup>

In years when the registration requirement is suspended, the same result will occur from the reversal of the cap selection process, however USCIS would be selecting petitions rather than registrations.

#### 5. Costs

DHS estimates costs specifically for selected and unselected petitioners between the current H-1B petition process and the new registration environment because the impact for each population is different. Current costs to selected petitioners are an aggregate of filing fees associated with each H-1B cap-subject petition, mailing cost, and the opportunity cost of time to complete all associated forms. Current costs to unselected petitioners are just the opportunity cost of time to complete forms and mail the petition since USCIS returns the H-1B cap-subject petition and filing fees to unselected petitioners. The only difference between total current costs for selected and unselected petitioners in an annual filing period consists of fees returned to unselected petitioners.

The new registration requirement will impose additional opportunity costs of time to all petitioners to complete the required registration, but relieve

<sup>43</sup> Calculation: 55,900 advanced degree – 18,835 advanced degree = 37,065 advanced degree.

<sup>44</sup> Calculation: 18,835 selected advanced degree petitions + 20,000 advanced degree petitions = 38,835 total advanced degree petitions selected.

<sup>45</sup> Calculation: 38,835 advanced degree petitions / 192,918 registrations = 20 percent (rounded).

<sup>46</sup> Calculation: (38,835 (new advanced degree petitions) – 33,495 (current advanced degree petitions)) / 33,495 (current advanced degree petitions) \* 100 = 16 percent.

<sup>47</sup> Calculation: 38,835 new advanced degree petitions – 33,495 current advanced degree petitions = 5,340 additional petitions.

petitioners with unselected registrations from the opportunity cost associated with completing an entire H-1B cap-subject petition. Therefore petitioners with selected registrations will face an additional cost and petitioners with unselected registrations will experience cost savings. Specifically, petitioners with selected registrations will face an additional opportunity cost of time to complete the required registration, as well as the current filing fees and opportunity costs of time to complete and file H-1B cap-subject petitions. Petitioners with unselected registrations will only experience the opportunity cost of time to complete the required registration.

The government will incur costs associated with developing and maintaining the electronic registration system on its website. Petitioners may also incur costs associated with the registration selection process that will increase the number of H-1B beneficiaries with a master's or higher degree from a U.S. institution of higher education in the form of higher salaries that might be paid to beneficiaries with advanced degrees from a U.S. institution of higher education. In order to determine the costs and cost savings of this rule, DHS first estimates the current costs of completing and filing an H-1B petition.

#### a. Current Costs To Complete and File Form I-129 Petitions

Currently, an employer seeking to file a petition on behalf of an H-1B worker must complete and file Form I-129. Form I-129 is estimated to take 2.26 hours to complete per petition and includes a filing fee of \$460.<sup>48</sup> Filing the Form I-129 petition includes the H Classification supplement and the H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement, which are estimated to take 2 hours and 1 hour per supplement to complete, respectively. Therefore, it is estimated to take a total of 5.26 hours to complete and file Form I-129. Petitioners may also choose or be required to complete the following forms:

<sup>48</sup> DHS recognizes there are other fees associated with an H-1B petition, such as the ACWIA Fee, the Fraud Fee and Public Law 114-113 fee. These fees generally vary depending on the size of the petitioning entity. Therefore, DHS has not specifically included these fees in the calculations of H-1B cap-subject petitions though DHS acknowledges these fees are statutorily required.

- Form I-907 is estimated to take 0.5 hours to complete with a filing fee of \$1,410, and/or

- Form G-28 is estimated to take 0.88 hours to complete and does not have a fee.

In order to estimate the opportunity costs of time in completing and filing Form I-129, and if necessary, Form I-907 or Form G-28, DHS assumes that a petitioner will use a human resources (HR) specialist, an in-house lawyer, or an outsourced lawyer to prepare Form I-129 petitions.<sup>49</sup> DHS uses the historical filings of Forms I-907 and Forms G-28 submitted with H-1B petitions to estimate the distribution of form submissions amongst type of petition preparer.

In section 4 of this analysis, DHS estimates that 75 percent of H-1B petitions were completed and filed by lawyers or other accredited representatives based on the submissions of Forms G-28. Table 4 presents the total number of Form G-28 accompanying total petitions, selected petitions and unselected petitions. DHS reasonably assumes the total number of Form G-28 represents the number of H-1B petitions that were completed and filed by lawyers or other accredited representatives and presents this in Table 7. DHS estimates the remaining petitions are completed and filed by HR specialists or other equivalent occupation. DHS estimates of total petitions filed, 47,487<sup>50</sup> petitions were filed by HR specialists or other equivalent occupation. Of selected petitions, DHS estimates 23,926<sup>51</sup> petitions were filed by HR specialists or other equivalent occupation. Of unselected petitions, DHS estimates 23,562<sup>52</sup> petitions were filed by HR specialists or other equivalent occupation. Table 7 summarizes the estimated population of H-1B petition submissions based on the type of petition preparer.

<sup>49</sup> USCIS limited its analysis to HR specialists, in-house lawyers, and outsourced lawyers to present estimated costs. However, USCIS understands that not all entities employ individuals with these occupations and, therefore, recognizes equivalent occupations may also prepare and file these petitions.

<sup>50</sup> Calculation: 192,918 – 145,431 = 47,487 petitions prepared by HR specialists.

<sup>51</sup> Calculation: 97,198 – 73,272 = 23,926 selected petitions prepared by HR specialists.

<sup>52</sup> Calculation: 95,720 – 72,158 = 23,562 unselected petitions prepared by HR specialists.

**Table 7: Summary of the Population of H-1B Petition Submissions Based on Preparer Type.**

| Type of Preparer  | Total Filed | Selected Petitions | Unselected Petitions |
|---|-------------|--------------------|----------------------|
| All H-1B petitions  | 192,918     | 97,198             | 95,720               |
| H-1B petitions filed by lawyers or accredited representatives         | 145,431     | 73,272             | 72,159               |
| H-1B petitions filed by HR specialists or other equivalent occupation | 47,487      | 23,926             | 23,562               |

Source: USCIS analysis.

The relevant wage is currently \$31.84<sup>53</sup> per hour for an HR specialist and \$68.22<sup>54</sup> per hour for an in-house lawyer. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the Department of Labor, BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.46 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement.<sup>55</sup> DHS

<sup>53</sup> Bureau of Labor Statistics, U.S. Department of Labor, "Occupational Employment Statistics, May 2017, Human Resources Specialist": <https://www.bls.gov/oes/2017/may/oes131071.htm>. Visited April 13, 2018.

<sup>54</sup> Bureau of Labor Statistics, U.S. Department of Labor, "Occupational Employment Statistics, May 2017, Lawyers": <https://www.bls.gov/oes/2017/may/oes231011.htm>. Visited April 13, 2018.

<sup>55</sup> The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour). See Economic News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (December 2017), available at [https://www.bls.gov/news.release/archives/ecec\\_03202018.pdf](https://www.bls.gov/news.release/archives/ecec_03202018.pdf) (viewed April 2018). The ECEC measures the average cost to employers for wages and salaries and benefits per employee hour worked.

multiplied the average hourly U.S. wage rate for HR specialists and lawyers by 1.46 to account for the full cost of employee benefits, for a total of \$46.49<sup>56</sup> per hour for an HR specialist and \$99.60<sup>57</sup> per hour for an in-house lawyer. DHS recognizes that a firm may choose, but is not required, to outsource the preparation of these petitions and, therefore, has presented two wage rates for lawyers. To determine the full opportunity costs if a firm hired an outsourced lawyer, DHS multiplied the average hourly U.S. wage rate for lawyers by 2.5 for a total of \$170.55<sup>58</sup> to approximate an hourly billing rate for an outsourced lawyer.<sup>59</sup>

Based on the time burden and relevant wages, the total opportunity costs of time to complete Form I-129 is

<sup>56</sup> Calculation: \$31.84 \* 1.46 = \$46.49 total wage rate for HR specialist.

<sup>57</sup> Calculation: \$68.22 \* 1.46 = \$99.60 total wage rate for in-house lawyer.

<sup>58</sup> Calculation: \$68.22 \* 2.5 = \$170.55 total wage rate for an outsourced lawyer.

<sup>59</sup> 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" (May 31, 2018), available at <https://www.federalregister.gov/documents/2018/05/31/2018-11732/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2018-numerical-limitation-for-the>, used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages. DHS believes the methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule.

\$244.52 per petition<sup>60</sup> and for Form I-907 is \$23.24<sup>61</sup> per petition if an HR specialist files. Although USCIS only requires petitioners to file Form I-129 and supplemental forms on behalf of an H-1B worker, DHS includes the opportunity cost of time for Form I-907 since some petitioners may file for premium processing. The opportunity cost of time for an in-house lawyer to complete Form I-129 is \$523.90,<sup>62</sup> Form I-907 is \$49.80,<sup>63</sup> and Form G-28 is \$87.65.<sup>64</sup> The opportunity cost of time for an outsourced lawyer to complete Form I-129 is \$897.09,<sup>65</sup> Form I-907 is \$85.28,<sup>66</sup> and Form G-28 is \$150.08.<sup>67</sup> DHS assumes that only Form I-129 petitions completed by in-house lawyers and outsourced lawyers would also complete Form G-28.

<sup>60</sup> Calculation: \$46.49 (HR wage) \* 5.26 hours (time to complete Form I-129) = \$244.52.

<sup>61</sup> Calculation: \$46.49 (HR wage) \* 0.5 hour (time to complete Form I-907) = \$23.24.

<sup>62</sup> Calculation: \$99.60 (in-house lawyer wage) \* 5.26 hours (time to complete Form I-129) = \$523.90.

<sup>63</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.5 hour (time to complete Form I-907) = \$49.80.

<sup>64</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.88 hour (time to complete Form G-28) = \$87.65.

<sup>65</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 5.26 hours (time to complete Form I-129) = \$897.09.

<sup>66</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.5 hour (time to complete Form I-907) = \$85.28.

<sup>67</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.88 hour (time to complete Form G-28) = \$150.08.

Based on the calculated opportunity costs of time, the total cost to complete and file Form I-129 is \$704.52<sup>68</sup> and Form I-907 is \$1,433.24<sup>69</sup> if an HR specialist files. The total cost to complete and file Form I-129 is \$983.90,<sup>70</sup> Form I-907 is \$1,459.80,<sup>71</sup> and Form G-28 is \$87.65 if an in-house lawyer files. The total cost to complete and file Form I-129 is \$1,357.09,<sup>72</sup> Form I-907 is \$1,495.28,<sup>73</sup> and Form G-28 is \$150.08 if an outsourced lawyer files.

Table 7 estimates that 75 percent of selected petitions (73,272) were completed and filed by lawyers or other accredited representatives from the

submitted Forms G-28. DHS assumes the remaining petitions (23,926 or 25 percent) are completed and filed by HR specialists. In order to determine the distribution of Forms I-907 among types of petition preparer, DHS uses historical filing data of Form I-907 submitted with H-1B petitions to estimate the number of Forms I-907 that are completed by HR specialists or lawyers.

Table 8 shows the number of Forms I-907 received with selected H-1B cap-subject petitions from fiscal years 2013 to 2017 categorized by accompaniment of a Form G-28. As previously stated, DHS assumes that only in-house

lawyers and outsourced lawyers would complete Form G-28. Therefore, Form I-907 petitions received with a Form G-28 are assumed to be completed by a lawyer. Table 8 shows that among selected petitions over the last 5 years, 21,401 Forms I-907 (89 percent)<sup>74</sup> have been completed and filed by lawyers and 2,606 Forms I-907 (11 percent)<sup>75</sup> have not. Therefore, DHS estimates that 89 percent of Forms I-907 would be completed by lawyers and 11 percent would be completed by HR specialists for this analysis.

**Table 8: Number of H-1B Petitions Received for Premium Processing (Form I-907) Filed by a Lawyer or Accredited Representative (Form G-28), FY 2013 - 2017.**

| Fiscal Year           | Number of Forms I-907 Received without a Form G-28 | Number of Forms I-907 Received with a Form G-28 | Total Forms I-907 Received with Selected H-1B Cap-Subject Petitions |
|-----------------------|--|---|---|
| 2013                  | 2,903  | 21,828  | 24,731  |
| 2014                  | 2,800  | 23,060  | 25,860  |
| 2015                  | 2,653  | 23,849  | 26,502  |
| 2016                  | 3,652  | 26,970  | 30,622  |
| 2017                  | 1,024  | 11,300  | 12,324  |
| <b>5-year average</b> | <b>2,606</b>                                       | <b>21,401</b>                                   | <b>24,008</b>   |

Source: USCIS Office of Performance and Quality (OPQ), Performance Analysis and External Reporting (PAER), January 2018.

For selected and unselected petitions, DHS presents costs by type of petition preparer. DHS estimates HR specialists would file 25 percent of Form I-129 H-1B petitions and 11 percent of Forms I-907. Since DHS uses two wages for lawyers, DHS presents these costs as if all in-house lawyers filed or all outsourced lawyers filed 75 percent of Form I-129 H-1B petitions and 89 percent of Forms I-907 (along with Form G-28). In reality, the costs estimated for lawyers are likely to be some distribution of the two ranges

presented. To present total costs for an annual filing period, DHS aggregates HR specialist costs and lawyer costs, using in-house lawyer costs for a lower bound and outsourced lawyers as an upper bound.

#### i. Current Costs to Selected Petitioners

Table 9 shows the current total cost of filed petitions that were selected during the H-1B cap-subject selection process by type of petition preparer. To calculate mailing costs, DHS uses the shipping prices of United States Postal

Service (USPS) Domestic Priority Mail Express Flat Rate Envelopes, which is currently priced at \$25.80 per envelope.<sup>76</sup>

Under current procedures for H-1B cap-subject petitions, DHS estimates cost to complete and file selected Form I-129 H-1B cap-subject petitions prepared by HR specialists is \$16.9 million,<sup>77</sup> Form I-907 is \$3.7 million,<sup>78</sup> and mailing cost is \$617,280<sup>79</sup> (an aggregate \$21.2 million). Similarly, DHS estimates the cost to complete and file selected Form I-129 H-1B cap-subject

<sup>68</sup> Calculation: \$244.52 opportunity cost + \$460 Form I-129 filing fee = \$704.52 total cost per Form I-129 if filed by an HR specialist.

<sup>69</sup> Calculation: \$23.24 opportunity cost + \$1,410 Form I-907 filing fee = \$1,433.24 total cost per Form I-907 if filed by an HR specialist.

<sup>70</sup> Calculation: \$523.90 opportunity cost + \$460 filing fee = \$983.90 total cost per Form I-129 if filed by an in-house lawyer.

<sup>71</sup> Calculation: \$49.80 opportunity cost + \$1,410 filing fee = \$1,459.80 total cost per Form I-907 if filed by an in-house lawyer.

<sup>72</sup> Calculation: \$897.09 opportunity cost + \$460 = \$1,357.09 total cost per Form I-129 if filed by an outsourced lawyer.

<sup>73</sup> Calculation: \$85.28 opportunity cost + \$1,410 = \$1,495.28 total cost per Form I-907 if filed by an outsourced lawyer.

<sup>74</sup> Calculation: 21,401 petitions received with a Form I-907 and a Form G-28/24,008 Total Forms I-907 = 89 percent (rounded).

<sup>75</sup> Calculation: 2,606 petitions received with a Form I-907 and without a Form G-28/24,008 Total Forms I-907 = 11 percent (rounded).

<sup>76</sup> For the purposes of this analysis, we assume that petitioners would use the USPS "Domestic Priority Mail Express Flat Rate Envelope" shipping at the retail price to ensure delivery of Form I-129 petitions to USCIS. USCIS also assumes that the petition weighs five pounds and ships locally or in

zone 1 or 2. However, USCIS acknowledges that a petitioner may choose other means of shipping. U.S. Postal Service, Price List: [https://pe.usps.com/text/dmm300/Notice123.htm#\\_c011](https://pe.usps.com/text/dmm300/Notice123.htm#_c011). Visited February 23, 2018.

<sup>77</sup> Calculation: 23,926 Forms I-129 filed by HR specialists \* \$704.52 total cost per petition = \$16,856,064 (rounded).

<sup>78</sup> Calculation: 2,606 Forms I-907 (11 percent of 24,008 Forms I-907) \* \$1,433.24 total cost per Form I-907 = \$3,735,023 (rounded).

<sup>79</sup> Calculation: 23,926 Forms I-129 filed by HR specialists \* \$25.80 mailing cost = \$617,280 (rounded).

petitions prepared by in-house lawyers is \$72.1 million,<sup>80</sup> Form I-907 is \$31.2 million,<sup>81</sup> Form G-28 is \$6.4 million,<sup>82</sup> and mailing cost is \$1.9 million<sup>83</sup> (an

aggregate \$111.6 million). If prepared by an outsourced lawyer, DHS estimates the cost to complete and file selected Form I-129 H-1B cap-subject petitions

is \$99.4 million,<sup>84</sup> Form I-907 is \$32.0 million,<sup>85</sup> Form G-28 is \$11.0 million,<sup>86</sup> and mailing cost is \$1.9 million<sup>87</sup> (an aggregate \$144.3 million).

**Table 9: Estimated Annual Costs to Selected Petitioners Under Current H-1B Cap-Subject Procedure by Preparer Type (includes opportunity cost of time and filing fees).**

|                         | HR Specialist       | In-house Lawyer      | Outsourced Lawyer    |
|-------------------------|---------------------|----------------------|----------------------|
| Form I-129              | \$16,856,064        | \$72,092,714         | \$99,437,241         |
| Form I-907              | \$3,735,023         | \$31,241,180         | \$32,000,487         |
| Form G-28               | -                   | \$6,422,326          | \$10,996,722         |
| Mailing Cost            | \$617,280           | \$1,890,428          | \$1,890,428          |
| <b>Cost</b>             | <b>\$21,208,367</b> | <b>\$111,646,648</b> | <b>\$144,324,878</b> |
| Source: USCIS analysis. |                     |                      |                      |

#### ii. Current Costs to Unselected Petitioners

Table 10 shows the estimated costs for the H-1B petitioners whose cap-subject petitions are not selected for adjudication under current procedures for H-1B cap-subject petitions. The fees for these unselected petitions are returned to petitioners and, therefore, petitioners with unselected petitions incur costs only in the opportunity costs of time for completing the appropriate forms and mailing costs for those cap-subject petitions that were not selected. From Table 7 of this analysis, DHS estimates that 72,158 unselected Form I-129 H-1B cap-subject petitions were completed and filed by lawyers or other

accredited representatives from the submitted Forms G-28. As seen in Table 7, DHS assumes the remaining H-1B cap-subject petitions (23,562) are completed and filed by HR specialists. DHS also estimates in Table 4 that 23,643 Forms I-907 were filed with H-1B cap-subject petitions that were not selected. USCIS continues to assume of Forms I-907 that were filed with H-1B cap-subject petitions that were not selected 89 percent are completed by lawyers and 11 percent are completed by HR specialists.

DHS estimates the annual cost to complete unselected Form I-129 H-1B cap-subject petitions prepared by HR specialists is \$5.8 million,<sup>88</sup> Forms I-

907 is \$60,447,<sup>89</sup> and mailing costs is \$607,900<sup>90</sup> (an aggregate \$6.4 million). DHS estimates the annual cost to complete unselected Form I-129 H-1B cap-subject petitions prepared by in-house lawyers is \$37.8 million,<sup>91</sup> Form I-907 is \$1 million,<sup>92</sup> Form G-28 is \$6.3 million,<sup>93</sup> and mailing costs is \$1.9 million<sup>94</sup> (an aggregate \$47.0 million). If prepared by an outsourced lawyer, DHS estimates the annual cost to complete unselected Form I-129 H-1B cap-subject petitions is \$64.7 million,<sup>95</sup> Form I-907 is \$1.8 million,<sup>96</sup> Form G-28 is \$10.8 million,<sup>97</sup> and mailing costs is \$1.9 million<sup>98</sup> (an aggregate \$79 million).

<sup>80</sup> Calculation: 73,272 Forms I-129 filed by lawyers \* \$983.90 total cost if filed by an in-house lawyer = \$72,092,714 (rounded).

<sup>81</sup> Calculation: 21,401 Forms I-907 (89 percent of 24,008 Forms I-907) \* \$1,459.80 total cost if filed by an in-house lawyer = \$31,241,180 (rounded).

<sup>82</sup> Calculation: 73,272 Forms G-28 filed by lawyers \* \$87.65 cost if filed by an in-house lawyer = \$6,422,326 (rounded).

<sup>83</sup> Calculation: 73,272 Forms I-129 filed by lawyers \* \$25.80 mailing cost = \$1,890,428 (rounded).

<sup>84</sup> Calculation: 73,272 Forms I-129 filed by lawyers \* \$1,357.09 total cost if filed by an outsourced lawyer = \$99,437,241 (rounded).

<sup>85</sup> Calculation: 21,401 Forms I-907 (89 percent of 24,008 Forms I-907) \* \$1,495.28 total cost if filed by an outsourced lawyer = \$32,000,487 (rounded).

<sup>86</sup> Calculation: 73,272 Forms G-28 filed by lawyers \* \$150.08 cost if filed by an outsourced lawyer = \$10,996,722 (rounded).

<sup>87</sup> Calculation: 73,272 Forms I-129 filed by lawyers \* \$25.80 mailing cost = \$1,890,428 (rounded).

<sup>88</sup> Calculation: 23,562 Forms I-129 filed by HR specialists \* \$244.52 opportunity cost = \$5,761,380 (rounded).

<sup>89</sup> Calculation: 2,601 Forms I-907 (11 percent of 23,643 Forms I-907) \* \$23.24 opportunity cost = \$60,447 (rounded).

<sup>90</sup> Calculation: 23,562 Forms I-129 filed by HR specialists \* \$25.80 mailing cost = \$607,900 (rounded).

<sup>91</sup> Calculation: 72,158 Forms I-129 filed by lawyers \* \$523.90 opportunity cost if filed by an in-house lawyer = \$37,803,576 (rounded).

<sup>92</sup> Calculation: 21,042 Forms I-907 (89 percent of 23,643 Forms I-907) \* \$49.80 opportunity cost if filed by an in-house lawyer = \$1,047,892 (rounded).

<sup>93</sup> Calculation: 72,158 Forms G-28 filed by lawyers \* \$87.65 opportunity cost if filed by an in-house lawyer = \$6,324,649 (rounded).

<sup>94</sup> Calculation: 72,158 Forms I-129 filed by lawyers \* \$25.80 mailing cost = \$1,861,676 (rounded).

<sup>95</sup> Calculation: 72,158 Forms I-129 filed by lawyers \* \$897.09 opportunity cost if filed by an outsourced lawyer = \$64,732,220 (rounded).

<sup>96</sup> Calculation: 21,042 Forms I-907 (89 percent of 23,643 Forms I-907) \* \$85.28 opportunity cost if filed by an outsourced lawyer = \$1,794,462 (rounded).

<sup>97</sup> Calculation: 72,158 Forms G-28 filed by lawyers \* \$150.08 opportunity cost if filed by an outsourced lawyer = \$10,829,473 (rounded).

<sup>98</sup> Calculation: 72,158 Forms I-129 filed by lawyers \* \$25.80 mailing cost = \$1,861,676 (rounded).

**Table 10: Estimated Annual Costs to Unselected Petitioners Under Current H-1B Cap-Subject Procedure by Preparer Type (includes opportunity cost of time and excludes filing fees).**

|              | HR Specialist      | In-house Lawyer     | Outsourced Lawyer   |
|--------------|--------------------|---------------------|---------------------|
| Form I-129   | \$5,761,380        | \$37,803,576        | \$64,732,220        |
| Form I-907   | \$60,447           | \$1,047,892         | \$1,794,462         |
| Form G-28    | -                  | \$6,324,649         | \$10,829,473        |
| Mailing Cost | \$607,900          | \$1,861,676         | \$1,861,676         |
| <b>Cost</b>  | <b>\$6,429,727</b> | <b>\$47,037,793</b> | <b>\$79,217,831</b> |

Source: USCIS analysis.

iii. Total Current Costs for Selected and Unselected Petitioners in an Annual Filing Period

As discussed in Table 7 of this analysis, DHS estimates the distribution of HR specialists and lawyers based on historical filings. DHS estimates that 75 percent of H-1B petitions are prepared by lawyers or other accredited representatives, and 25 percent are completed and prepared by HR

specialists or other equivalent occupation. In order to present total costs for an annual filing period, DHS aggregates HR specialist costs and lawyer costs. Since DHS uses two wages for lawyers, DHS presents lawyer costs as if all in-house lawyers filed or all outsourced lawyers filed. DHS assumes a reasonable lower bound estimate for annual filing costs would be HR specialist costs added with in-house lawyers. Similarly, DHS assumes an

upper bound estimate for annual filing costs would be reasonably estimated by combining HR specialist costs added with outsourced lawyers. These lower and upper bound estimates reflect the range of total current petitioner costs associated with H-1B cap-subject process in an annual filing period.

Table 11 summarizes the estimated lower bound and upper bound for selected petitioners and unselected petitioners in an annual filing period.

**Table 11: Estimated Costs for All (Selected and Unselected) Petitioners in an Annual Filing Period**

| Petitioner Type        | Lower Bound <sup>a</sup> | Upper Bound <sup>b</sup> |
|------------------------|--------------------------|--------------------------|
| Selected Petitioners   | \$132,855,015            | \$165,533,245            |
| Unselected Petitioners | \$53,467,520             | \$85,647,558             |
| All Petitioners        | \$186,322,535            | \$251,180,803            |

Source: USCIS analysis.

Note: DHS estimates that 75 percent of H-1B petitions are prepared by lawyers or other accredited representatives and 25 percent are completed and prepared by HR specialists or other equivalent occupation in an annual filing period. Therefore in order to present total costs for an annual filing period, DHS aggregates HR specialist costs and accredited representative costs.

<sup>a</sup>HR specialist cost + in-house lawyer cost = Total costs in annual filing period

<sup>b</sup>HR specialist cost + outsourced lawyer cost = Total costs in an annual filing period

As seen in Table 11, the total current costs for selected petitioners in an annual filing period ranges from

\$132.9<sup>99</sup> million to \$165.5 million,<sup>100</sup>

<sup>99</sup> Calculation: \$21,208,367 HR specialist cost + \$111,646,648 in-house lawyer cost = \$132,855,015 total annual cost (rounded).

<sup>100</sup> Calculation: \$21,208,367 HR specialist cost + \$144,324,878 outsourced lawyer cost = \$165,533,245 total annual cost (rounded).

depending on who petitioners use to prepare the petition. The total current costs for unselected petitioners in an annual filing period ranges from

\$53.5<sup>101</sup> million to \$85.6 million,<sup>102</sup> again depending on who petitioners use to prepare the petition. Fees returned to unselected petitioners make up the difference between total current costs for selected and unselected petitioners in an annual filing period.

For all petitioners, DHS estimates the total current cost to complete and file an H-1B petition for an annual filing period ranges from \$186.3 million to \$251.2 million, using lower bound and upper bound calculations.

#### b. Costs From the Registration Requirement

In order to accurately describe the registration requirements, and distinguish between the petitioner under the current H-1B process, DHS will use the term “registrants” when describing impacts to employers intending to petition for H-1B cap-subject beneficiaries under this final rule. The registration requirement results in selected and unselected registrants. Comparing Table 4 and Table 5, DHS assumes that the selected registrant population is equal to the selected petitioner population. Similarly, DHS assumes that the unselected registrant population is equal to the unselected petitioner population.

The registration requirement will impose an additional cost to all registrants who are seeking to file H-1B cap-subject petitions. Selected registrants will be eligible to file an H-1B cap-subject petition. Therefore as selected registrants under the registration requirement, DHS estimates current selected petitioners will incur additional opportunity costs of time to complete the electronic registration relative to the costs of completing and filing the associated H-1B petition. Unselected registrants will not be eligible to file an H-1B cap-subject petition. Therefore as unselected registrants under the registration requirement, DHS estimates the costs of this rule to unselected petitioners will only result from the estimated opportunity costs associated with the registration requirement. Overall, unselected petitioners will experience a cost savings relative to the current H-1B petitioning process since as unselected registrants they will not complete and file an entire H-1B cap-subject petition.

The registration requirement will impose costs to registrants in terms of

the opportunity costs of time to create an initial account per user and complete a registration for each prospective cap-subject H-1B worker. Additionally, under this registration requirement, registrations that are completed by lawyers or accredited representatives will require completion annually of Form G-28 once per lawyer-petitioner relationship. This rule will require that all who seek to file an H-1B cap petition (an estimated 192,918 petitions annually) will now be required to register. Only those whose registrations are selected will then be eligible to complete and file an H-1B cap-subject petition on behalf of a prospective H-1B worker for that fiscal year. DHS estimates a range of the total cost of the registration requirement<sup>103</sup> by using the time burden estimated for each account creation (0.17 hours) and registration (0.5 hours) by the wages previously discussed for each type of petition preparer, in addition to the time burden to complete a Form G-28 for in-house and outsourced lawyers.<sup>104</sup>

Unlike the standard for current H-1B cap-subject petitions, lawyers and accredited representatives will not be required to file a separate Form G-28 for each electronic registration when submitting multiple registrations for the same employer. Instead, in the electronic registration environment, a lawyer or accredited representative that submits multiple electronic registrations for an employer will only be required to file Form G-28 once annually for that employer for purpose of filing H-1B cap registrations after which multiple registrations could be filed at various times. This creates efficiency for those lawyers that file multiple registrations for the same employer since the uploaded Form G-28 information can be provided once annually and linked with all registrations filed by that lawyer or accredited representative for that employer. Lawyers and accredited representatives will still be required to complete one electronic registration per beneficiary, and a separate Form G-28 will still be required for each H-1B cap-

subject petition subsequently filed based on a selected registration.<sup>105</sup>

The total opportunity cost of time for an HR specialist to create an account will be \$7.90<sup>106</sup> and to register a single beneficiary will be \$23.24.<sup>107</sup> The opportunity cost of time for an in-house lawyer to create an account will be \$16.93,<sup>108</sup> to register a single beneficiary will be \$49.80,<sup>109</sup> and to complete Form G-28 will be \$87.65.<sup>110</sup> The opportunity cost of time for an outsourced lawyer to create an account will be \$28.99,<sup>111</sup> to register a single beneficiary will be \$85.28,<sup>112</sup> and to complete Form G-28 will be \$150.08.<sup>113</sup> Therefore, based on the calculated opportunity costs of time, the total cost to submit a registration for a single beneficiary will be \$31.14<sup>114</sup> if submitted by an HR specialist, \$154.38<sup>115</sup> if submitted by an in-house lawyer, and \$264.35<sup>116</sup> if submitted by an outsourced lawyer.

In order to estimate how many accounts will be created for registration of beneficiaries, DHS used historical filings to identify the number of unique entities filing H-1B cap-subject petitions by employer identification number (EIN). DHS distinguishes the

<sup>105</sup> The Form G-28 submission to authorize a lawyer or accredited representative to file registrations for an H-1B cap-subject petition under this rule is separate from the authorization that is required for an attorney or accredited representative to otherwise represent an applicant, petitioner, or requestor. This rule does not change the process or requirements related to the submission of Form G-28 when an applicant or petitioner files an application, petition, or request with USCIS. As such, petitioners with selected registrations who proceed to file an H-1B cap-subject petition will still be required to submit a properly completed Form G-28 if an attorney or accredited representative prepared the petition or will represent the petitioner in the case.

<sup>106</sup> Calculation: \$46.49 (HR wage) \* 0.17 hours (time to create an account) = \$7.90.

<sup>107</sup> Calculation: \$46.49 (HR wage) \* 0.5 hour (time to register one beneficiary) = \$23.24.

<sup>108</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.17 hours (time to create an account) = \$16.93.

<sup>109</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.5 hour (time to register one beneficiary) = \$49.80.

<sup>110</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.88 hour (time to complete Form G-28) = \$87.65.

<sup>111</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.17 hours (time to create an account) = \$28.99.

<sup>112</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.5 hour (time to register one beneficiary) = \$85.28.

<sup>113</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.88 hour (time to complete Form G-28) = \$150.08.

<sup>114</sup> Calculation: \$7.90 (HR specialist account creation cost) + \$23.24 (HR specialist registration cost) = \$31.14.

<sup>115</sup> Calculation: \$16.93 (in-house lawyer account creation cost) + \$49.80 (in-house lawyer registration cost) + \$87.65 (in-house lawyer Form G-28 cost) = \$154.38.

<sup>116</sup> Calculation: \$28.99 (outsourced lawyer account creation cost) + \$85.28 (outsourced lawyer registration cost) + \$150.08 (outsourced lawyer Form G-28 cost) = \$264.35.

<sup>101</sup> Calculation: \$6,429,727 HR specialist cost + \$47,037,793 in-house lawyer cost = \$53,467,520 total annual cost (rounded).

<sup>102</sup> Calculation: \$6,429,727 HR specialist cost + \$79,217,831 in-house lawyer cost = \$85,647,558 total annual cost (rounded).

<sup>103</sup> As previously stated, DHS does not assume petitioners would need to expend additional funds to procure computer equipment or acquire internet connections because DOL already requires employers to use electronic filing of Labor Condition Applications (LCAs), and an approved LCA is a requisite for requesting an H-1B employee.

<sup>104</sup> Lawyers and accredited representatives who complete electronic registration would need to complete a paper Form G-28 and upload the paper form as a portable document format (PDF) file. One Form G-28 would need to be uploaded for each employer, and can be tied automatically to multiple registrations of beneficiaries under the same employer.

number of filings which included a Form G-28. DHS assumes petitions without a Form G-28 were filed by HR

specialists and petitions with a Form G-28 were filed by lawyers.

Table 12 summarizes the filing history for the number of unique entities filing

H-1B cap-subject petitions with and without associated Forms G-28.

**Table 12: Number of Unique Entities Filing H-1B Petitions With or Without Form G-28, Selected H-1B Cap-Subject Petitions FY 2013-2017.**

| FY                    | Number of Unique Petitioners Filing with Form G-28 | Number of Unique Petitioners Filing without Form G-28 |
|-----------------------|--|---|
| 2013                  | 18,795   | 1,605   |
| 2014                  | 19,639   | 1,892   |
| 2015                  | 18,729   | 2,171   |
| 2016                  | 18,573   | 2,231   |
| 2017                  | 21,039   | 2,180   |
| <b>5-year average</b> | <b>19,355</b>                                      | <b>2,016</b>  |

Source: USCIS Office of Performance and Quality (OPQ), Performance Analysis and External Reporting (PAER), January 2018.

For selected petitioners, DHS estimates 19,355 unique accounts will be created by lawyers and 2,016 unique accounts will be created by HR specialists for electronic registration based on the five-year historical averages in Table 12 (overall 21,371 unique entities).<sup>117</sup>

To estimate the number of unique accounts created by lawyers and HR specialists for unselected petitioners, DHS applies the proportion of 21,371 unique entities among selected petitions to unselected petitions (populations which are estimated in Table 4) and estimates 21,046 total unique entities.<sup>118</sup> Furthermore, DHS reasonably estimates that 91 percent<sup>119</sup> of unique accounts will be created by lawyers and 9 percent<sup>120</sup> of unique accounts will be created by HR specialists. DHS applies these percentages to 21,046 total unique entities among unselected petitioners

<sup>117</sup> Calculation: 19,355 unique entities + 2,016 unique entities = 21,371 total unique entities.

<sup>118</sup> Calculation: 21,371 total unique entities among selected petitions/97,198 selected petitions = 22 percent; 22 percent \* 95,720 unselected petitions = 21,046 unique entities among unselected petitions.

<sup>119</sup> Calculation: 19,355/21,371 = 91 percent.

<sup>120</sup> Calculation: 2,016/21,371 = 9 percent.

and estimates 19,152<sup>121</sup> unique accounts will be created by lawyers and 1,894<sup>122</sup> unique accounts will be created by HR specialists.

USCIS recognizes that a single lawyer could represent multiple employers seeking to file H-1B cap-subject petitions, however in each such case a lawyer will need to upload a Form G-28 to represent the unique lawyer and employer relationship. Therefore, DHS also uses the estimate of unique accounts created by lawyers as a reasonable estimate for the total uploads of Forms G-28 during the electronic registration process.

#### i. Cost to Selected Registrants

The registration requirement will add an additional cost to those whose registrations are selected to complete and file H-1B cap-subject petitions. As stated in Table 5, DHS estimates 97,198 registrations will be selected annually. Of the 97,198 selected registrations, USCIS estimates 73,272 registrations will be submitted by lawyers with the

<sup>121</sup> Calculation: 21,046 unique entities \* 91 percent = 19,152 unique entities.

<sup>122</sup> Calculation: 21,046 unique entities \* 9 percent = 1,894 unique entities.

remaining registrations (23,926) submitted by HR specialists.

As stated previously in the calculated opportunity costs of time presented in section 5(a) of this analysis, the total cost to complete and file Form I-129 will be \$704.52 and Form I-907 will be \$1,433.24 for an HR specialist who files. The total cost to complete and file Form I-129 will be \$983.90, Form I-907 will be \$1,459.80, and Form G-28 will be \$87.65 for lawyers if an in-house lawyer files. The total cost to complete and file Form I-129 will be \$1,357.09, Form I-907 will be \$1,495.28, and Form G-28 will be \$150.08 for lawyers if an outsourced lawyer files.

Table 13 shows the total estimated annual costs to complete and file H-1B petitions for all selected registrants who are eligible to proceed as a petitioner under the registration requirement. DHS estimates the cost to complete electronic registration account creation is \$15,926,<sup>123</sup> registration is \$556,031,<sup>124</sup> Form I-129 is \$16.9 million, Form I-907

<sup>123</sup> Calculation: 2,016 unique HR specialists among selected registrations \* \$7.90 cost per account creation for HR specialist = \$15,926 (rounded).

<sup>124</sup> Calculation: 23,926 selected registrations filed by HR specialists \* \$23.24 cost per registration = \$556,031 (rounded).



is \$3.7 million, and mailing cost is \$617,280 based on selected registrations anticipated to be prepared by an HR specialist. If completed by an in-house lawyer, DHS estimates the cost to complete electronic registration account creation is \$327,680,<sup>125</sup> submitting a Form G-28 with the registration is \$1.7 million,<sup>126</sup> registration is \$3.6

million,<sup>127</sup> Form I-129 is \$72.1 million, Form I-907 is \$31.2 million, Form G-28 again with each petition is \$6.4 million, and mailing cost is \$1.9 million based on selected anticipated to be prepared by in-house lawyers. Finally, if completed by an outsourced lawyer, DHS estimates the cost to complete electronic registration account creation

is \$561,101,<sup>128</sup> submitting a Form G-28 with the registration is \$2.9 million,<sup>129</sup> registration is \$6.2 million,<sup>130</sup> Form I-129 is \$99.4 million, Form I-907 is \$32.0 million, and Form G-28 again with each petition is \$11.0 million, and mailing cost is \$1.9 million based on selected registrations anticipated to be prepared by lawyers.

**Table 13: Estimated Costs for Selected Registrants under the Registration Requirement by Preparer Type (includes opportunity cost of time for registration, opportunity cost of time to complete petition, and filing fees).**

|  | HR Specialist       | In-house Lawyer      | Outsourced Lawyer    |
|--|---------------------|----------------------|----------------------|
| Registration Account Creation          | \$15,926            | \$327,680            | \$561,101            |
| Form G-28 Submission with Registration | -                   | \$1,696,466          | \$2,904,798          |
| Registration                           | \$556,031           | \$3,648,966          | \$6,248,670          |
| Form I-129                             | \$16,856,064        | \$72,092,714         | \$99,437,241         |
| Form I-907                             | \$3,735,023         | \$31,241,180         | \$32,000,487         |
| Form G-28 Submission with Form I-129   | -                   | \$6,422,326          | \$10,996,722         |
| Mailing Cost                           | \$617,280           | \$1,890,428          | \$1,890,428          |
| <b>Total Cost</b>                      | <b>\$21,780,324</b> | <b>\$117,319,760</b> | <b>\$154,039,447</b> |

Source: USCIS analysis.

<sup>125</sup> Calculation: 19,355 unique lawyers \* \$16.93 cost per account creation for in-house lawyer = \$327,723 (rounded).

<sup>126</sup> Calculation: 19,355 unique lawyers \* \$87.65 cost per Form G-28 upload for in-house lawyer = \$1,696,447 (rounded).

<sup>127</sup> Calculation: 73,272 selected petitions filed by lawyers \* \$49.80 cost per registration for in-house lawyer = \$3,649,009 (rounded).

<sup>128</sup> Calculation: 19,355 unique lawyers \* \$28.99 cost per account creation for outsourced lawyer = \$561,169 (rounded).

<sup>129</sup> Calculation: 19,355 unique lawyers \* \$150.08 cost per Form G-28 upload for outsourced lawyer = \$2,904,876 (rounded).

<sup>130</sup> Calculation: 73,272 selected petitions filed by lawyers \* \$85.28 cost per registration for outsourced lawyer = \$6,248,304 (rounded).

Compared to current costs, DHS estimates the registration process will add a new cost of \$571,957,<sup>131</sup> \$5.7 million,<sup>132</sup> or \$9.7 million<sup>133</sup> in costs to selected petitioners depending on the type of preparer. Per petition, as previously stated, DHS estimates the total cost to submit a registration for a single beneficiary will be \$31.14 if submitted by an HR specialist, \$154.38 if submitted by an in-house lawyer, and \$264.35 if submitted by an outsourced lawyer.

ii. Costs to Unselected Registrants

Those whose registrations are not selected will incur new costs as a result

from this registration requirement as well. DHS estimates annually 95,720 registrations will be not selected as presented in Table 4. Of the 95,720 unselected registrations DHS estimates 72,158 registrations will be submitted by lawyers with the remaining registrations (23,562) submitted by HR specialists.

Table 14 shows the estimated costs to unselected registrants from this registration requirement. DHS estimates the annual cost to complete electronic registration account creation is \$14,963,<sup>134</sup> and cost to complete registrations is \$547,581<sup>135</sup> for HR

specialists who submit unselected registrations. DHS estimates the annual cost to complete electronic registration account creation is \$324,243,<sup>136</sup> registrations is \$3.6 million,<sup>137</sup> and cost to complete and upload Form G-28 is \$1.7 million<sup>138</sup> for in-house lawyers who submit unselected registrations. Finally, DHS estimates the annual cost to complete electronic registration account creation is \$552,216,<sup>139</sup> registrations is \$6.2 million,<sup>140</sup> and cost to complete and upload Form G-28 is \$2.9 million<sup>141</sup> for outsourced lawyers who submit unselected registrations.

**Table 14: Estimated Costs for Unselected Registrants under the Registration Requirement by Preparer Type (includes opportunity cost of time for registration).**

|   | HR Specialist    | In-house Lawyer    | Outsourced Lawyer  |
|---|------------------|--------------------|--------------------|
| Electronic Registration Account Creation                  | \$14,963         | \$324,243          | \$552,216          |
| Form G-28 Submission with Registration                    | -                | \$1,678,673        | \$2,874,332        |
| Registration  | \$547,581        | \$3,593,468        | \$6,153,634        |
| <b>Total Cost</b>   | <b>\$562,544</b> | <b>\$5,596,384</b> | <b>\$9,583,182</b> |
| Source: USCIS analysis of H-1B cap-subject petition cost. |                  |                    |                    |

Table 14 demonstrates the registration process will add a new cost of \$562,544, \$5.6 million, or \$9.6 million in costs to unselected registrants depending on the type of preparer.

iii. Total Costs for Selected and Unselected Registrants in Annual Filing Period

As upper and lower bounds are discussed in section 5(a) of this analysis, DHS estimates total costs for

an annual filing period by adding HR specialist costs and lawyer costs. Table 15 summarizes the lower bound and upper bound for selected petitioners and unselected registrants in an annual filing period.

<sup>131</sup> Calculation: \$15,926 + \$556,031 = \$571,957 (rounded).

<sup>132</sup> Calculation: \$327,680 + \$1,696,466 + \$3,648,966 = \$5,673,111 (rounded).

<sup>133</sup> Calculation: \$561,101 + \$2,904,798 + \$6,248,670 = \$9,714,570 (rounded).

<sup>134</sup> Calculation: 1,894 unique HR specialists among unselected registrations \* \$7.90 opportunity cost = \$14,963 (rounded).

<sup>135</sup> Calculation: 23,562 unselected registrations filed by HR specialists \* \$23.24 opportunity cost = \$547,581 (rounded).

<sup>136</sup> Calculation: 19,152 unique lawyers among unselected registrations \* \$16.93 cost per account creation for in-house lawyer = \$324,243 (rounded).

<sup>137</sup> Calculation: 72,158 unselected registrations filed by lawyers \* \$49.80 opportunity cost = \$3,593,468 (rounded).

<sup>138</sup> Calculation: 19,152 Form G-28 petitions \* \$87.65 opportunity cost in-house lawyer = \$1,678,673 (rounded).

<sup>139</sup> Calculation: 19,152 unique lawyers among unselected registrations \* \$28.99 cost per account creation for outsourced lawyer = \$552,216 (rounded).

<sup>140</sup> Calculation: 72,158 unselected registrations filed by lawyers \* \$85.28 opportunity cost = \$6,153,634 (rounded).

<sup>141</sup> Calculation: 19,152 Form G-28 petitions \* \$150.08 opportunity cost outsourced lawyer = \$2,874,332 (rounded).

| <b>Table 15: Summary of Registration Costs and Petition Costs for All (Selected and Unselected) Registrants in an Annual Filing Period under the Registration Requirement.</b>  |               |               |
|---|---------------|---------------|
| <b>Estimated Registration Costs<br/>(new costs as a result of this registration requirement)</b>  |               |               |
| Registrant Type   | Lower Bound   | Upper Bound   |
| Selected Registrants  | \$6,245,069   | \$10,286,527  |
| Unselected Registrants  | \$6,158,928   | \$10,145,726  |
| All Registrants   | \$12,403,997  | \$20,432,254  |
| <b>Estimated Petition Costs associated with the New H-1B Cap-Subject Petition Process<br/>(estimated costs as a result of the registration requirement)</b>   |               |               |
| Registrant Type   | Lower Bound   | Upper Bound   |
| Selected Registrants  | \$139,100,084 | \$175,819,772 |
| Unselected Registrants  | \$6,158,928   | \$10,145,726  |
| All Registrants   | \$145,259,012 | \$185,965,498 |
| Source: USCIS analysis.   |               |               |
| Note: DHS estimates that 75 percent of H-1B petitions are prepared by lawyers or other accredited representatives and 24 percent are completed and prepared by HR specialists or other equivalent occupation in an annual filing period. Therefore in order to present total costs for an annual filing period, DHS aggregates HR specialist costs and lawyer (or accredited representative) costs. |               |               |

In Table 15, the estimated registration costs for selected registrants in an annual filing period would range from \$6.2 million<sup>142</sup> to \$10.3 million,<sup>143</sup> depending on who registrants use to submit the registration. The estimated registration costs for unselected registrants in an annual filing period would range from \$6.2 million<sup>144</sup> to \$10.1 million,<sup>145</sup> again depending on

<sup>142</sup> Calculation: \$571,957 HR specialist cost + \$5,673,111 in-house lawyer cost = \$6,245,069 annual costs (rounded).

<sup>143</sup> Calculation: \$571,957 HR specialist cost + \$9,714,570 outsourced lawyer cost = \$10,286,527 annual costs (rounded).

<sup>144</sup> Calculation: \$562,544 HR specialist cost + \$5,596,384 in-house lawyer cost = \$6,158,928 annual costs (rounded).

<sup>145</sup> Calculation: \$562,544 HR specialist cost + \$9,583,182 outsourced lawyer cost = \$10,145,726 annual costs (rounded).

who registrants use to submit the registration. Therefore, DHS estimates under the registration requirement the total registration cost to all petitioners for an annual filing period will range from \$12.4 million to \$20.4 million, using lower bound and upper bound calculations.

DHS anticipates selected registrants will complete and file H-1B cap-subject petitions. The total costs for all selected registrants to complete H-1B cap-subject petitions under the registration requirement will range from \$134.7 million<sup>146</sup> to \$171.4 million,<sup>147</sup>

<sup>146</sup> Calculation: \$21,341,632 HR specialist cost + \$113,317,338 in-house lawyer cost = \$134,658,970 annual costs (rounded).

<sup>147</sup> Calculation: \$21,341,632 HR specialist cost + \$150,035,823 outsourced lawyer cost = \$171,377,455 annual costs (rounded).

depending on who selected registrants use to complete the process. Under the registration requirement, DHS anticipates unselected registrants will only experience registration costs in pursuing H-1B cap-subject petitions. Therefore, DHS estimates the total registration costs and new costs associated with the H-1B cap-subject petition process are equal for unselected registrants, as seen in Table 15. For all registrants, DHS estimates the total cost to complete and file an H-1B petition for an annual filing period will range from \$140.8 million to \$181.5 million.

#### c. Costs of the Registration Requirement to the Government

The government will incur costs to develop the electronic registration requirement. In this final rule and after

reassessing the registration requirements with USCIS' Office of Information Technology, DHS updates the costs associated with the registration website's development since the NPRM was published. USCIS is developing the registration website and will not need to invest in new hardware or other equipment during its development; USCIS will be able to use its current infrastructure. Therefore, the total cost of the registration website to the Government comes from the associated labor costs.

There are two components to the registration website's development: the public facing user-interface and the back-end data management system. For the development of the user-interface component of the registration website, USCIS anticipates paying four contractors for six months for a total of approximately \$790,000.<sup>148</sup> For the development of the back-end data management system, USCIS anticipates paying about 10 contractors for six months for a total of approximately \$732,000.<sup>149</sup> Annual maintenance of both components, including running the registration website servers and the labor costs associated with server maintenance, are reported as negligible since they are already covered by the current USCIS fee structure and therefore are not separately calculated in these total cost estimates. Any additional future maintenance, development, or enhancement costs to the government associated with the registration system will be considered in future USCIS fee studies and may set an appropriate fee to recover any additional costs not mentioned in this final rule. Accordingly, the total cost to the Government, which includes the development of the user-interface and the back-end data management system, is \$1,522,000.<sup>150</sup>

#### d. Cost to Petitioners From Reversing the Petition Selection Process

As discussed in the population section of this analysis, under the current process, if more petitions are received during the first five business days that petitions may be filed than USCIS has projected are needed to meet both the regular cap and the advanced degree exemption, USCIS randomly selects an estimated 33,495 beneficiaries with master's degrees or higher from

U.S. institutions of higher education in total between the regular cap and advanced degree exemption, which accounts for 17 percent of the total H-1B cap-subject petitions received.<sup>151</sup> Under the provision to reverse the selection process, USCIS will now randomly select an estimated 38,835 registrations relating to beneficiaries with an advanced degree from a U.S. institution of higher education, which will account for 20 percent of the total registrations received by USCIS.<sup>152</sup> Conversely, beneficiaries qualifying under the regular cap currently account for 83 percent of selected H-1B cap-subject petitions,<sup>153</sup> and under the new selection process, such beneficiaries will account for 80 percent of selected registrations.<sup>154</sup> Therefore, USCIS anticipates the probability of randomly selecting a petition filed for a beneficiary without a master's or higher degree from a U.S. institution of higher education during the H-1B cap registration selection process under this final rule to fall by 3 percentage points.<sup>155</sup> This could result in fewer selections of petitioners with H-1B cap-subject beneficiaries holding a bachelor's degree, an advanced degree from a U.S. for-profit institution of higher education, or a foreign advanced degree. This potential decrease could result in some higher labor costs to petitioners assuming that beneficiaries with bachelor's degrees, advanced degrees from U.S. for-profit universities or foreign advanced degrees are paid less than and replaced by beneficiaries with master's or higher degrees from U.S. institutions of higher education.<sup>156</sup> However, more highly educated workers tend to have a higher marginal product of labor, which would benefit employers and could be expected to offset the additional wages costs. Thus, any potential wage differential may be more appropriately thought of as a benefit

<sup>151</sup> Calculation: 33,495 advanced degree Forms I-129 selected/192,918 total H-1B cap-subject petitions \* 100 = 17 percent (rounded).

<sup>152</sup> Calculation: 38,835 advanced degree registrations selected/192,918 total registrations \* 100 = 20 percent (rounded).

<sup>153</sup> Calculation: 100 percent - 17 percent advanced degree beneficiaries = 83 percent regular cap beneficiaries (rounded).

<sup>154</sup> Calculation: 100 percent - 20 percent advanced degree beneficiaries = 80 percent regular cap beneficiaries (rounded).

<sup>155</sup> Calculation: 80 percent - 83 percent = -3 percent.

<sup>156</sup> While DHS recognizes that wages paid to workers with a master's degrees may be higher than wages paid to workers with a bachelor's degree, it is unclear whether wages paid to workers with a master's or higher degree from a U.S. institution of higher education are higher than those paid to workers with a comparable advanced degree from a foreign educational institution.

because it takes account of the higher value of the labor resources being brought to the economy.

DHS has been able to develop an estimate of the aggregate increase in the expected number of beneficiaries with master's degrees or above from U.S. institutions of higher education being selected and a commensurate decrease in other types of workers who might otherwise be selected. However, DHS has not been able to determine how this may impact particular industries currently submitting H-1B cap petitions for individuals without master's degrees and above from U.S. institutions of higher education and how this may impact particular types of workers.

#### 6. Benefits

Under the new registration requirement, current unselected petitioners will benefit in the form of cost savings between the current and new process as unselected registrants. The benefits to unselected petitioners will derive from the reduced time and effort required to file an entire petition.

DHS estimated that unselected petitioners experience a cost savings by subtracting new registration costs from the current costs of preparing an H-1B cap-subject petition. Unselected petitioners and the government will also benefit by reduced mailing expenses. Furthermore, DHS estimates the probability that individuals with master's or higher degree from a U.S. institution of higher education will become H-1B workers will increase. Consequently, the registration selection process likely will allow more cap-subject H-1B workers with a master's or higher degree from a U.S. institution of higher education to obtain H-1B status.

##### a. Benefits to Petitioners From the Registration Requirement

Under the registration requirement, those seeking to file an H-1B cap-subject petition will need to create their electronic registration account, complete registration, and have a selected registration before completing and filing an H-1B cap-subject petition in a particular fiscal year. If USCIS selects a registration, the registrant will then complete and file a Form I-129 (and if necessary Form I-907 and/or Form G-28) on behalf of the beneficiary named in the selected registration. If USCIS does not select a registration, no further steps are required as the registrant will be ineligible to file an H-1B cap-subject petition for the beneficiary in the unselected registration for that fiscal year. The unselected registrant will only incur those opportunity costs of time for

<sup>148</sup> Estimate provided by USCIS Office of Information Technology (OIT).

<sup>149</sup> Estimate provided by USCIS Benefits and Biometrics Branch, Systems Engineering Division (SED).

<sup>150</sup> Calculation: (User-interface labor costs) + (back-end data management system labor costs) = \$790,000 + 732,000 = \$1,522,000.

creating the electronic registration account and registering the beneficiary, as well as the opportunity costs of time to submit Form G-28 if a lawyer or accredited representative completes the electronic registration. Overall, unselected registrants will save in costs by no longer having to complete and file an entire H-1B cap-subject petition to be selected in the H-1B lottery.

Table 11 presents the current total costs to unselected petitioners in an annual filing period ranges from \$53.5 million to \$85.6 million, depending on who petitioners use to prepare the

petition. These costs represent the opportunity costs of time to complete and file H-1B cap-subject petitions without the filing fees since those are returned to petitioners as well as the costs of mailing in the petition.

Table 15 presents the total cost to unselected registrants under the new registration requirement ranging from \$6.1 million to \$10.1 million, again depending on the type of preparer who submits the registration. These costs represent the opportunity costs of time to submit a registration in the electronic registration system.

DHS estimates a cost savings for unselected petitioners from the registration requirement by subtracting the total new costs to unselected registrants from the total current costs to unselected petitioners. As summarized in Table 16, DHS estimates the total cost savings will range from \$47.3 million<sup>157</sup> to \$75.5 million,<sup>158</sup> depending on the type of preparer. This cost savings results because fewer resources will be required to create an account and complete registration than to complete and file H-1B cap-subject petitions.

| Annual H-1B Petition Filing Costs       | Lower Bound<br>(In house Lawyer) | Upper Bound<br>(Outsourced Lawyer) |
|---|----------------------------------|------------------------------------|
| Current Costs to Unselected Petitioners | \$53,467,520                     | \$85,647,558                       |
| New Costs to Unselected Petitioners     | \$6,158,928                      | \$10,145,726                       |
| <b>Total Cost Savings</b>               | <b>\$47,308,592</b>              | <b>\$75,501,832</b>                |

Source: USCIS analysis.  
Note: See Table 9 and Table 14 for cost calculations.

DHS estimates net quantitative impact from the registration requirement by subtracting the total new costs to all registrants (selected and unselected) from the total current costs to all

petitioners (selected and unselected). As summarized in Table 17, DHS estimates the net quantitative impact of this registration requirement for H-1B petitioners overall is a positive net

annual benefit ranging from \$41.0 million to \$65.2 million, depending on who the petitioners use to complete the H-1B petition process.

| Annual H-1B Petition Filing Costs                    | Lower Bound         | Upper Bound         |
|--|---------------------|---------------------|
| Current Costs to Selected and Unselected Petitioners | \$186,322,535       | \$251,180,803       |
| New Costs to Selected and Unselected Petitioners     | \$145,259,012       | \$185,965,4983      |
| <b>Total Cost Savings</b>                            | <b>\$41,063,523</b> | <b>\$65,215,305</b> |

Source: USCIS analysis.  
Note: See Table 11 and Table 15 for cost calculations.

<sup>157</sup> Calculation: \$53,467,520 (current total costs for unselected petitioners lower bound) - \$6,158,928 (total costs for unselected registrants lower bound) = \$47,308,592 cost savings.

<sup>158</sup> Calculation: \$85,647,558 (current total costs for unselected petitioners upper bound) - \$10,145,726 (total costs for unselected

registrants upper bound) = \$75,501,832 cost savings.

b. Benefits to the Government From the Registration Requirement

USCIS will expect net cost-savings as a result of the registration requirement by no longer needing to receive, handle and return unselected H-1B cap-subject

petitions back to petitioners. Table 18 shows the costs to USCIS in FY 2017 from unselected H-1B cap-subject petitions at both the Vermont Service Center (VSC) and California Service Center (CSC), where such petitions are filed and processed. DHS uses the FY

2017 costs to estimate USCIS' cost savings from this final rule.<sup>159</sup> USCIS will save \$1.6 million annually by removing petition handling, data entering, return shipping, and other costs.

**Table 18: USCIS Costs for Unselected H-1B Cap-Subject Petitions in FY 2017.**

|  | VSC       | CSC       | Total       |
|--|-----------|-----------|-------------|
| Handling (including overtime), data entry, and other costs | \$526,357 | \$479,406 | \$1,005,763 |
| Shipping costs   | \$271,015 | \$335,642 | \$606,657   |
| Total  | \$797,372 | \$815,048 | \$1,612,420 |

Source: USCIS Service Center Operations (SCOPS) July, 2017.

As stated in the cost section of this analysis, USCIS will incur a one-time total cost of \$1,522,000 to develop the registration website. To measure the net quantitative impact, USCIS estimates

the difference between current costs associated with H-1B cap-subject petitions and costs estimated under the registration provision. Summarized in Table 19, the net quantitative impact of

the registration requirement for the government is cost savings of \$90,420 in the first year, and \$1.6 million in each subsequent year.

**Table 19: Net Annual Quantitative Impact to Government from the Registration Requirement.**

| Annual H-1B Cap-Subject Petition Filing Costs (First Year)              | Total Costs to Government |
|---|---------------------------|
| Current Costs   | \$ 1,612,420              |
| New Costs (First Year)  | \$ 1,522,000              |
| <b>Cost Savings (First Year)</b>  | <b>\$ 90,420</b>          |
| <b>Annual H-1B Cap-Subject Petition Filing Costs (Subsequent Years)</b> |                           |
| Current Costs   | \$ 1,612,420              |
| New Costs (Subsequent Year)   | \$ 0                      |
| <b>Cost Savings (Subsequent Year)</b>                                   | <b>\$ 1,612,420</b>       |

Source: USCIS analysis.

The net quantitative impact of the registration requirement for the government is cost savings of \$14.6 million undiscounted over 10 years (\$12.6 million discounted at 3 percent and \$10.6 million discounted at 7 percent over ten years) or an annualized cost savings of \$1.4 million discounted

at 7 percent. In addition to the estimated cost savings, USCIS will eliminate any potential need to manually enter petition information into the database to eliminate duplicate petitions in order to administer the random selection process. The registration system will allow USCIS to focus its efforts on

adjudicating petitions rather than managing the intake, storage and return of tens of thousands of unselected H-1B cap-subject petitions.

<sup>159</sup> While DHS prefers to base assumptions on a longer time period (ideally years), 1 year was the

longest time period for which this data could be reported.

c. Net Quantitative Impacts of This Registration Requirement (Petitioners and Government)

DHS estimates the net quantitative impact from the registration requirement by combining the net impact to petitioners and net impact to government as described in preceding sections.

As summarized in Table 18, DHS estimates the net quantitative impact of the registration requirement for H-1B petitioners overall is a positive net benefit ranging from \$41.0 million to \$65.2 million, depending on who the petitioners use to complete the H-1B petition process. As summarized earlier, the net quantitative impact of the

registration requirement for the government is cost savings of \$90,420 in the first year, and \$1.6 million in each subsequent year. To estimate the net quantitative impact of the registration requirement, DHS calculates the cost savings for the lower bound and upper bound ranges using the total cost savings shown in Table 20.

| <b>Table 20: Net Annual Quantitative Impact from the Registration Requirement (undiscounted).</b> |  |                                    |                            |
|---|--|------------------------------------|----------------------------|
| <b>Lower Bound (combination of HR specialist + in-house lawyer)</b>                               |  |                                    |                            |
|   | <b>Petitioner Net Cost Savings (Selected and Unselected)</b> | <b>Government Net Cost Savings</b> | <b>Total Costs Savings</b> |
| Year 1  | \$41,063,523   | \$ 90,420                          | \$ 41,153,943              |
| Sub. Annual   | \$42,063,523   | \$1,612,420                        | \$ 43,675,943              |
| <b>Upper Bound (combination of HR specialist + outsourced lawyer)</b>                             |  |                                    |                            |
|   | <b>Petitioner Net Cost Savings (Selected and Unselected)</b> | <b>Government Net Cost Savings</b> | <b>Total Costs Savings</b> |
| Year 1  | \$61,215,305   | \$ 90,420                          | \$ 61,305,725              |
| Sub. Annual   | \$61,215,305   | \$1,612,420                        | \$ 62,827,725              |
| Source: USCIS analysis.   |  |                                    |                            |

Using lower bound figures, the net quantitative impact of the registration requirement is cost savings of \$434.2

million over ten years. These cost savings will be \$381.2 million discounted at 3 percent over ten years

and \$325.7 million discounted at 7 percent over ten years (Table 21).

**Table 21: Net Cost Savings from the Registration Requirement, Lower Bound (discounted at 3 percent and 7 percent).**

|                | <b>Non-discounted<br/>Estimated Cost</b> | <b>3 Percent<br/>Discount</b> | <b>7 Percent<br/>Discount</b> |
|----------------|--|-------------------------------|-------------------------------|
| <b>Year 1</b>  | \$41,153,943.00                          | \$41,153,943.00               | \$41,153,943.00               |
| <b>Year 2</b>  | \$43,675,943.00                          | \$42,403,828.20               | \$40,818,638.30               |
| <b>Year 3</b>  | \$43,675,943.00                          | \$41,168,765.20               | \$38,148,260.10               |
| <b>Year 4</b>  | \$43,675,943.00                          | \$39,969,675.00               | \$35,652,579.50               |
| <b>Year 5</b>  | \$43,675,943.00                          | \$38,805,509.70               | \$33,320,167.80               |
| <b>Year 6</b>  | \$43,675,943.00                          | \$37,675,252.10               | \$31,140,343.70               |
| <b>Year 7</b>  | \$43,675,943.00                          | \$36,577,914.70               | \$29,103,125.00               |
| <b>Year 8</b>  | \$43,675,943.00                          | \$35,512,538.50               | \$27,199,182.20               |
| <b>Year 9</b>  | \$43,675,943.00                          | \$34,478,192.70               | \$25,419,796.50               |
| <b>Year 10</b> | \$43,675,943.00                          | \$33,473,973.50               | \$23,756,819.10               |
| <b>Total</b>   | <b>\$434,237,430</b>                     | <b>\$381,219,592</b>          | <b>\$325,712,855</b>          |

Source: USCIS analysis.

Using upper bound figures, the net quantitative impact of the registration requirement is cost savings of \$626.8

million over ten years. These cost savings will be \$550.5 million discounted at 3 percent over ten years

and \$470.6 million discounted at 7 percent over ten years (Table 22).

**Table 22: Net Cost Savings from the Registration Requirement, Upper Bound (discounted at 3 percent and 7 percent).**

|                | <b>Non-discounted<br/>Estimated Cost</b> | <b>3 Percent<br/>Discount</b> | <b>7 Percent<br/>Discount</b> |
|----------------|--|-------------------------------|-------------------------------|
| <b>Year 1</b>  | \$61,305,725                             | \$61,305,725                  | \$61,305,725                  |
| <b>Year 2</b>  | \$62,827,725                             | \$60,997,791.3                | \$58,717,500.0                |
| <b>Year 3</b>  | \$62,827,725                             | \$59,221,156.6                | \$54,876,168.2                |
| <b>Year 4</b>  | \$62,827,725                             | \$57,496,268.5                | \$51,286,138.5                |
| <b>Year 5</b>  | \$62,827,725                             | \$55,821,619.9                | \$47,930,970.6                |
| <b>Year 6</b>  | \$62,827,725                             | \$54,195,747.5                | \$44,795,299.6                |
| <b>Year 7</b>  | \$62,827,725                             | \$52,617,230.6                | \$41,864,766.0                |
| <b>Year 8</b>  | \$62,827,725                             | \$51,084,689.9                | \$39,125,949.5                |
| <b>Year 9</b>  | \$62,827,725                             | \$49,596,786.3                | \$36,566,308.0                |
| <b>Year 10</b> | \$62,827,725                             | \$48,152,219.7                | \$34,174,119.6                |
| <b>Total</b>   | <b>\$626,755,250</b>                     | <b>\$550,489,235</b>          | <b>\$470,642,945</b>          |

Source: USCIS analysis.



DHS notes that these overall cost savings result only in years when the demand for registrations and the subsequently filed petitions exceeds the number of available visas needed to meet the regular cap and advanced degree exemption allocation. For years

where DHS has demand that is less than the number of available visas, the registration requirement will result in costs.

DHS conducted a break-even analysis to determine how many registrations and subsequently filed petitions will be

needed to offset the costs imposed by this rule. This analysis shows the number of registrations and subsequently filed petitions that will need to be received to ensure that cost-savings exceed the costs added by the registration requirement (Table 23).

**Table 23: Projected H-1B Cap-Subject Petitions Needed for Benefits (Cost-savings) to Exceed Costs Under the Registration Requirement.**

| Total Annual Cost Under Registration Requirement (Petitioner and Government Costs) | Number of Petitions |
|--|---------------------|
| \$153,221,714<br>(Lower Bound)   | 112,913             |
| \$201,956,457<br>(Upper Bound)   | 112,169             |
| Source: USCIS analysis.  |                     |

Total costs under the registration requirement are a combination of costs to petitioners and costs to government, presented in Table 23 as a range with lower bound \$153.22 million (preparer types HR specialist and in-house lawyer) and upper bound, \$201.96 (preparer types HR specialist and outsourced lawyer).<sup>160</sup> To calculate the number of petitions at which the new costs under this final rule offset the total cost-savings, DHS used a standard break-even formula.<sup>161</sup>

Based on each lower and upper bound cost estimate, DHS set receipt volume to the estimated number of H-1B cap-subject petitions randomly selected each year (97,198) and static target equal to 0 (representative of a breakeven point) and solved for the value of how many petitions were needed to reach the target value of 0. From the resulting output, DHS estimates that 112,913 petitions (registrations and subsequently filed petition under this rule) will need to be received by USCIS for this provision to break-even based on lower bound costs. Another way to say this is that this rule will break-even if USCIS received 15,715 registrations above the numerical limitations in a given year for the lower bound estimate. DHS estimates USCIS will need to receive 112,169 registrations and subsequently filed petitions (or an additional 14,971 registrations above the numerical

limitations) for the registration requirement to break-even based on upper bound costs. Since this government cost of \$1,522,000 is a one-time cost, for future years DHS estimates that 109,834 petitions will need to be received by USCIS for this provision to break-even based on lower bound costs and 110,239 petitions for this provision to break-even based on upper bound costs.

#### d. Benefits to Petitioners From Reversing the Petition Selection Process

As discussed in the section 4 of this analysis, USCIS currently randomly selects an estimated 33,495 H-1B cap-subject petitions filed for beneficiaries with a master's or higher degree from a U.S. institution of higher education (see Table 6), which accounts for 17 percent of the total H-1B cap-subject petitions received annually. Under the reversal of the selection process imposed by this final rule, in years when the number of registrations received during the initial registration period exceeds the projected number of registrations needed to meet the numerical limits, there is a probability that USCIS will randomly select an estimated 38,835 registrations for beneficiaries with a master's or higher degree from a U.S. institution of higher education, which would account for 20 percent of the total registrations received. USCIS anticipates that the probability of selecting registrations for H-1B beneficiaries with a master's or higher degree from a U.S. institution of higher education will rise by 3 percentage points, (shifting from 17 percent to 20 percent).<sup>162</sup>

<sup>162</sup> Calculation: 20 percent—17 percent = 3 percent.

#### 7. Labor Market Impacts

Congress currently limits the number of new cap-subject H-1B workers to 85,000, with 20,000 visas allocated to H-1B beneficiaries with a master's or higher degree from a U.S. institution of higher education and 65,000 visas allocated to the remaining pool of H-1B beneficiaries that could include H-1B workers eligible for either the advanced degree exemption or regular cap. The new provisions requiring registration prior to filing an H-1B cap-subject petition, as well as the amendment to the order in which beneficiaries are counted toward the advanced degree exemption allocation and regular cap will change the H-1B cap-subject petitioning process. Neither of these changes will amend the numerical limit on individuals who may be issued H-1B visas or otherwise accorded H-1B status as provided by Congress. In other words, neither of the provisions changes the number of new H-1B workers entering the U.S. labor force. Therefore, this rule does not directly impact the labor market. While this rule does not change the numbers of H-1B workers in the labor market, it could change the composition of future H-1B workers. The selection process will likely increase the probability that more H-1B workers with a master's or higher degree from a U.S. institution of higher education may obtain classification as H-1B workers. While some of these beneficiaries might already be in the U.S. labor market based on an existing nonimmigrant status and associated employment authorization (e.g., F-1 nonimmigrant student status and Optional Practical Training employment authorization), others will be new to the

<sup>160</sup> The costs to petitioners are presented in Table 15 and the one-time cost to government is estimated to be an annualized amount of \$1,522,000 as detailed in the costs section of this analysis.

<sup>161</sup> DHS conducted break-even analysis through Goal Seek in Microsoft Excel. Goal Seek sets a formula equal to a certain target (0 for breakeven analysis) and solves for the value of one parameter at that target.

U.S. labor market, thereby increasing the level of H-1B workers in the U.S. labor market educated at a U.S. institution of higher education.

DHS acknowledges that this regulation will likely result in a shift from one pool of H-1B cap-subject workers to another pool of H-1B cap-subject workers. DHS believes it is possible that petitioning employers may choose to petition for a higher number of H-1B beneficiaries that have advanced degrees from a U.S. institution of higher learning than may currently be the case. However, DHS was not able to estimate the magnitude of such transfers. DHS recognizes that there are potential wage increases for those that earn a master's degree compared to those with only a bachelor's degree. Overall, individuals with a master's degree earned 19.6 percent more in wages than individuals with a bachelor's degree. Additionally, workers with a master's degree in selected STEM occupations earned between 18 and 33 percent more than workers with a bachelor's degree in those same occupations.<sup>163</sup> However, due to the variability in the composition and delineation of workers in our H-1B petition process, DHS is not able to estimate the magnitude of such transfers for the specific pool of H-1B workers. Importantly, within the regular cap there are H-1B beneficiaries that have bachelor's degrees (or their equivalents) as well as beneficiaries that have advanced degrees from foreign institutions of higher education.

Using fully loaded wages, and assuming that there is a shift of about 5,000 visas from individuals in the general pool to individuals in the advanced degree pool, DHS finds that the rule is likely to have an annualized transfer of fully loaded wages that is greater than \$100 million.<sup>164</sup> For instance, with this assumption of 5,000 visas shifted from individuals in the general pool to individuals in the advanced degree pool, the fully-loaded wages transferred will only need to average at least \$20,000, discounted, to reach the \$100 million threshold. DHS notes that the magnitude of such transfers are uncertain at this juncture

<sup>163</sup> Source: Bureau of Labor Statistics, Department of Labor, "Measuring the Value of Education April 2018": <https://www.bls.gov/careeroutlook/2018/data-on-display/education-pays.htm>. Visited November, 2018. Bureau of Labor Statistics, Department of Labor, "Should I Get a Master's Degree?": <https://www.bls.gov/careeroutlook/2015/article/should-i-get-a-masters-degree.htm#STEM>. Visited November, 2018.

<sup>164</sup> As discussed elsewhere in the document, DHS uses a multiplier of 1.46 to establish a fully loaded wage that accounts for benefits and overhead costs in addition to gross salary.

given that the cap allocation process is by definition unpredictable, that the regular cap includes individuals with advanced degrees from foreign universities, and that wages can vary widely between occupations, as well as location of employment (e.g., New York, NY v. Sioux Falls, SD).

#### 8. Alternatives

##### Alternative 1: First-In, First-Out Registration Process

In the development of this final rule, DHS considered an alternative to the H-1B cap registration and selection process. The alternative considered was a first-in, first-out registration process, where USCIS would select the first petitioners to complete electronic registrations instead of using a random sampling process. This alternative would simplify the selection process for USCIS. However, it would likely create an unfair advantage for petitioners with relatively greater resources to complete registrations faster and in greater volume than other small entities that may not have the same resources or experience. DHS determined that this option would unfairly disadvantage small entities and decided against it.

##### Alternative 2: Status Quo

DHS also considered maintaining the current regulatory and policy guidelines for the H-1B cap selection process (the status quo alternative). Under this alternative, DHS would continue to expend resources towards opening and sorting petitions, identifying properly filed petitions, and removing duplicate petitions before proceeding with the petition selection process. In years of high petition volume, these duties would continue to present DHS with operational challenges that include greater labor needs and limited space at Service Centers where petitions are stored, sorted, and selected.

Also, under the status quo, all petitioners seeking to file a petition on behalf of an H-1B worker would have to complete and file Form I-129 without any guarantee that their petition would be selected during the H-1B cap filing period, therefore expending time and resources to complete and submit the entire petition. As explained in section 5(a)(iii) of this analysis, under the current process, the total cost for all petitioners to complete and file an H-1B petition for an annual filing period ranges from \$186.3 million to \$251.2 million, using lower bound and upper bound calculations. The status quo alternative is a much more costly process for petitioners as long as demand continues to exceed available

visas. Additionally, the high costs of filing a full H-1B petition without the guarantee of obtaining a worker under the status quo could be a barrier to some small entities. The lower costs of a registration system could allow more small entities to submit a registration that otherwise may not file a full H-1B petition.

##### B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. The term "small entities" comprises of small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An "individual" is not defined by the RFA as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered as costs for RFA purposes.

This final rule may have direct impacts to those entities that petition on behalf of H-1B cap-subject workers. Generally, petitions are filed by a sponsoring employer who may incur some additional costs from the proposed registration requirement. Therefore, DHS examines the direct impact of this final rule on small entities in the analysis that follows.

#### 1. Final Regulatory Flexibility Analysis

Small entities primarily impacted by this final rule are those that would incur additional direct costs to electronically register to file an H-1B cap-subject petition. DHS conducted a statistically valid sample analysis of H-1B cap-subject petitions to determine the number of small entities directly impacted by this rule.<sup>165</sup> These costs are related to the additional opportunity cost of time for a selected small entity

<sup>165</sup> Although Form I-129 collects data on petitioners' numbers of employees and annual business income, the use of statistically valid random samples allow us to draw conclusions on the population as a whole. Additionally, more in-depth research of petitioner's information using this statistically valid sample ensures the integrity of the data needed to estimate the impact to small businesses likely to be affected by this proposed rule.

to complete the registration process in this rule. Additionally, if a lawyer or other accredited representative completed the electronic registration on behalf of a petitioner, these additional costs will also include the opportunity costs of time to submit Form G-28. These opportunity costs of time will be an additional burden to completing and filing H-1B cap-subject petitions for selected entities.

a. A Statement of the Need for, and Objectives of, the Rule.

The purpose of this final rule is to streamline the H-1B cap-subject petition process. In the last several years, USCIS has received large numbers of H-1B cap-subject petitions in the first few days of the filing season that have far exceeded the annual numerical limitations set by Congress. DHS has found that USCIS spends an inordinate amount of time on handling the volume of petitions received within the first few days of the H-1B filing period. After expending USCIS resources to ensure proper processing of these petitions, USCIS still must reject and return petitions and associated fees that are not selected in the current H-1B cap-subject selection process. Petitioners are also adversely affected by the current petition process. Preparing and mailing H-1B cap-subject petitions, with the required filing fee, can be burdensome and costly for petitioners, especially if USCIS returns the petition because it was not selected in the current H-1B-subject cap selection process. This registration process will improve the agency's ability to manage the H-1B cap-subject petition process and reduce the burden on those petitioners whose registrations are not selected and who are therefore ineligible to file an H-1B cap-subject petition for that fiscal year. Additionally, this final rule also amends the process by which USCIS selects H-1B petitions toward the projected number of petitions needed to reach the regular cap and advanced degree exemption. Changing the order in which petitions are selected will increase the probability of selecting more petitions under the regular cap for H-1B beneficiaries who possess a master's or higher degree from a U.S. institution of higher education each fiscal year.

b. A Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

*Comment:* A business association argued that small businesses in particular would be negatively impacted by the registration requirement as they would not have the necessary resources that would allow for such changes in time for the FY 2020 H-1B cap year. More specifically, this commenter argued that requiring the registration process for the FY 2020 H-1B cap season will prevent businesses from realizing the cost savings associated with registration because they have already expended resources to complete a full petition for the upcoming cap season. The commenter goes on to state that the registration process would negatively impact business across industries because it increases the uncertainty of obtaining their needed workforce. Also, the commenter was concerned with how small businesses will mitigate the registration's low barrier to entry, where larger companies might flood the system, placing small businesses at a disadvantage. Another commenter similarly argued that these changes would favor larger companies, who would obtain a larger share of H-1B visas at the expense of smaller companies.

*Response:* DHS appreciates the commenters' concerns of the impact of the registration requirement on small entities. As mentioned previously in this final rule, USCIS will be suspending the implementation of the registration requirement until further notice. Therefore, due to the delayed implementation, entities submitting H-1B cap subject petitions will realize the cost savings as outlined in Executive Orders 12866 and 13563.

DHS disagrees with the commenter's assertion that this rule will increase uncertainty for entities. This final rule establishes a registration requirement that, when implemented, will streamline the H-1B cap selection process. The manner of selection, however, mirrors the manner of selection under the current petition-based process, with the exception of the reversal of the selection order for the numerical allocations. While DHS recognizes that there is uncertainty in the random selection process, that uncertainty is not increased by this final rule or through the use of a registration system. DHS believes the benefits of the

registration requirement, when applicable, outweigh the costs, and the use of a random selection process is useful to fairly administer the H-1B allocations in years of high demand for new H-1B workers. DHS points out that small entities across industries will benefit since they will only have to register, once registration is required, rather than fill out and submit an entire H-1B petition as is currently required. This could cause some small entities to register for the H-1B cap that might have not have otherwise since the costs to filing an entire H-1B petition are substantially higher than that of submitting a registration.

DHS reiterates that competition among hiring entities will not be removed or impacted by the registration system. However, registration will ease and lower the cost of entry to allow for more participation by small entities than under the current process. USCIS will provide an initial 14-day registration period where the random lottery will be used if demand is high or all registrations will be selected if demand is below the number of registrations projected as needed to reach the H-1B numerical allocations. This initial registration period is designed to ensure fairness for small entities by avoiding massive submissions of registrations as soon as registration opens and thereby unfairly being advantageous to larger entities that may have the resources to submit registrations rapidly and effectively crowd-out smaller entities. The annual initial registration period, which will remain open for at least 14 days each year that registration is required, regardless of the number of registrations received, will provide smaller entities sufficient time to submit registrations without being crowded-out by large entities. In addition, DHS believes that it is speculative to conclude that the registration system would result in large entities crowding-out small entities any more than they might already have the capacity to do under the current petition based process given that large entities may be able to more easily incur the costs associated with filing a petition. DHS believes that it is equally possible that small entities that do not currently participate may be more inclined to seek to employ an H-1B worker when the registration requirement is implemented, given the low cost to submit a registration. If more small entities file registrations, it is equally possible that the additional rates of participation by small entities could reduce the overall chances of selection for large entities. Either way, the degree

to which large entities may crowd-out small entities, or vice versa, is entirely speculative and DHS therefore does not believe that changes are needed to this final rule to address such speculation. DHS believes that the random selection process, when applicable, is sufficient to ensure that all registrants are considered fairly.

*Comment:* Multiple commenters argued that small businesses would be at a disadvantage because they would need to prioritize costlier employees with a master's degree over an equally competent candidate without one.

*Response:* Entities make the cost-benefit decision to hire workers that maximize production and profit to the entity. DHS disagrees that reversing the selection process always results in higher labor costs for entities. For example, entities could hire an H-1B worker with a master's degree from a U.S. higher educational institution over an H-1B worker with a Ph.D. from a foreign higher educational institution. Depending on the industry, location, etc. of the entity and worker, labor costs would be variable and may not always be higher.

*Comment:* A commenter suggested small businesses should get an extended time period to better understand the rule, while another commenter proposed a small business exemption that would give special preference to the hiring needs of small businesses. Similarly, a trade association suggested a separate exemption pool for small businesses should be made within the registration process to give such firms greater access to H-1B visas.

*Response:* DHS does not believe that small entities require special compliance accommodations for this rulemaking or that DHS has the statutory authority to provide special preference or exemptions to small businesses in the H-1B cap selection process. DHS is already delaying the implementation of the registration requirement, which DHS believes will be beneficial to all stakeholders involved. This delay in implementation and further notice from USCIS will provide small entities with the time necessary to adequately familiarize and plan for the new process.

c. The Response of the Agency to Any Comments Filed by the Chief Counsel For Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

The Acting Chief Counsel for Advocacy provided a comment on the proposed rule on behalf of the Small

Business Administration (SBA). DHS summarizes and responds to the comment as follows.

*Comment:* The SBA Office of Advocacy ("Advocacy") believes the registration requirement may not accomplish cost savings as estimated by USCIS in the NPRM in either the first year or any subsequent year. Advocacy believes that the registration requirement will just add another layer of bureaucracy to an already complicated process. Advocacy states that small businesses may not have cost savings in future years with this registration requirement because petitioners will hire attorneys and spend the same amount of time evaluating beneficiaries. Advocacy states that this rule will only make this process happen a month earlier than it otherwise would have under the current petition-based process.

*Response:* DHS does not plan to implement the registration requirement until after the FY 2020 H-1B cap year. While this rule will add another step in the process, when registration is required, for petitioners who are selected and thus eligible to submit an H-1B cap petition on behalf of a beneficiary named in the applicable registration selection notice, this additional registration step considerably reduces the time for those with unselected registrations. DHS believes the registration requirement makes the H-1B cap selection process more cost effective for petitioners and the government. Additionally, DHS disagrees with Advocacy that this rule will not produce cost savings in any given year. The registration process is intended to collect basic questions about the petitioner and the intended beneficiary which could reasonably be completed without the aid of an attorney, compared to the current lengthy and complicated process that requires the filling out of an entire H-1B Form I-129 petition. When registration is required, a petitioner could actually wait until after registration selection to incur the additional time and expense of petition preparation. Further, DHS disagrees with Advocacy's assertion that the registration requirement will extend the H-1B cap petition preparation timeline. As many commenters have expressed, in requesting DHS to delay implementation of the registration requirement, many petitioners and law firms begin the H-1B cap petition preparation process several months in advance of when petitions may be filed. As such, registration will not extend the timeline but rather will coincide with the existing timeline. Further, given the

limited information needed to register, as opposed to that require to submit a complete H-1B cap-subject petition, the registration requirement may even reduce the overall timeline as petitioners and law firms would have the option to delay petition preparation until after registration selection has occurred for the applicable fiscal year.

*Comment:* Advocacy believes that USCIS underestimated the compliance costs of the registration requirement. Advocacy summarizes the methodology USCIS used in the NPRM by stating that small entities are likely to employ outsourced attorneys at a total cost of \$264.35 and that registration will only take 1.55 hours. Advocacy believes that USCIS should increase burden estimates to factor in that small businesses may have multiple registrants.

*Response:* DHS disagrees with Advocacy in underestimating the costs of the registration requirement. DHS uses a reasonable methodology and approach to determine the total per petition cost of registration. DHS uses a loaded wage of \$170.55 for outsourced lawyers to account for higher salaries based on national wage data and employer paid benefits based on compensation costs provided by the Bureau of Labor Statistics. DHS uses time burdens of 0.17 hours for completion of account creation, 0.5 hours to complete registration, and 0.88 hours for filing and submitting Form G-28 (total of 1.55 hours). DHS reiterates that both the 0.17 hours for account creation and the 0.88 hours for filing and submitting Form G-28 are already OMB approved information collections. Further, DHS continues to believe that 0.5 hours is reasonable and adequate time for completion of registration since the tool only requests basic information. DHS believes it would be erroneous to increase the time burden for the registration requirement. Advocacy did not provide an alternative methodology for determining costs or burden in its comment and therefore, DHS believes the current costs are appropriate and reasonable estimates. DHS recognizes that one petitioner may submit multiple registrations and already addresses these situations in the rule. In the Executive Orders 12866 and 13563 sections of the NPRM and this final rule, DHS explicitly discusses that lawyers will only have to submit one Form G-28 when submitting multiple registrations for the same employer and accounts for this cost. DHS states that this will create efficiency for those lawyers that file multiple registrations for the same employer since the uploaded Form G-28 information can be provided once annually and linked with

all registrations filed by that lawyer or accredited representative for that employer. DHS also explicitly estimates the number of unique accounts and registrations and provides costs by preparer type in the Executive Orders 12866 and 13563. Therefore, DHS believes it is appropriate to keep the time burden estimate as proposed for the registration requirement in this final rule.

*Comment:* Advocacy recommends re-analyzing the impact to small businesses resulting from the advanced degree exemption allocation change. Advocacy states that small start-up businesses note that most skilled and highest paid staffers at their tech companies often only have a 4-year degree and this provision may deter these types of companies from participating in the H-1B program. Advocacy states that this rule does not factor work experience of employees with a bachelor's degree who might be more skilled than a recent graduate student.

*Response:* DHS does not believe that the impact to small entities resulting from the advanced degree exemption allocation provision needs to be re-analyzed. DHS was not able to quantify the impact of this provision because the H-1B cap selection process often involves a random lottery given the excess demand for new H-1B workers, and DHS cannot predict or control how many bachelor's or master's degree holders from U.S. institutions are ultimately selected during random selection. Additionally, DHS reiterates that the purpose of the change in the advanced degree exemption is to increase the probability of selecting more workers that have a master's degree or higher from a U.S. educational institution. DHS disagrees with Advocacy's conclusion that small entities will be deterred from participating in the H-1B program. DHS believes that the lower barrier in costs resulting from this rule will in fact increase participation by small entities.

*Comment:* Advocacy states that the timing of an early registration process may shut small businesses out of the H-1B program who cannot anticipate their employment needs or may not have the necessary budget seven or more months in advance. They note that some small U.S. based IT staffing companies already find it difficult to meet the April 1st deadline. Additionally, Advocacy is concerned that 60 days may not be enough time for some small businesses to obtain the needed documentation to

file a petition, such as a Labor Condition Application.

*Response:* As previously stated, in each fiscal year, the registration period will begin at least 14 calendar days before the first day of petition filing and will last at least 14 calendar days. DHS notes that although registration will occur prior to the previous filing period, the process will reduce the cost, paperwork burden, and complexity of participation to all businesses regardless of size and believes this benefit outweighs any costs, including registration periods that are 14 calendar days prior. Additionally, and as described in the preamble of this final rule, DHS initially proposed a filing period of at least 60 days in the NPRM. In response to public comments stating that 60 days is an insufficient amount of time for a company to gather all the necessary documentation to properly file the petition, DHS is revising the filing period to be at least 90 days.

Advocacy also commented on the flooding of registrations that would be received and the use of an improperly tested electronic system. DHS has provided responses to similar comments in other part of this preamble.

#### d. A Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

DHS conducted a statistically valid sample analysis of H-1B cap-subject petitions to determine the maximum potential number of small entities directly impacted by this rule. DHS utilized a subscription-based online database of U.S. entities, Hoovers Online, as well as two other open-access, free databases of public and private entities, Manta and Cortera, to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity.<sup>166</sup> In order to determine a business' size, DHS first classified each entity by its NAICS code, and then used SBA guidelines to note the requisite revenue or employee count threshold for each entity. Some entities were classified as small based on their annual revenue and some by number of employees.

Using FY 2016 data on H-1B cap-subject petitions selected in the H-1B cap-subject selection process, DHS collected internal data for each filing

organization.<sup>167</sup> Each entity may make multiple filings. For instance, there were 95,839 H-1B cap-subject petitions selected,<sup>168</sup> but only 20,046<sup>169</sup> unique entities that filed H-1B cap-subject petitions. DHS devised a methodology to conduct the small entity analysis based on a representative, statistically valid random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 20,046 entities, DHS used the standard statistical formula to determine that a minimum sample size of 377 entities was necessary. DHS created a sample size 30 percent greater than the 377 minimum necessary in order to increase the likelihood that our matches would meet or exceed the minimum required sample. Of the 491 entities<sup>170</sup> sampled, 385 instances resulted in entities defined as small (Table 24). Of the 385 small entities, 293 entities were classified as small by revenue or number of employees. The remaining 92 entities were classified as small because information was not found (either no petitioner name was found or no information was found in the databases). A total of 103 entities were classified as not small. Therefore, of the 20,046 entities that filed at least one Form I-129 in FY 2016, DHS estimates that 78 percent or 15,636 entities are considered small based on SBA size standards.<sup>171</sup>

<sup>167</sup> USCIS Office of Performance and Quality (OPQ), Performance Analysis and External Reporting (PAER), May 25, 2017.

<sup>168</sup> Number of petitions reported in this IRFA (95,839) shows 7 more receipts than is shown in the population section of the Economic Analysis (95,832). This discrepancy is due to OPQ pulling the data for the IRFA (April 25, 2017) and the data for the Economic Analysis (May 22, 2017) from the same database at different times. During the time in between data pulls, petitioner(s) withdrew 7 H-1B petitions. We do not know which petitions were withdrawn. Therefore, the IRFA uses all petitions as of April 25, 2017.

<sup>169</sup> Number of unique entities reported in this IRFA (20,046) shows 426 more receipts than is shown in Table 6 of the costs section of the Economic Analysis (19,620). This discrepancy is due to OPQ pulling the data for the IRFA (April 25, 2017) and the data for the Economic Analysis (January 12, 2018) from the same database at different times. During the time in between data pulls, petitioner(s) withdrew H-1B petitions. We do not know which petitions were withdrawn. Therefore, the IRFA uses all petitions as of April 25, 2017.

<sup>170</sup> Calculation:  $377 + (377 * 30 \text{ percent}) = 491$  (rounded).

<sup>171</sup> Calculation:  $20,046 \text{ entities} * 78 \text{ percent} = 15,636$  small entities (rounded).

<sup>166</sup> The Hoovers website can be found at <http://www.hoovers.com/>; The Manta website can be found at <http://www.manta.com/>; and the Cortera website can be found at <https://www.cortera.com/>.

| <b>Parameter</b>  | <b>Quantity</b> | <b>Proportion of Sample (percent)</b> |
|---|-----------------|---------------------------------------|
| Population—Selected H-1B cap-subject petitions  | 95,839          | -                                     |
| Population—Unique Entities  | 20,046          | -                                     |
| Minimum Required Sample   | 377             | -                                     |
| Selected Sample   | 491             | 100.00                                |
| <b>Entities Classified as “Not Small”</b>   |                 |                                       |
| by revenue  | 98              | 19.96                                 |
| by number of employees  | 8               | 1.63                                  |
| <b>Entities Classified as “Small”</b>   |                 |                                       |
| by revenue  | 233             | 47.45                                 |
| by number of employees  | 60              | 12.21                                 |
| because no information found in databases   | 92              | 18.75                                 |
| <b>Total Number of Small Entities</b>   | <b>385</b>      | <b>78.41<sup>a</sup></b>              |
| Source: USCIS analysis.   |                 |                                       |
| <sup>a</sup> Calculation: 47.45 percent (Entities classified as small by revenue) + 12.21 percent (Entities classified as small by number of employees) + 18.75 percent (Entities classified as small because no information found in database) = 78 percent (total number of small entities, rounded). |                 |                                       |

As previously stated, DHS classified each entity by its NAICS code to

determine business' size. Table 25 shows a list of the top 10 NAICS

industries that submit an H-1B cap petition.

**Table 25: Top 10 NAICS Industries Submitting Form I-129, Small Entity Analysis Results.**

| Rank | NAICS Code | NAICS U.S. Industry Title  | Size Standards in millions of dollars <sup>a</sup> | Size Standards in number of employees <sup>a</sup> |
|------|------------|--|--|--|
| 1    | 541511     | Custom Computer Programming Services                                 | \$27.5   | -  |
| 2    | 541512     | Computer Systems Design Services                                     | \$27.5   | -  |
| 3    | 561499     | All Other Business Support Services                                  | \$15.0   | -  |
| 4    | 541330     | Engineering Services   | \$15.0   | -  |
| 5    | 511210     | Software Publishers  | \$38.5   | -  |
| 6    | 541611     | Administrative Management and General Management Consulting Services | \$15.0   | -  |
| 7    | 334413     | Semiconductor and Related Device Manufacturing                       | -  | 1,250  |
| 8    | 541618     | Other Management Consulting Services                                 | \$15.0   | -  |
| 9    | 541690     | Other Scientific and Technical Consulting Services                   | \$15.0   | -  |
| 10   | 325412     | Pharmaceutical Preparation Manufacturing                             |  | 1,250  |

Source: USCIS analysis.

<sup>a</sup> The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 C.F.R., section 121.201.

The increase in cost per petition to file Form I-129 (and if relevant, Forms I-907 or G-28) on behalf of a cap-subject H-1B worker is the opportunity cost of time to create an account, complete the registration and file Form G-28 if registration is completed by a lawyer. As previously stated in section

5(b), this final rule will add \$31.14<sup>172</sup> in costs to submit a registration for a single beneficiary if an HR specialist files, \$152.19<sup>173</sup> in costs to submit a registration for a single beneficiary if an in-house lawyer files, and \$264.35<sup>174</sup> in costs to submit a registration for a single beneficiary if an outsourced lawyer files

(an average cost of \$149.23 per entity), which are summarized in Table 26. In order to calculate the impact of this increase, DHS estimates the total costs associated with the registration increase for each entity, divided by sales revenue of that entity.<sup>175 176</sup>

**Table 26: Cost per Registration Associated with the Registration Requirement by Type of Preparer.**

|                              | HR Specialist | In-house Lawyer | Outsourced Lawyer |
|------------------------------|---------------|-----------------|-------------------|
| Cost for Single Registration | \$31.14       | \$154.38        | \$264.35          |

Source: USCIS analysis.

<sup>172</sup> Calculation: \$7.90 opportunity cost of account creation + \$23.24 opportunity cost of registration = \$31.14 added costs.

<sup>173</sup> Calculation: \$16.93 opportunity cost of account creation + \$49.80 opportunity cost of registration + \$87.65 cost to complete Form G-28 for in-house lawyer = \$154.38 added costs.

<sup>174</sup> Calculation: \$28.99 opportunity cost of account creation + \$85.28 opportunity cost of registration + \$150.08 cost to complete Form G-28 for in-house lawyer = \$264.35 added costs.

<sup>175</sup> For HR specialists: Total Impact to Entity = Number of Petitions \* (\$31.14)/Entity Sales Revenue. For in-house lawyers: Total Impact to

Entity = Number of Petitions \* (\$154.38)/Entity Sales Revenue. For outsourced lawyers: Total Impact to Entity = Number of Petitions \* (\$264.35)/Entity Sales Revenue.

<sup>176</sup> USCIS used the lower end of the sales revenue range for those entities where ranges were provided.

Since entities can file multiple petitions, this analysis uses the number of petitions submitted by each entity. Entities that were considered small based on employee count with missing revenue data were excluded. Among the 229 small entities with reported revenue data, the greatest economic impact imposed by this rule will be 2.227 percent if an HR specialist files, 11.035 percent if an in-house lawyer files, and 18.896 percent if an outsourced lawyer files. The smallest economic impact will be 0.0001 percent if an HR specialist files, 0.0007 percent if an in-house lawyer files and 0.0012 percent if an outsourced lawyer files. The average impact on all 229 small entities with revenue data will be 0.186 percent if an HR specialist files, 0.921 percent if an in-house lawyer files and 1.576 percent if an outsourced lawyer files.

Table 3 shows that 97,198 H-1B cap-subject petitions are selected annually. Table 21 shows that 78 percent of selected petitioners are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 97,198 selected petitioner population, 75,814<sup>177</sup> selected petitions are submitted by small entities.

Next, DHS estimates the number of selected small entities with beneficiaries holding a master's degree or higher from a U.S. institution of higher education. To estimate this, DHS assumes that the percentage of petitions for the advanced degree exemption received annually by USCIS (29 percent), from section 4, is a reasonable percentage to estimate the relevant distribution among small entities. As stated previously, anecdotal evidence suggests that very few petitions do not align with the education requirements of the numerical limitation under which the petition was submitted. Therefore, of the selected 75,814 petitions submitted by small entities, DHS estimates that 21,986<sup>178</sup> petitions have a beneficiary holding a master's degree or higher from a U.S. institution of higher education. DHS assumes 50,619<sup>179</sup> petitions are submitted by small entities for beneficiaries who have not earned a master's degree or higher from a U.S. institution of higher education (*i.e.* beneficiaries who have earned a bachelor's degree (or its equivalent), foreign advanced degree, or advanced degree from an institution in the United States that does not qualify as a U.S.

institution of higher education as defined at 20 U.S.C. 1001(a)). DHS is unable to quantitatively estimate the impact of the new selection process on petitioning employers. DHS does not anticipate petitioning employers will suffer economic harm from the decreased probability of selecting, under the new selection process, an H-1B beneficiary who has not earned a master's degree or higher from a U.S. institution of higher education.

#### d. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

This final rule does not require any new professional skills for reporting, but does directly impose new "reporting" requirements in the form of registration for an H-1B cap subject petition. As stated earlier, DHS estimates that 78 percent of entities that filed at least one Form I-129 in FY 2016 were considered small based on SBA size standards. For unselected petitions the total cost will range from \$2,324,975 to \$19,736,899 depending on the preparer and for selected petitions the total cost for registration ranges from \$2,360,862 to \$20,041,430 depending on the preparer.<sup>180</sup>

#### e. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

This final rule will add a registration requirement for all petitioners who seek to file an H-1B cap-subject petition. DHS considered alternative solutions that are described in further detail in

Executive Orders 12866 and 13653. One alternative was a first-in, first-out registration process where USCIS would select registrations strictly in the order in which registrations are properly submitted. This alternative would not minimize the impact on small entities, but rather would disadvantage small entities that would have to compete with the resources and personnel of larger entities, which may enable larger entities to submit registrations faster and sooner than small entities. DHS decided against the alternative described.

Additionally, the status quo alternative is a much more costly process for petitioners as long as demand continues to exceed available visas. The high costs of filing a full H-1B petition without the guarantee of obtaining a worker under the status quo could be a barrier to some small entities. The lower costs of a registration system could allow more small entities to submit a registration that otherwise may not file a full H-1B petition.

#### C. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

Executive Order (E.O.) 13771 on Reducing Regulation and Controlling Regulatory Costs requires all agencies to repeal or revise at least two existing regulations, guidance documents, or information collections with costs less than zero whenever a new final regulation will have costs greater than zero. Under E.O. 13771 any new incremental costs associated with the proposed regulation must be offset by the elimination of existing costs associated with a repealed or revised regulation or other applicable document. Additionally, no regulation can exceed DHS' total incremental cost allowance set by the OMB Director, unless a waiver is obtained from OMB. For FY 2019, OMB has set a regulatory cost threshold of \$0 for DHS.

DHS's analysis finds that this final rule is expected to result in annual net benefits ranging from \$43 million to \$63 million mainly due to the reduction in time burden of unselected petitioners who would no longer have to complete and file H-1B cap-subject petitions. Since this rule reduces costs and time burden, the rule is considered to be a deregulatory action for the purposes of E.O. 13771. The cumulative cost savings in perpetually annualized 2016 dollars at 7 percent ranges between \$35,517,898 and \$51,204,860. DHS notes, however, that these cost savings assume that there is no expansion in the number of registrations. Given the lower barrier to submitting a registration as compared to

<sup>177</sup> Calculation: 97,198 annually selected petitions \* 78 percent = 75,814 submitted by small entities (rounded).

<sup>178</sup> Calculation: 75,814 petitions \* 29 percent = 21,986 petitions.

<sup>179</sup> Calculation: 75,814 - 21,986 = 53,828 petitions.

<sup>180</sup> Calculation: Unselected petitions: HR specialist = (95,720 unselected petitions from Table 4 \* 78 percent) \* \$31.14 from Table 26 = \$2,324,975 (rounded); In-house lawyer = (95,720 unselected petitions from Table 4 \* 78 percent) \* \$154.38 from Table 26 = \$11,526,319; Outsourced lawyers = (95,720 unselected petitions from Table 4 \* 78 percent) \* \$264.35 from Table 26 = \$19,736,899. Selected petitions: HR specialists = (97,198 selected petitions from Table 4 \* 78 percent) \* \$31.14 from Table 26 = \$2,360,862 (rounded); In-house lawyer = (97,198 selected petitions from Table 4 \* 78 percent) \* \$154.38 from Table 26 = \$11,704,165; Outsourced lawyers = (97,198 selected petitions from Table 4 \* 78 percent) \* \$264.35 from Table 26 = \$20,041,430.



submitting a petition, DHS believes that it is likely that more registrations will be received under the rule than the agency currently receives in petitions—particularly because DHS will not be charging a fee for registration under this rule at this time. If there is, in fact, an expansion in the number of registrations, the cost savings would be reduced. DHS is uncertain of the extent to which registrations will increase and thus cannot estimate the degree to which cost savings would be reduced at this time.

#### *D. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of \$100 million in 1995 adjusted for inflation to 2017 levels by the Consumer Price Index for All Urban Consumers (CPI-U) is \$161 million.

This final rule does not exceed the \$100 million expenditure in any 1 year when adjusted for inflation (\$161 million in 2017 dollars), and this rulemaking does not contain such mandates. The requirements of Title II of the Act, therefore, do not apply, and the Department has not prepared a statement under the Act.

#### *E. Small Business Regulatory Enforcement Fairness Act of 1996*

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This final rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. However, as some small businesses may be impacted under this regulation, DHS has prepared a Final Regulatory Flexibility Analysis (FRFA) under the Regulatory Flexibility Act (RFA).

#### *F. Congressional Review Act*

DHS has sent this final rule to the Congress and to Comptroller General under the Congressional Review Act, 5 U.S.C. 801 *et seq.* This rule is a “major rule” within the meaning of the Congressional Review Act and therefore has a 60-day delayed effective date.

#### *G. Executive Order 13132 (Federalism)*

This final rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132, DHS has determined that this rulemaking does not have significant Federalism implications to warrant the preparation of federalism summary impact statement.

#### *H. Executive Order 12988 (Civil Justice Reform)*

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

#### *I. National Environmental Policy Act*

DHS analyzes actions to determine whether NEPA applies to them and, if so, what degree of analysis is required. DHS Directive (Dir) 023–01 Rev. 01 and Instruction (Inst.) 023–01–001 rev. 01 establish the 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)(1)(iii), 1508.4. DHS Instruction 023–01–001 Rev. 01 establishes such Categorical Exclusions that DHS has found to have no such effect. Inst. 023–01–001 Rev. 01 Appendix A Table 1. For an action to be categorically excluded, DHS Inst. 023–01–001 Rev. 01 requires the action to 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. Inst. 023–01–001 Rev. 01 section V.B (1)–(3).

DHS analyzed this action and has concluded that NEPA does not apply due to the excessively speculative nature of any effort to conduct an impact analysis. Nevertheless, if NEPA did apply to this action, the action clearly would come within our categorical exclusion A.3(d) as set forth in DHS Inst. 023–01–001 Rev. 01, Appendix A, Table 1.

As discussed in more detail throughout this final rule, this rule will require petitioners seeking to file H–1B cap-subject petitions to first electronically register with USCIS during a designated registration period. Unless the registration requirement is suspended by USCIS, in order to properly file an H–1B cap-subject petition, the petitioner must have a selected registration for the beneficiary named in the H–1B cap-subject petition for the applicable fiscal year. In addition, this final rule changes the order in which USCIS selects H–1B beneficiaries who may be counted toward the projected number of petitions needed to reach the H–1B regular cap (65,000) or the H–1B advanced degree exemption allocation (20,000). Under this final rule, USCIS will select registrations (petitions, if the registration requirement is suspended) under the regular cap first, including registrations for beneficiaries eligible for the advanced degree exemption, until the projected number needed to meet the regular cap is reached, and only then will USCIS select registrations that are eligible for the advanced degree exemption until the projected number needed to meet the advanced degree exemption allocation is reached. This change will likely increase the number of beneficiaries with a master’s or higher degree from a U.S. institution of higher education that would be selected. However, this rule does not alter the statutory limitations on the numbers of nonimmigrants who may be issued new H–1B visas or granted initial H–1B status, or who will consequently be admitted into the United States as H–1B nonimmigrants, or allowed to change their status to H–1B, or extend their stay in H–1B status. This rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, if NEPA were determined to apply, this rule would be categorically excluded from further NEPA review.

*J. Paperwork Reduction Act*

## USCIS H-1B Registration Tool

The final rule will require that petitioners submit a registration for each beneficiary for whom they wish to file an H-1B cap-subject petition via Form I-129, Petition for Nonimmigrant Worker, unless the registration requirement is suspended by USCIS. USCIS has addressed comments received on the registration information collection in the responses above, and has updated the information collection. USCIS will publish a notice in the **Federal Register** to announce that it is implementing the registration requirement in advance of the cap season during which the registration requirement will be in effect for the first time.

a. *Type of Information Collection:* New information collection.

b. *Abstract:* The data collected during the H-1B Registration process will determine which petitioners will be informed that they may submit a USCIS Form I-129, Petition for Nonimmigrant Worker, as an H-1B cap-subject nonimmigrant petition. USCIS will collect the minimum amount of information needed to identify the prospective H-1B cap-subject petitioner and the named beneficiary, to eliminate duplicate registrations, and to match selected registrations with subsequently filed Form I-129 H-1B cap-subject petitions.

c. *Title of the Form/Collection:* H-1B Registration Tool.

d. *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No Agency Form Number; USCIS.

e. *Affected public who will be asked or required to respond, as well as a brief abstract:* Business or other for-profit.

f. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H-1B Registration Tool is 192,918 and the estimated hour burden per response is .5 hours.

g. *Hours per response:* The total estimated annual hour burden associated with this collection is 96,459 hours.

h. *Total Annual Reporting Burden:* The estimated total annual cost burden associated with this collection of information is \$0.

## USCIS Form I-129

USCIS is revising the estimated number of respondents for Form I-129, Petition for Nonimmigrant Worker, but is not changing the time burden per

response as no changes were made to this collection of information.

a. *Type of Information Collection:* Revision of a Currently Approved Collection.

b. *Abstract:* 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.

c. *Title of the Form/Collection:* Petition for Nonimmigrant Worker.

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

e. *Affected public who will be asked or required to respond, as well as a brief abstract:* Business or other for-profit.

f. *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 2.34 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; 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; 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; 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; 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; 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; 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; 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.

g. *Hours per response:* The total estimated annual hour burden associated with this collection is 1,072,810 hours.

h. *Total Annual Reporting Burden:* The estimated total annual cost burden associated with this collection of information is \$70,680,553.

## USCIS Form G-28

USCIS is revising the estimated number of respondents for Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative; Notice of Entry of Appearance as Attorney In Matters Outside the Geographical Confines of the United States.

a. *Type of Information Collection:* Revision of a Currently Approved Collection.

b. *Abstract:* The data collected on Forms G-28 and G-28I is used by DHS to determine eligibility of the individual to appear as a representative. Form G-28 is used by attorneys admitted to the practice of law in the United States and accredited representatives of certain non-profit organizations recognized by the Department of Justice. Form G-28I is used by attorneys admitted to the practice of law in countries other than the United States and only in matters in DHS offices outside the geographical confines of the United States. If the representative is eligible, the form is filed with the case and the information is entered into DHS systems for whatever type of application or petition it may be.

c. *Title of the Form/Collection:* Notice of Entry of Appearance as Attorney or Accredited Representative; Notice of Entry of Appearance as Attorney In matters Outside the Geographical Confines of the United States.

d. *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* G-28; G-28I; USCIS.

e. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit.

f. *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 G–28 paper filing is 2,638,276 and the estimated hour burden per response is 0.833 hours; the estimated total number of respondents for the information collection G–28 electronic filing is 281,950 and the estimated hour burden per response is 0.667 hours; the estimated total number of respondents for the information collection G–28I is 25,057 and the estimated hour burden per response is 0.700 hours.

g. *Hours per response:* The total estimated annual hour burden associated with this collection is 2,403,285 hours.

h. *Total Annual Reporting Burden:* The estimated total annual cost burden associated with this collection of information is \$0.

#### USCIS ICAM

USCIS is revising the estimated number of respondents for the Identity, Credential, and Access Management (ICAM) information collection.

a. *Type of Information Collection:* Revision of a Currently Approved Collection.

b. *Abstract:* In order to interact with USCIS electronic systems accessible through the USCIS ICAM portal, a first-time user must establish an account. The account creation process requires the user to submit a valid email address; create a password; select their preference for receiving a one-time password (via email, mobile phone, or both); select five password reset questions and responses; and indicate the account type they want to set up (customer or legal representative). The account creation and the account login processes both require the user to receive and submit a one-time password. The one-time password can be provided either as an email to an email address or to a mobile phone via text message.

USCIS ICAM currently grants access to myUSCIS and the information collections available for online filing. ICAM would also be the portal through which accounts to submit H–1B cap registrations would be created and accessed.

c. *Title of the Form/Collection:* USCIS Identity and Credentialing Access Management (ICAM).

d. *Agency form number, if any, and the applicable component of the DHS*

*sponsoring the collection:* No Form; USCIS.

e. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households.

f. *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 ICAM is 2,813,225 and the estimated hour burden per response is 0.167 hours.

g. *Hours per response:* The total estimated annual hour burden associated with this collection is 469,809 hours.

h. *Total Annual Reporting Burden:* The estimated total annual cost burden associated with this collection of information is \$0.

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

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

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

#### PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 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.

■ 2. Section 214.2 is amended by:

- a. Redesignating paragraph (h)(9)(i)(B) as paragraph (h)(2)(i)(I) and revising it;
- b. Adding paragraph (h)(8)(iii);
- c. Redesignating paragraph (h)(8)(ii)(F) as paragraph (h)(8)(iii)(F);
- d. In newly redesignated paragraphs (h)(8)(ii)(F)(6)(i) and (i), removing the reference to “(h)(8)(ii)(F)(6)” and adding in its place “(h)(8)(iii)(F)(6)”;
- e. Removing paragraph (h)(8)(ii)(B);
- f. Redesignating paragraphs (h)(8)(ii)(C) and (D) as paragraphs (h)(8)(ii)(B) and (C), respectively;
- g. Redesignating paragraphs (h)(8)(ii)(E) introductory text and (h)(8)(ii)(E)(1) through (6) as paragraphs (h)(8)(vi) introductory text and (h)(8)(vi)(A) through (F), respectively;
- h. Adding paragraphs (h)(8)(iv) and (v);

- i. Adding a heading for newly redesignated paragraph (h)(8)(vi);
- j. In newly redesignated paragraph (h)(8)(vi)(A), removing the reference to “(h)(8)(ii)(F)(3)” and adding in its place “(h)(8)(vi)(C)”;
- k. In newly redesignated paragraph (h)(8)(vi)(B), removing the references to “(h)(8)(ii)(F)(1)” and “(h)(8)(ii)(F)(3)” and adding in their place “(h)(8)(vi)(A)” and “(h)(8)(vi)(C),” respectively;
- l. Adding paragraph (h)(8)(vii); and
- m. Revising paragraph (h)(9)(i).

The additions and revisions read as follows:

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

\* \* \* \* \*

(h) \* \* \*

(2) \* \* \*

(i) \* \* \*

(1) *Time of filing.* A petition filed under section 101(a)(15)(H) of the Act may not be filed earlier than 6 months before the date of actual need for the beneficiary’s services or training.

\* \* \* \* \*

(8) \* \* \*

(iii) *H–1B numerical limitations—(A) Registration—(1) Registration requirement.* Except as provided in paragraph (h)(8)(iv) of this section, before a petitioner can file an H–1B cap-subject petition for a beneficiary who may be counted under section 214(g)(1)(A) of the Act (“H–1B regular cap”) or eligible for exemption under section 214(g)(5)(C) of the Act (“H–1B advanced degree exemption”), the petitioner must register to file a petition on behalf of an alien beneficiary electronically through the USCIS website ([www.uscis.gov](http://www.uscis.gov)). To be eligible to file a petition for a beneficiary who may be counted against the H–1B regular cap or the H–1B advanced degree exemption for a particular fiscal year, a registration must be properly submitted in accordance with 8 CFR 103.2(a)(1), paragraph (h)(8)(iii) of this section and the form instructions. A petitioner may file an H–1B cap-subject petition on behalf of a registered beneficiary only after the petitioner’s registration for that beneficiary has been selected for that fiscal year. USCIS will notify the petitioner of the selection of the petitioner’s registered beneficiaries.

(2) *Limitation on beneficiaries.* A petitioner must electronically submit a separate registration to file a petition for each beneficiary it seeks to register, and each beneficiary must be named. A petitioner may only submit one registration per beneficiary in any fiscal year. If a petitioner submits more than one registration per beneficiary in the

same fiscal year, all registrations filed by that petitioner relating to that beneficiary for that fiscal year will be considered invalid.

(3) *Initial registration period.* The annual initial registration period will last a minimum of 14 calendar days and will start at least 14 calendar days before the earliest date on which H-1B cap-subject petitions may be filed for a particular fiscal year, consistent with paragraph (h)(2)(i)(I) of this section. USCIS will announce the start and end dates of the initial registration period on the USCIS website at [www.uscis.gov](http://www.uscis.gov) for each fiscal year. USCIS will announce the start of the initial registration period at least 30 calendar days in advance of such date.

(4) *Limitation on requested start date.* A petitioner may submit a registration during the initial registration period only if the requested start date for the beneficiary is the first day for the applicable fiscal year. If USCIS keeps the registration period open beyond the initial registration period, or determines that it is necessary to re-open the registration period, a petitioner may submit a registration with a requested start date after the first business day for the applicable fiscal year, as long as the date of registration is no more than 6 months before the requested start date.

(5) *Regular cap selection.* In determining whether there are enough registrations to meet the H-1B regular cap, USCIS will consider all properly submitted registrations relating to beneficiaries that may be counted under section 214(g)(1)(A) of the Act, including those that may also be eligible for exemption under section 214(g)(5)(C) of the Act.

(i) *Fewer registrations than needed to meet the H-1B regular cap.* At the end of the annual initial registration period, if USCIS determines that it has received fewer registrations than needed to meet the H-1B regular cap, USCIS will notify all petitioners that have properly registered that their registrations have been selected. USCIS will keep the registration period open beyond the initial registration period, until it determines that it has received a sufficient number of registrations to meet the H-1B regular cap. Once USCIS has received a sufficient number of registrations to meet the H-1B regular cap, USCIS will no longer accept registrations for petitions subject to the H-1B regular cap under section 214(g)(1)(A). USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the “final registration date”). The day the public is

notified will not control the applicable final registration date. When necessary to ensure the fair and orderly allocation of numbers under Section 214(g)(1)(A) of the Act, USCIS may randomly select the remaining number of registrations deemed necessary to meet the H-1B regular cap from among the registrations received on the final registration date. This random selection will be made via computer-generated selection.

(ii) *Sufficient registrations to meet the H-1B regular cap during initial registration period.* At the end of the initial registration period, if USCIS determines that it has received more than sufficient registrations to meet the H-1B regular cap, USCIS will no longer accept registrations under section 214(g)(1)(A) of the Act and will notify the public of the final registration date. USCIS will randomly select from among the registrations properly submitted during the initial registration period the number of registrations deemed necessary to meet the H-1B regular cap. This random selection will be made via computer-generated selection.

(6) *Advanced degree exemption selection.* After USCIS has determined it will no longer accept registrations under section 214(g)(1)(A) of the Act, USCIS will determine whether there is a sufficient number of remaining registrations to meet the H-1B advanced degree exemption.

(i) *Fewer registrations than needed to meet the H-1B advanced degree exemption numerical limitation.* If USCIS determines that it has received fewer registrations than needed to meet the H-1B advanced degree exemption numerical limitation, USCIS will notify all petitioners that have properly registered that their registrations have been selected. USCIS will continue to accept registrations to file petitions that may be eligible for the H-1B advanced degree exemption under section 214(g)(5)(C) of the Act until USCIS determines that it has received enough registrations to meet the H-1B advanced degree exemption numerical limitation. USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the “final registration date”). The day the public is notified will not control the applicable final registration date. When necessary to ensure the fair and orderly allocation of numbers under Section 214(g)(1)(A) of the Act, USCIS may randomly select the remaining number of registrations deemed necessary to meet the H-1B advanced degree exemption numerical limitation from among the registrations properly submitted on the final

registration date. This random selection will be made via computer-generated selection.

(ii) *Sufficient registrations to meet the H-1B advanced degree exemption numerical limitation.* If USCIS determines that it has received more than enough registrations to meet the H-1B advanced degree exemption numerical limitation, USCIS will no longer accept registrations that may be eligible for exemption under section 214(g)(5)(C) of the Act and will notify the public of the final registration date. USCIS will randomly select the number of registrations needed to meet the H-1B advanced degree exemption numerical limitation from among the remaining registrations that may be counted against the advanced degree exemption numerical limitation. This random selection will be made via computer-generated selection.

(7) *Increase to the number of registrations projected to meet the H-1B regular cap or advanced degree exemption allocations in a fiscal year.* Unselected registrations will remain on reserve for the applicable fiscal year. If USCIS determines that it needs to increase the number of registrations projected to meet the H-1B regular cap or advanced degree exemption allocation, and select additional registrations, USCIS will select from among the registrations that are on reserve a sufficient number to meet the H-1B regular cap or advanced degree exemption numerical limitation, as applicable. If all of the registrations on reserve are selected and there are still fewer registrations than needed to meet the H-1B regular cap or advanced degree exemption numerical limitation, as applicable, USCIS may reopen the applicable registration period until USCIS determines that it has received a sufficient number of registrations projected as needed to meet the H-1B regular cap or advanced degree exemption numerical limitation. USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the new “final registration date”). The day the public is notified will not control the applicable final registration date. When necessary to ensure the fair and orderly allocation of numbers, USCIS may randomly select the remaining number of registrations deemed necessary to meet the H-1B regular cap or advanced degree exemption numerical limitation from among the registrations properly submitted on the final registration date. If the registration period will be re-opened, USCIS will announce the start of the re-opened

registration period on the USCIS website at [www.uscis.gov](http://www.uscis.gov).

(B) *Confirmation.* Petitioners will receive electronic notification that USCIS has accepted a registration for processing.

(C) *Notification to file H-1B cap-subject petitions.* USCIS will notify all petitioners with selected registrations that the petitioner is eligible to file an H-1B cap-subject petition on behalf of the beneficiary named in the notice within the filing period indicated on the notice.

(D) *H-1B cap-subject petition filing following registration—(1) Filing procedures.* In addition to any other applicable requirements, a petitioner may file an H-1B petition for a beneficiary that may be counted under section 214(g)(1)(A) or eligible for exemption under section 214(g)(5)(C) of the Act only if the petitioner's registration to file a petition on behalf of the beneficiary named in the petition was selected beforehand by USCIS and only within the filing period indicated on the notice. A petitioner may not substitute the beneficiary named in the original registration or transfer the registration to another petitioner. If a petitioner files an H-1B cap-subject petition based on a registration that was not selected beforehand by USCIS, or based on a registration for a different beneficiary than the beneficiary named in the petition, the H-1B cap-subject petition will be denied or rejected.

(2) *Filing period.* An H-1B cap-subject petition must be properly filed within the filing period indicated on the relevant selection notice. The filing period for filing the H-1B cap-subject petition will be at least 90 days. If petitioners do not meet these requirements, USCIS will deny or reject the H-1B cap-subject petition.

(E) *Calculating the number of registrations needed to meet the H-1B regular cap and H-1B advanced degree exemption allocation.* When calculating the number of registrations needed to meet the H-1B regular cap and the H-1B advanced degree exemption numerical limitation for a given fiscal year, USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. If necessary, USCIS may increase those numbers throughout the fiscal year.

\* \* \* \* \*

(iv) *Suspension of registration requirement—(A) Determination to suspend registration requirement.* USCIS may suspend the H-1B registration requirement, in its discretion, if it determines that the

registration process is inoperable for any reason. If USCIS suspends the registration requirement, USCIS will make an announcement of the suspension on its website (<http://www.uscis.gov>) along with the opening date of the applicable H-1B cap-subject petition-filing period.

(B) *Petition-based cap-subject selections in event of suspended registration process.* In any year in which USCIS suspends the H-1B registration process for cap-subject petitions, USCIS will allow for the submission of H-1B petitions notwithstanding paragraph (h)(8)(iii) of this section and conduct a cap-subject selection process based on the petitions that are received. USCIS will deny petitions indicating that they are exempt from the H-1B regular cap and the H-1B advanced degree exemption if USCIS determines, after the final receipt date, that they are not eligible for the exemption sought. If USCIS determines, on or before the final receipt date, that the petition is not eligible for the exemption sought, USCIS may consider the petition under the applicable numerical allocation and proceed with processing of the petition. If a petition is denied under this paragraph (h)(8)(iv)(B), USCIS will not return or refund filing fees.

(1) *H-1B regular cap selection in event of suspended registration process.* In determining whether there are enough H-1B cap-subject petitions to meet the H-1B regular cap, USCIS will consider all petitions properly submitted in accordance with 8 CFR 103.2 relating to beneficiaries that may be counted under section 214(g)(1)(A) of the Act, including those that may be eligible for exemption under section 214(g)(5)(C) of the Act. When calculating the number of petitions needed to meet the H-1B regular cap USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received and will announce on its website the date that it receives the number of petitions projected as needed to meet the H-1B regular cap (the "final receipt date"). The date the announcement is posted will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers under the H-1B regular cap, USCIS may randomly select via computer-generated selection the remaining number of petitions deemed necessary to meet the H-1B regular cap from among the petitions properly submitted on the final receipt date. If the final receipt date is any of the first five business days on which petitions

subject to the H-1B regular cap may be received (*i.e.*, if the cap is reached on any one of the first five business days that filings can be made), USCIS will randomly select from among all the petitions properly submitted during the first five business days the number of petitions deemed necessary to meet the H-1B regular cap. After any random selection under this paragraph (h)(8)(iv)(B)(1), petitions that are subject to the H-1B regular cap and that do not qualify for the H-1B advanced degree exemption will be rejected if they are not randomly selected or were received after the final receipt date.

(2) *Advanced degree exemption selection in event of suspended registration process.* After USCIS has received a sufficient number of petitions to meet the H-1B regular cap and, as applicable, completed the random selection process of petitions for the H-1B regular cap, USCIS will determine whether there is a sufficient number of remaining petitions to meet the H-1B advanced degree exemption numerical limitation. When calculating the number of petitions needed to meet the H-1B advanced degree exemption numerical limitation USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received and will announce on its website the date that it receives the number of petitions projected as needed to meet the H-1B advanced degree exemption numerical limitation (the "final receipt date"). The date the announcement is posted will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers under the H-1B advanced degree exemption, USCIS may randomly select via computer-generated selection the remaining number of petitions deemed necessary to meet the H-1B advanced degree exemption numerical limitation from among the petitions properly submitted on the final receipt date. If the final receipt date is any of the first five business days on which petitions subject to the H-1B advanced degree exemption may be received (*i.e.*, if the numerical limitation is reached on any one of the first five business days that filings can be made), USCIS will randomly select from among all the petitions properly submitted during the first five business days the number of petitions deemed necessary to meet the H-1B advanced degree exemption numerical limitation. After any random selection under this paragraph (h)(8)(iv)(B)(2), petitions that are not randomly selected or that were received

after the final receipt date will be rejected.

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

(vi) *H-1C numerical limitations*. \* \* \*

(vii) *H-2B numerical limitations*.

When calculating the numerical limitations under section 214(g)(1)(B) and 214(g)(10) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will

monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the “final receipt date”). The day the public is notified will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers subject to the numerical limitations in 214(g)(1)(B) and 214(g)(10) of the Act, USCIS may randomly select from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded. If the final receipt date is any of the first five business days on which petitions subject to the

applicable numerical limit may be received (*i.e.*, if the numerical limit is reached on any one of the first five business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those five business days.

(9) \* \* \*

(i) *Approval*. USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication. USCIS will notify the petitioner of the approval of the petition on a Notice of Action. The approval notice will include the beneficiary’s (or beneficiaries’) name(s) and classification and the petition’s period of validity. A petition for more than one beneficiary and/or multiple services may be approved in whole or in part. The approval notice will cover only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act.

\* \* \* \* \*

**Kirstjen M. Nielsen,**

*Secretary.*

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