

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 214**

[CIS No. 2679–21; DHS Docket No. USCIS–2020–0019]

RIN 1615–AC61

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

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Homeland Security (DHS or the Department) is amending its regulations governing the process by which U.S. Citizenship and Immigration Services (USCIS) selects H–1B registrations for the filing of H–1B cap-subject petitions (or H–1B petitions for any year in which the registration requirement is suspended), by generally first selecting registrations based on the highest Occupational Employment Statistics (OES) prevailing wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code and area(s) of intended employment.

**DATES:** This final rule is effective March 9, 2021.

**FOR FURTHER INFORMATION CONTACT:** Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240–721–3000 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

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**II. Table of Abbreviations**

- BLS—U.S. Bureau of Labor Statistics
- CEQ—Council on Environmental Quality
- CNMI—Commonwealth of the Northern Mariana Islands
- CRA—Congressional Review Act

DHS—U.S. Department of Homeland Security  
 DOD—U.S. Department of Defense  
 DOL—U.S. Department of Labor  
 DOS—U.S. Department of State  
 EA—Environmental Assessment  
 EIS—Environmental Impact Statement  
 E.O.—Executive Order  
 FEMA—Federal Emergency Management Agency  
 FQHC—Federally Qualified Healthcare Center  
 FRFA—Final Regulatory Flexibility Analysis  
 FVRA—Federal Vacancies Reform Act  
 FY—Fiscal Year  
 GAO—U.S. Government Accountability Office  
 HHS—U.S. Department of Health and Human Services  
 HPSA—Health Professional Shortage Area  
 HSA—Homeland Security Act of 2002  
 ICE—U.S. Immigration and Customs Enforcement  
 IMG—International Medical Graduate  
 INA—Immigration and Nationality Act  
 INS—Immigration and Naturalization Service  
 IT—Information Technology  
 LCA—Labor Condition Application  
 NAICS—North American Industry Classification System  
 NEPA—National Environmental Policy Act  
 NPRM—Notice of Proposed Rulemaking  
 OES—Occupational Employment Statistics  
 OMB—Office of Management and Budget  
 OPT—Optional Practical Training  
 R&D—Research and Development  
 SOC—Standard Occupational Classification  
 STEM—Science, Technology, Engineering, and Mathematics  
 UMRA—Unfunded Mandates Reform Act of 1995  
 USCIS—U.S. Citizenship and Immigration Services  
 VA—U.S. Department of Veterans Affairs

### III. Background and Discussion

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

DHS is amending its regulations governing the selection of registrations submitted by prospective petitioners seeking to file H-1B cap-subject petitions (or the selection of petitions, if the registration process is suspended), which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to allow for ranking and selection based on wage levels. When applicable, USCIS will rank and select the registrations received generally on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. The proffered wage is the wage that the employer intends to pay the beneficiary. This ranking process will not alter the prevailing wage levels associated with a given position for U.S. Department of Labor

(DOL) purposes, which are informed by a comparison of the requirements for the proffered position to the normal requirements for the occupational classification. This final rule will not affect the order of selection as between the regular cap and the advanced degree exemption. The wage level ranking will occur first for the regular cap selection and then for the advanced degree exemption.

Rote ordering of petitions leads to impossible results because petitions are submitted simultaneously. While administering a random lottery system is reasonable, it is inconsiderate of Congress's statutory purposes for the H-1B program and its administration. Instead, a registration system that faithfully implements the Immigration and Nationality Act (INA) while prioritizing registrations based on wage level within each cap will incentivize H-1B employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, to increase the likelihood of selection and eligibility to file an H-1B cap-subject petition. Moreover, it will maximize H-1B cap allocations, so that they more likely will go to the best and brightest workers; and it will disincentivize abuse of the H-1B program to fill relatively lower-paid, lower-skilled positions, which is a selection problem under the present selection system.<sup>1</sup>

<sup>1</sup> See U.S. Department of Homeland Security, U.S. Citizenship, and Immigration Services, Office of Policy and Strategy, Policy Research Division, *I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for H-1B Petitions filed in FY2018*, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 161,432 of the 189,963 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages); *I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for H-1B Petitions filed in FY2019*, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 87,589 of the 103,067 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages). See also HaeYoun Park, *How Outsourcing Companies are Gaming the Visa System*, N.Y. Times (Nov. 10, 2015), <https://www.nytimes.com/interactive/2015/11/06/us/outsourcing-companies-dominate-h1b-visas.html> (noting "H-1B workers at outsourcing firms often receive wages at or slightly above \$60,000, below what skilled American technology professionals tend to earn, so those firms can offer services to American companies at a lower cost, undercutting American workers"); Daniel Costa and Ron Hira, *H-1B Visas and Prevailing Wage Level*, Economic Policy Institute (May 4, 2020), <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/> (explaining that "the fundamental flaw of the H-1B program is

#### 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 INA section 103(a), 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, as well as HSA section 102, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations.<sup>2</sup> Further authority for these regulatory amendments is found in:

- INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b), which classifies as nonimmigrants aliens coming temporarily to the United States to perform services in a specialty occupation or as a fashion model with distinguished merit and ability;
  - INA section 214(a)(1), 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the terms and conditions of the admission of nonimmigrants;
  - INA section 214(c), 8 U.S.C. 1184(c), which, among other things, authorizes the Secretary to prescribe how an importing employer may petition for an H nonimmigrant worker, and the information that an importing employer must provide in the petition; and
  - INA section 214(g), 8 U.S.C. 1184(g), which, among other things, prescribes the H-1B numerical limitations, various exceptions to those limitations, and criteria concerning the order of processing H-1B petitions.
  - INA section 214(i), 8 U.S.C. 1184(i), which defines the term "specialty occupation," referenced in INA section 101(a)(15)(H)(i)(B), 8 U.S.C. 1101(a)(15)(H)(i)(B), a requirement for the classification.
- Further, under HSA section 101, 6 U.S.C. 111(b)(1)(F), a primary mission of DHS is to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland."

that it permits U.S. employers to legally underpay H-1B workers relative to U.S. workers in similar occupations in the same region).

<sup>2</sup> See also 6 U.S.C. 202(4) (charging the Secretary with "[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States").

Finally, as explained above, “Congress left to the discretion of USCIS how to handle simultaneous submissions.”<sup>3</sup> Accordingly, “USCIS has discretion to decide how best to order those petitions” in furtherance of Congress’ legislative purpose.<sup>4</sup>

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

Following careful consideration of public comments received, including relevant data provided, DHS has declined to modify the regulatory text proposed in the Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on November 2, 2020.<sup>5</sup> Therefore, DHS is publishing this final rule as proposed in the NPRM.

### D. Implementation

The changes in this final rule will apply to all registrations (or petitions, in the event that registration is suspended), including those for the advanced degree exemption, submitted on or after the effective date of the final rule. The treatment of registrations and petitions filed prior to the effective date of this final rule will be based on the regulatory requirements in place at the time the registration or petition, as applicable, is properly submitted. DHS has determined that this manner of implementation best balances operational considerations with fairness to the public. USCIS will engage in public outreach and provide training to the regulated public on the modified registration system in advance of its implementation.

### E. The H-1B Visa Program

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 U.S. 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.<sup>6</sup> A specialty occupation is defined as an occupation that requires the (1) theoretical and practical application of a body of highly specialized knowledge

and (2) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum qualification for entry into the occupation in the United States.<sup>7</sup>

Congress has established limits on the number of foreign workers who may be granted initial H-1B nonimmigrant visas or status each fiscal year (FY).<sup>8</sup> This limitation, commonly referred to as the “H-1B cap,” generally does not apply to H-1B petitions filed on behalf of certain aliens who have previously been counted against the cap.<sup>9</sup> The total number of foreign workers who may be granted initial H-1B nonimmigrant status during any FY currently may not exceed 65,000.<sup>10</sup> Certain petitions are exempt from the 65,000 numerical limitation.<sup>11</sup> The annual exemption from the 65,000 cap for H-1B workers who have earned a qualifying U.S. master’s or higher degree may not exceed 20,000 foreign workers.<sup>12</sup> Moreover, H-1B petitions for aliens who are employed or have received offers of employment at institutions of higher education, nonprofit entities related to or affiliated with institutions of higher education, or nonprofit research organizations or government research organizations, are also exempt from the cap.<sup>13</sup>

### F. Current Selection Process

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

USCIS monitors the number of H-1B registrations it receives during the announced registration period and, at the conclusion of that period, if more registrations are submitted than projected as needed to reach the

numerical allocations, randomly selects from among properly submitted registrations the number of registrations projected as needed to reach the H-1B numerical allocations. USCIS first selects registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption. USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption.

A prospective petitioner whose registration is selected is notified of the selection and instructed that the petitioner is eligible to file an H-1B cap-subject petition for the beneficiary named in the selected registration within a filing period that is at least 90 days in duration and begins no earlier than 6 months ahead of the actual date of need (commonly referred to as the employment start date).<sup>14</sup> When registration is required, a petitioner seeking to file an H-1B cap-subject petition is not eligible to file the petition unless the petition is based on a valid, selected registration for the beneficiary named in the petition.<sup>15</sup>

### G. Final Rule

Following careful consideration of all public comments received, DHS is issuing this final rule as proposed in the NPRM, without modifications to the regulatory text.

## IV. Response to Public Comments on the Proposed Rule

### A. Overview of Comments and General Feedback on the Proposed Rule

In response to the rulemaking, DHS received 1103 comments during the 30-day public comment period, and 388 comments on the rule’s information collection requirements before the comment period ended. A large majority of public comments received are form letter copies rather than unique submissions. Commenters consisted primarily of individuals, including anonymous submissions. DHS received the remaining submissions from professional associations, trade or

<sup>3</sup> See *Walker Macy v. USCIS*, 243 F.Supp.3d 1156, 1176 (D. Or. 2017) (finding that USCIS’ rule establishing the random-selection process was a reasonable interpretation of the INA).

<sup>4</sup> See 243 F.Supp.3d at 1176.

<sup>5</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, 85 FR 69236 (Nov. 2, 2020).

<sup>6</sup> See INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); Public Law 101-649, section 222(a)(2), 104 Stat. 4978 (Nov. 29, 1990); 8 CFR 214.2(h).

<sup>7</sup> See INA section 214(i)(1), 8 U.S.C. 1184(i)(1).

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

<sup>9</sup> See INA section 214(g)(7), 8 U.S.C. 1184(g)(7).

<sup>10</sup> See INA section 214(g), 8 U.S.C. 1184(g).

<sup>11</sup> See INA section 214(g)(5) and (7), 8 U.S.C. 1184(g)(5) and (7).

<sup>12</sup> See INA section 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C).

<sup>13</sup> See INA section 214(g)(5), 8 U.S.C. 1184(g)(5).

<sup>14</sup> See 8 CFR 214.2(h)(8)(iii)(D)(2). See also 8 CFR 214.2(h)(8)(iii)(A)(4) (if the petition is based on a registration that was submitted during the initial registration period, then the beneficiary’s employment start date on the petition must be October 1 of the associated FY, consistent with the registration, regardless of when the petition is filed).

<sup>15</sup> During the initial filing period, if USCIS does not receive a sufficient number of petitions projected as needed to reach the numerical allocations, USCIS will select additional registrations, or reopen the registration process, as applicable, to receive the number of petitions projected as needed to reach the numerical allocations. See 8 CFR 214.2(h)(8)(iii)(A)(7).

business associations, employers/companies, law firms, advocacy groups, schools/universities, attorneys/lawyers, joint submissions, research institutes/organizations, and a union.

DHS reviewed all of the public comments received in response to the proposed rule and is addressing substantive comments relevant to the proposed rule (*i.e.*, 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 beneficiaries) in this section IV, grouped by subject area. While DHS provides a brief overview of comments deemed out of scope of this rulemaking in section IV.F. (*e.g.*, comments seeking changes in U.S. laws, or regulations and agency policies unrelated to the changes proposed in the NPRM), DHS is not providing substantive responses to those comments.

Public comments may be reviewed in their entirety at the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number USCIS-2020-0019-0001.

#### 1. General Support for the Proposed Rule

*Comments:* Multiple commenters expressed general support for the rule, providing the following rationale: The proposed rule should be implemented as soon as possible; the proposed rule is a step in the right direction; the proposed rule is necessary to protect U.S. workers; the proposed rule is a well-guided and legal attempt to strengthen the economy and legal immigration of workers; wage-based H-1B allocation can help economic growth; salary is the best and most reasonable criteria, since it is not practical to compare the skills of one professional with another; people with higher salaries should be prioritized to receive H-1B visas; the United States should increase the possibility of obtaining a visa for people with higher degrees or wages; the proposed rule would ensure more visas were allocated to the best workers; the proposed rule would keep high-level, meritorious employees in the United States; H-1B allocation should be merit-based; the proposed rule would ensure that workers who were to contribute most would get to stay in the United States while other workers still would have the same chance of being selected as previous years; if companies were willing to pay a higher salary for some workers, it would mean that they would deserve a better chance to stay and work in the United States; people with more

professional experience should not have the same chance of staying in the United States as college graduates or less experienced professionals; the proposed rule would preserve the true intent of the H-1B program, which was to allow U.S. companies to seek out the best foreign talent; there would be less duplication of H-1B petitions for the same employees; every year, many highly qualified workers have had to leave the United States because they have not been selected in the existing lottery system; entry-level recruitment of U.S. citizens to fill roles occupied by H-1B beneficiaries can and should be done in high schools, vocational schools, and college campuses; the proposed rule would increase the average and median wage levels of H-1B beneficiaries; the current lottery process makes it difficult for employers to plan for their staffing needs, so the proposed rule will benefit both employers and employees.

*Response:* DHS thanks these commenters for their support and agrees with commenters that the proposed rule should be implemented as soon as possible; the proposed rule is a step in the right direction; the proposed rule is necessary to better protect U.S. workers, particularly those U.S. workers competing against H-1B workers for entry-level jobs; and this rule is a well-guided and legal attempt to improve the H-1B cap selection process. DHS further agrees that relative salary generally is a reasonable proxy for skill level and the wage level that a proffered wage equals or exceeds is a reasonable criterion for registration. DHS also agrees that this rule may lead to the selection of the most-skilled or most-valued H-1B beneficiaries; may lead to an increase in wages for H-1B beneficiaries; may increase access to entry-level positions for available and qualified U.S. workers; and is expected to reduce uncertainty about selection resulting from a purely randomized process. Prioritizing wage levels in the registration selection process is expected to incentivize employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, to increase the likelihood of selection for cap-subject petition filings. In doing so, prioritization, as compared to a purely random selection process, may reduce uncertainty about selection. In turn, U.S. employers that might have petitioned for cap-subject H-1B workers to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions.

*Comments:* Several commenters expressed support for the rule and the need to stop visa fraud, abuse, and flooding of petitions by certain staffing or consulting companies. One commenter said the proposed rule would disincentivize companies from abusing the H-1B program and harming U.S. workers. Other commenters stated that: The proposed rule would decrease potential visa abuse by employers and make sure all workers were paid according to their skillset as employers no longer would be able to lower labor expenses by hiring foreign workers; the proposed rule would have a positive impact on U.S. employees and college-educated U.S. citizens who take out loans for their education by making it harder for technology companies to discriminate against U.S. citizens; U.S. workers are being laid off in large numbers because corporations are outsourcing for profits; and the proposed rule is necessary because Indian corporations are acquiring U.S. jobs.

*Response:* DHS agrees that this rule will reduce abuse and provide incentives for employers to use the H-1B program to primarily fill relatively lower-paid, lower-skilled positions.<sup>16</sup> Prioritizing registrations or petitions, as applicable, reflecting higher wage levels for positions requiring higher skills and higher-skilled or more valued aliens will further Congressional intent for the program by helping U.S. employers fill labor shortages in positions requiring highly skilled and/or highly educated workers.

#### a. Positive Impacts on New Graduates and Entry-Level Workers

*Comments:* An individual commenter wrote that this rule would be extremely beneficial to international students graduating from U.S. universities. The commenter explained that, while recent graduates earning level I wages initially would be less likely to be selected in the lottery, many of those recent graduates actually would benefit from the rule over the long term. The commenter said that recent graduates who were not initially selected likely would gain additional experience in future years, which would make them more competitive for selection at higher wage levels. The commenter indicated that Science, Technology, Engineering, and Mathematics (STEM) graduates generally have three chances at the existing H-1B lottery, and, ideally, new graduates should not stay in level I positions for all three years. On the other hand, non-STEM graduates

<sup>16</sup> See *supra* note 1.

already have low selection odds under the existing lottery and, thus, face difficulties finding suitable employment. With this proposed rule, however, non-STEM graduates now would have a probable path forward and would be able to negotiate with their employers to get H-1B sponsorship. The commenter added that concerns that new graduate employees would not be able to receive an H-1B visa, even from large technology companies, are unfounded, knowing firsthand that new graduates regularly receive job offers at level II wages or above from large technology companies. A different commenter stated that there are many new graduates with greater academic achievements and capability who will be able to get job offers at level II wages or above. This commenter stated that, for graduates unable to get job offers with level II wages, this proposed rule could incentivize them to work hard to prove their value and be promoted.

*Response:* DHS agrees that this rule could be beneficial to international students, as the commenter explains. DHS recognizes that, under this final rule, it is less probable that USCIS will select registrations (or, if applicable, petitions) that reflect a wage level that is lower than the prevailing wage level II. DHS agrees with the comment that registrations (or, if applicable, petitions) reflecting prevailing wage levels II, III, and IV will have greater chances of being selected compared to the status quo. To the extent that recent foreign graduates, STEM-track or otherwise, in Optional Practical Training (OPT) can gain the necessary skills and experience to warrant prevailing wage levels II or above, the final rule may result in greater chances of selection of registrations (or, if applicable, petitions) for those beneficiaries. Further, recent graduates with master's or higher degrees from U.S. institutions of higher education already benefit from the advanced degree exemption and cap selection order, as eligibility for that exemption increases their chance of selection. A registration or petition, as applicable, submitted on behalf of an alien eligible for the advanced degree exemption is first included in the submissions that may be selected toward the regular cap projection. If not selected toward the regular cap projection, submissions eligible for the advanced degree exemption may be selected toward the advanced degree exemption projection. This existing selection order increases the chance of selection for registrations or petitions submitted on behalf of aliens who have

earned a master's or higher degree from a U.S. institution of higher education.

#### b. Positive Impacts on Healthcare Workforce

*Comments:* An individual commenter and a submission from U.S. doctors indicated that thousands of U.S. citizen medical graduates have been unemployed because residency positions have been filled by foreign doctors on H-1B and J-1 visas. A submission from U.S. physicians stated that it is inappropriate to hire non-citizen physicians at the taxpayer's expense for federally funded residency training positions instead of available and skilled U.S. physicians. The commenter said the proposed rule is a step in the right direction to disincentivize a trend in the physician residency training programs that have favored foreign graduates and that have caused the displacement of several thousand qualified U.S. citizen medical school graduates, which has been an ongoing problem for the past few decades. The commenter explained that this displacement cripples the U.S. economy as thousands of qualified U.S. citizen doctors with federal student loan debt continue to go "unmatched."

*Response:* DHS agrees with commenters that there are more U.S. citizens who graduate from medical schools each year than are matched with residency programs. DHS believes that this final rule may lead to increased opportunities for entry-level positions for available and qualified U.S. workers by incentivizing employers seeking cap-subject H-1B beneficiaries to offer higher wage levels to increase the chance for selection. This, in turn, may have the effect of freeing up entry-level cap-subject positions for U.S. workers, including U.S. medical graduates in the event they are seeking to be employed in cap-subject positions.<sup>17</sup> In turn, DHS

<sup>17</sup> See Rebecca Corey, *The coronavirus pandemic is straining hospitals, but many medical school grads can't get jobs*, yahoo!news (Mar. 27, 2020), [https://news.yahoo.com/the-coronavirus-pandemic-is-straining-hospitals-but-many-medical-school-grads-cant-get-jobs-194905748.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xiLmNvbS8&guce\\_referrer\\_sig=AQAAABHJK2wibpo\\_XDEjXtc-zrUFFyWbMnPU1-IO1uj9REueBPmgzPIgNTToSGomCcZ5DQkT3lBW17oeLkUKfJZzPnh3TxqqonTKW84557Cgzfle-5\\_JPnq7\\_EzMiGQbadnRFv7VrAscZWdh h0IXCob34vhCnor9QYNsheYgNsFZMS](https://news.yahoo.com/the-coronavirus-pandemic-is-straining-hospitals-but-many-medical-school-grads-cant-get-jobs-194905748.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xiLmNvbS8&guce_referrer_sig=AQAAABHJK2wibpo_XDEjXtc-zrUFFyWbMnPU1-IO1uj9REueBPmgzPIgNTToSGomCcZ5DQkT3lBW17oeLkUKfJZzPnh3TxqqonTKW84557Cgzfle-5_JPnq7_EzMiGQbadnRFv7VrAscZWdh h0IXCob34vhCnor9QYNsheYgNsFZMS) ("You have a lot of students who are unmatched who have been reporting working at delis, working as baristas. They might be teaching at a community college or something like that because they have an MD, but they can't work clinically," [Dr. Monya De, an internist in Los Angeles] said. "Service industry jobs are really common. Bartending, waitering or waitressing. There are a lot of unmatched students driving for Uber and Lyft, I will tell you that.").

hopes that increased opportunities for those U.S. workers will benefit the U.S. economy.

#### c. Positive Impacts on the Economy

*Comments:* An individual commenter in support of this rule stated that the proposed rule would result in higher salaries for the H-1B population, which will lead to increased spending for the U.S. economy. The commenter also wrote that, under the proposed rule, employers would have access to higher wage and more talented employees increasing innovation and productivity. Another individual commenter similarly said the proposed rule would improve innovation because it would favor retaining more talented and highly paid individuals over less talented workers. The commenter said wages serve as a proxy for talent, and the proposed rule helps bring and retain talented individuals to the United States.

*Response:* DHS agrees with these commenters and believes that this rule may result in higher salaries for the H-1B population. This rule may also increase innovation and productivity,<sup>18</sup> and help retain and attract talented aliens to the United States.<sup>19</sup> DHS believes that facilitating the admission of more highly-paid and relatively higher-skilled workers "would benefit the economy and increase the United States' competitive edge in attracting the 'best and the brightest' in the global labor market," consistent with the goals of the H-1B program.<sup>20</sup>

#### 2. General Opposition to the Proposed Rule

Comments generally opposing the proposed rule fell into various

<sup>18</sup> See William Craig, *How Your Productivity is Related To Career Growth*, Forbes (Dec. 31, 2015), <https://www.forbes.com/sites/williamcraig/2015/12/31/how-your-productivity-is-related-to-career-growth/?sh=8fc20583363a> (stating the "basic tenet of economic theory" that "The wage a worker earns, measured in units of output, equals the amount of output the worker can produce").

<sup>19</sup> See Drew Calvert, *Companies Want to Hire the Best Employees. Can Changes to the H-1B Visa Program Help?*, KelloggInsight (Feb. 26, 2017), <https://insight.kellogg.northwestern.edu/article/how-to-revamp-the-visa-program-for-highly-skilled-workers> (noting "[u]nder the current system, U.S. companies are often discouraged from even attempting to hire a foreign worker, despite how uniquely qualified he or she might be).

<sup>20</sup> See Muzaffar Chrishti and Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*, Migration Policy Institute (July 2016), [https://www.migrationpolicy.org/sites/default/files/publications/1990-Act\\_2016\\_FINAL.pdf](https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf) ("Sponsors of [the Immigration Act of 1990 which created the H-1B program as it exists today] believed that facilitating the admission of higher-skilled immigrants would benefit the economy and increase the United States' competitive edge in attracting the 'best and the brightest' in the global labor market.").

categories: Immigration policy concerns; negative impacts on new graduates and entry-level workers, academic institutions, healthcare workers and facilities, employers, and the economy; and general concerns about wage-based selection. In addition, some comments fell outside of the scope of these categories.

#### a. Immigration Policy Concerns

*Comments:* A few commenters opposed the rule and expressed immigration policy concerns without substantive rationale, offering only that: the proposed rule “springs purely from nativism and no real concern for domestic workers”; the proposed rule is inconsistent with U.S. founding principles as a refuge for those seeking opportunity and freedom; and imposing a wage-based prioritization system is contrary to American values and would harm innovation.

*Response:* DHS disagrees with the comment that the proposal “springs purely from nativism and no real concern for domestic workers[.]” This rule does not reduce the total number of aliens who will receive cap-subject H-1B status in a given fiscal year. Instead, this rule will benefit those H-1B beneficiaries who are most highly paid and/or most highly skilled, relative to their SOC codes and areas of intended employment. DHS believes this rule will incentivize employers to offer higher wages and/or higher-skilled positions to H-1B workers and disincentivize the existing widespread use of the H-1B program to fill relatively lower-paid or lower-skilled positions, for which there may be available and qualified U.S. workers. In general, DHS recognizes that the admission of higher paid and/or higher skilled workers is likely to benefit the economy and increase the United States’ competitive edge in the global labor market.<sup>21</sup>

Further, this rule is intended to potentially increase employment opportunities for relatively lower-skilled unemployed or underemployed U.S. workers. Recent college graduates, some of who otherwise would serve as U.S. workers, have the highest unemployment rate in decades, and the underemployment rate (which reflects the rate at which workers are accepting jobs lower than their academic or experience level) is at an all-time high.<sup>22</sup>

Roughly 53 percent of recent college graduates, some of who could potentially work in these jobs, are currently unemployed or underemployed.<sup>23</sup> While the overall unemployment rates for college graduates is 3.8 percent, the unemployment rate is higher for graduates with majors in some fields common to the H-1B program such as computer science (5.2 percent), mathematics (4.9 percent) and information systems & management (4.9 percent).<sup>24</sup> This rule is intended to potentially benefit the population of unemployed or underemployed U.S. workers. DHS further disagrees that this rule is inconsistent with U.S. founding principles as a refuge for those seeking opportunity and freedom, and that instituting a ranking system is contrary to American values and would harm innovation. First, the H-1B program is a temporary, employment-based nonimmigrant program and not a form of humanitarian relief. Additionally, by maximizing H-1B cap allocations, so that they more likely would go to the best and brightest workers, DHS believes that this rule likely would promote opportunity, innovation, and development.

#### b. Negative Impacts on New Graduates and Entry-Level Workers, Academic Institutions, Healthcare Workers and Facilities, Employers, and the Economy

Multiple commenters said the proposal would have negative impacts

*also* Federal Reserve Bank of New York, The Labor Market for Recent College Graduates (Oct. 22, 2020), [https://www.newyorkfed.org/research/college-labor-market/college-labor-market\\_unemployment.html](https://www.newyorkfed.org/research/college-labor-market/college-labor-market_unemployment.html). This data does not differentiate college graduates based on citizenship, and therefore, DHS cannot determine the exact percentage of these college graduates that could serve as US workers.

<sup>23</sup> See Darko Jacimovic, *College Graduates Unemployment Rate in the US, What to Become* (Nov. 25, 2020), <https://whattobecome.com/blog/college-graduates-unemployment-rate/#:~:text=The%20median%20pay%20for%20those,in%20the%20US%20is%202.1%25> (citing University of Washington data); Irene Sullivan, *What Now?*, The Oracle (Nov. 24, 2020), <http://www.tntechoracle.com/2020/11/24/7833/>. This data does not differentiate college graduates based on citizenship, and therefore, DHS cannot determine the exact percentage of these college graduates that could serve as U.S. workers. However, DHS notes that, in 2019, international students accounted for 5.5% of the students enrolled in U.S. colleges. *International Student Enrollment Statistics*, <https://educationdata.org/international-student-enrollment-statistics>.

<sup>24</sup> See Federal Reserve Bank of New York, The Labor Market for Recent College Graduates (Oct. 22, 2020), [https://www.newyorkfed.org/research/college-labor-market/college-labor-market\\_unemployment.html](https://www.newyorkfed.org/research/college-labor-market/college-labor-market_unemployment.html). This data does not differentiate college graduates based on citizenship, and therefore, DHS cannot determine the exact percentage of these college graduates that could serve as U.S. workers.

on new graduates and entry-level workers, academic institutions, healthcare workers and facilities, employers, and the economy.

#### i. New Graduates and Entry-Level Workers

*Comments:* Commenters stated, without substantive rationale, that the proposed rule would negatively impact this population because: New foreign graduates would be disadvantaged by this rule; the proposed rule would prevent the future growth of new foreign graduates in the workplace; the proposed rule would be unfair to immigrants who earn lower wages; it takes time to be promoted from entry level to a more senior level; it is “too difficult for most people to earn that much”; the proposed rule would dramatically reduce access to the H-1B visa program for early career professionals, including those who have completed master’s or doctoral degrees at U.S. colleges and universities; the proposed rule would make it nearly impossible for entry-level employees with degrees in STEM majors to be eligible for H-1Bs; non-STEM graduates would have a more difficult time obtaining H-1B classification under the proposed rule; the rule would unfairly discriminate against aliens who work in areas related to humanities, arts, or accounting that do not receive high starting wages; the proposed rule would greatly decrease the number of H-1B visas that would be available to educators, translators, and other specialty positions; doctors who recently graduated and entered medical residency programs would have no chance of obtaining H-1B classification under this proposed rule; the rule would negatively impact U.S. biomedical research, as it would make it difficult for young scientists to study and conduct health research in the United States; the computer science industry requires experience to get to a higher level, which is something new graduates do not typically have; it is harder to earn higher wages quickly in certain industries, such as mechanical engineering or medicine; basing the selection on wage levels would be disadvantageous to people who work for small-sized companies, which offer lower wages; the proposed rule would send a message that the United States does not welcome talented foreign students; the rule would divide international students because everyone would be “considering the interests of their own”; and pushing entry-level workers out in the beginning of their careers disobeys a fundamental economics principle, which states that

<sup>21</sup> See 85 FR 69236, 69239.

<sup>22</sup> See Jack Kelly, *Recent College Graduates Have the Highest Unemployment Rate In Decades—Here’s Why Universities Are To Blame*, Forbes (Nov. 14, 2019), <https://www.forbes.com/sites/jackkelly/2019/11/14/recent-college-graduates-have-the-highest-unemployment-rate-in-decades-heres-why-universities-are-to-blame/?sh=333d181c320b>. See

laborers are underpaid in the early stage, but will make more with more experience and skillsets.

Multiple commenters said the proposal would have negative impacts on new foreign graduates and entry-level workers, and they provided substantive rationale in support of those assertions. Specifically, several commenters, including a form letter campaign, said the rule would have a “direct and negative” impact on college-educated foreign-born professionals by “dramatically reducing” access to the H-1B visa program for early-career professionals because no aliens who are paid a level I wage would be selected to submit a petition. A trade association stated that early-career workers in science, math, and engineering might be shut out by the proposed rule, but that those are the workers the U.S. economy needs. Several commenters, including a university, a professional association, and a joint submission, argued that the proposed rule would reduce access to the H-1B program, negatively impacting graduating international students. A university stated that the proposed rule indirectly would affect F-1 and J-1 students and scholars by removing a pathway to employment after completion of educational or training experiences in the United States, which would also negatively impact the economy. The university argued that almost all F-1 and J-1 visa holders enter at level I wages.

*Response:* DHS disagrees with the assertions that this rule will either preclude or essentially preclude H-1B status for recent graduates, entry-level foreign workers, and young alien professionals. In general, registrations (or petitions, if applicable) will be selected according to the wage level that the proffered wage equals or exceeds. Therefore, if an employer chooses to offer a recent foreign graduate a wage that equals or exceeds a particular wage level, the registration will be grouped at that wage level, regardless of the beneficiary’s experience level or the requirements of the position. Further, as explained in the proposed rule, DHS believes that a purely random selection process is not optimal, and selection based on the highest wage level that a proffered wage equals or exceeds is more consistent with the primary purpose of the statute. DHS acknowledges that, under this rule, in years of excess demand, relatively lower-paid or lower-skilled positions will have a reduced chance of selection. However, DHS believes that selection in this manner is consistent with the primary purpose of the statute.

DHS further disagrees with the assertion that this rule will preclude recent foreign medical graduates from obtaining H-1B status. Importantly, according to DHS data, in FY 2019, more than 93 percent of H-1B petitions approved for initial employment for physicians, surgeons, and dentists were cap-exempt and thus not subject to the H-1B cap selection process.<sup>25</sup> Thus, it is not accurate to say that recent foreign medical graduates, who may seek initial employment as physicians, would have “no chance” of obtaining H-1B status under this rule. DHS acknowledges that, under this rule, in years of excess demand, in the infrequent situation of recent foreign medical graduates seeking employment with a cap subject employer, recent foreign medical graduates may face a reduced chance of selection for cap-subject H-1B visas. However, because a significant majority of H-1B petitions filed for recent foreign medical graduates are cap-exempt, and thus not affected by this rule, this reduction likely will affect a minimal population, if any, of recent medical graduates. Further, as explained in the proposed rule, DHS believes that a random selection is not optimal, and selection based on the highest wage level that a proffered wage equals or exceeds is more consistent with the primary purpose of the statute.

In terms of STEM-specific concerns, DHS disagrees with comments that this rule will make it “harder” or “nearly impossible” for employers to hire entry-level employees with degrees in STEM majors. These types of potential foreign workers have multiple avenues to obtain employment in the United States. In general, foreign STEM graduates can apply for the regular 12-month OPT

<sup>25</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *Wage Level of H-1B Initial Employment Physician Approvals (Cap-Subject and Cap-Exempt), Fiscal Year 2019*, Database Queried: PETAPP, Report Created: 11/18/2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2019. Note that the tables for “Wage Level of H-1B Initial Employment Physicians Approvals” and “Wage Level of H-1B Initial Employment Dentists Approvals” show approval counts for the cap year in which the petitions were filed. For these tables, DHS used the approval counts for FY 2019. Whereas the tables for “Wage Level of Select Cap-subject H-1B Physicians Approvals” and “Wage Level of Select Cap-subject H-1B Dentists Approvals” show approval counts for the cap year. For these tables, DHS used the cap counts for Cap Year 2020. For purposes of this data, DHS used the DOT code identified on the H-1B petition, namely, DOT codes 070–072 for physicians, surgeons, and dentists. The DOT Code is a three-digit occupational group for professional, technical, and managerial occupations and fashion models that can be obtained from the Dictionary of Occupational Titles. DHS then linked petition data to LCA data for wage level information.

plus an additional 24-month extension of their post-completion OPT.<sup>26</sup> The additional 24-month extension of OPT is available only to foreign STEM graduates. During the 3-year cumulative OPT period, such a graduate can gain significant training and work experience with a U.S. employer and can demonstrate their value to that employer. If the employer wants to continue their employment by way of H-1B classification, then the employer can choose to offer the worker a wage that will maximize their chance of selection. Additionally, an employer could directly petition for an employment-based immigrant visa for the alien at any time. There is no statutory or regulatory requirement that an alien admitted on a F-1 nonimmigrant visa go through OPT and/or the H-1B program before being petitioned for an immigrant visa.

Concerning the comments about non-STEM graduates who work in the humanities, arts, accounting, education, or other areas that generally may not receive as high of starting wages as other occupations, DHS does not believe these graduates will be unfairly impacted by this rule. Because USCIS will be ranking and selecting registrations (or petitions) generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code, this method of ranking takes into account wage variations by occupation.

#### ii. Academic Institutions

*Comments:* A few individual commenters generally stated that the proposed rule would harm schools and universities. Multiple commenters, including a university, law firm, and individual commenters, stated that this rule would negatively impact U.S. universities’ ability to recruit international students, which would affect enrollments, because U.S. institutions would be less attractive due to the lower possibility of remaining in the United States to work after completion of their studies or at the conclusion of their OPT. Similarly, several commenters said the proposal would make it difficult for universities to attract top talent that would contribute to the U.S. economy. A trade association stated that the rule would restrict the ability of graduating talent to switch from F-1 student status to H-1B status, particularly when operating in conjunction with the DOL Interim Final Rule (IFR), *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain*

<sup>26</sup> See 8 CFR 214.2(f)(10)(ii).

*Aliens in the United States* (DOL IFR).<sup>27</sup> Another commenter stated that the DOL IFR also is aimed at pricing international students and others out of the U.S. labor market, while the Student and Exchange Visitor Program proposed rule<sup>28</sup> to limit the time students are allowed to stay in the United States appears designed to deter foreign students from coming to U.S. universities.

A trade association stated, without evidence, that since graduating international students are unlikely to find employers who are willing to pay them the same rate as their median-wage workers, this would lead to U.S.-educated international students taking their knowledge and skills elsewhere. A university said that, if the proposed rule were implemented, the United States would lose “advanced science, technology, engineering, and mathematics knowledge and talent” because international students would choose to pursue their education in countries with more favorable immigration policies. Another commenter claimed that international students would study elsewhere if they could not identify employment opportunities after graduation, which would “cripp[le] a critical pipeline of future community members, workers, innovators and entrepreneurs.” A few commenters stated that, under this rule, the United States would lose money, talent, and inventiveness by reducing the employment potential of foreign students upon graduation from a U.S. educational institution, and the United States eventually would lose attractiveness and competitiveness because international students would go elsewhere. Some commenters provided specific figures to detail the contributions of foreign enrollment at U.S. universities. Specifically: Education service exports ranked sixth among service exports in 2019 according to data released by the U.S. Department of Commerce’s Bureau of Economic Analysis; international students studying in the United States added an estimated \$41 billion to the economy and supported over 458,000 jobs during the 2018 through 2019 academic year; international students

make up 5.5 percent of the total U.S. higher education population and contributed \$44.7 billion to the U.S. economy in 2018; international students have founded approximately one-quarter of U.S. start-up companies worth \$1 billion or more; the Institution for International Education (IIE) reports that international students contributed \$482.5 million to the State of Minnesota during 2018 through 2019, supporting 4,497 jobs; international students and scholars contributed an estimated \$304.2 million to the local Ithaca, New York, economy and supported nearly 4,000 jobs during the 2018 through 2019 academic year; and, in one commenter’s experience, foreign students paid more than \$10,000 per year full tuition compared to less than \$4,000 for in-state residents, which provided major subsidies for low income resident students.

Some commenters expressed that this is not the time to be driving students away, as State and college/university budgets have suffered greatly as a result of COVID-19. One commenter cited data indicating a “shocking decline” in international student enrollment at U.S. institutions of higher education for the Fall 2020 semester, as well as a study indicating that the overall economic impact generated by international students had already started to decline in 2019, down to \$38.7 billion. The commenter said the declining enrollment numbers for 2020 are likely to perpetuate a large economic impact as we continue to deal with the economic fallout of the COVID-19 pandemic. A professional association stated that the proposed regulation would have a “monumentally negative” effect on U.S. colleges and universities at a time when those institutions would be reeling from the impact of the COVID-19 pandemic. The commenter cited statistics indicating that, in the current school year, new enrollment of international students dropped 43 percent because of COVID-19. The commenter concluded that the COVID-19 pandemic, uncertainty about immigration status, and “anti-immigrant rhetoric[,]” compounded with this rule that would further destabilize the career progression of foreign students by eliminating a legal pathway to temporary employment opportunities in the United States post-graduation, would create a “perfect storm” that would devastate the U.S. college and university system for years to come.

Several commenters, including a university, advocacy group, and individual commenters, said restricting the H-1B program for foreign students, while competitor nations seek to expand

their ability to attract international students, would lead talented students to choose other countries of study and decrease enrollments in U.S. institutions. One of these commenters said countries such as Canada and Germany already are seeing increases in international student enrollment as U.S. restrictions to international students have led to waning interest from the future CEOs, inventors, and researchers of the world. An individual commenter said universities essentially would be training laborers for other countries.

Some commenters stated that colleges and universities rely, in particular, on foreign students who pay full tuition to help make up for declining Federal and State support and to subsidize the cost of education for U.S. students. An attorney stated that U.S. colleges, universities, and communities benefit financially from the attendance of foreign students, typically in F-1 foreign student nonimmigrant status or J-1 exchange visitor nonimmigrant status. The commenter said the economic and intellectual advancement of educational institutions and their communities is enhanced by the presence of these students from other countries.

A university stated that international students and scholars are essential to a university’s makeup, as students and faculty benefit from exposure to intercultural differences and the leadership opportunities that arise from global collaborations. Another commenter stated that foreign national researchers and professors provide the needed diversity to help educate students to become the professionals they need, as they cannot compete globally if they do not have the ability to adapt culturally.

An individual stated that this rule would make it impossible for some colleges to fill teaching positions that they cannot fill with qualified U.S. workers. For example, the commenter stated that North Dakota colleges are not able to pay higher than the level I wage as that is the average salary paid to all of its beginning professors and researchers, and this rule would result in many of North Dakota colleges having unfilled teaching positions and a decrease in higher level class offerings, particularly in STEM fields, putting a strain on education in the state. Multiple commenters offered similar concerns, but at other levels of academic institutions and owing to their less-desirable locations.

*Response:* DHS appreciates the academic benefits, cultural value, and economic contributions that aliens make to academic institutions and local

<sup>27</sup> U.S. Department of Labor, Employment and Training Administration, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 FR 63872 (Oct. 8, 2020).

<sup>28</sup> U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media*, 85 FR 60526 (Sept. 25, 2020).



communities throughout the United States. DHS does not believe that this rule will negatively impact the ability of U.S. colleges and universities to recruit international students. Nor will the rule impact the ability of international students to study in the United States, which is the basis of their admission to the United States in that status. While increased employment opportunities, both in the United States and abroad, may be a factor in deciding whether to study in the United States, the reputation of the academic institutions themselves is also an important factor for the great majority of those choosing to study in the United States.<sup>29</sup> Further, DHS notes that international students will continue to have significant employment opportunities in the United States under this rule. First, this rule has no impact on OPT, which allows for 12 months of employment for most aliens admitted in F-1 student status, plus an additional 24-month extension of post-completion OPT available only to STEM graduates.<sup>30</sup> In addition, with the current random selection process, even the most talented foreign student may have less than a 50 percent chance of selection. This rule will increase the chance of employment at the higher wage levels and thus may facilitate the selection of the best and brightest students for cap-subject H-1B status. To the extent that that this change does negatively affect the potential of some colleges and universities to recruit international students, DHS believes that any such harm will be outweighed by the benefits that this rule will provide for the economy overall.<sup>31</sup>

Facilitating the admission of higher-skilled foreign workers, as indicated by their earning of wages that equal or exceed higher prevailing wage levels, would benefit the economy and increase the United States' competitive edge in attracting the "best and the brightest" in the global labor market, consistent with

the goals of the H-1B program discussed in the NPRM.

Further, DHS disagrees that this rule will make it "impossible" for academic institutions to fill teaching and research positions. Congress already exempted from the annual H-1B cap aliens who are employed or have received offers of employment at institutions of higher education, nonprofit entities related to or affiliated with institutions of higher education, nonprofit research organizations or government research organizations.<sup>32</sup> Therefore, many petitions for academic institutions will not be affected by this rule.<sup>33</sup> In FY 2020 alone, USCIS approved over 41,000 petitions for petitioners that qualified under one of these cap exemptions.<sup>34</sup> These cap exemptions mitigate these commenters' concerns or misunderstanding of the H-1B program. Comments about the DOL IFR and the Student and Exchange Visitor Program proposed rule are out of scope, so DHS will not address them.

### iii. Healthcare Workforce and Facilities

#### (a) Impact on Healthcare Workers

*Comments:* Some commenters expressed concern that the rule could prevent qualified and highly skilled entry-level health care workers and recent foreign-born graduates from medical school from obtaining an H-1B visa. A professional association said this proposal would reduce the overall number of international medical graduates (IMGs) practicing in the United States, also stating that pricing H-1B visa holders out of the physician employment market would only exacerbate ongoing physician shortages and worsen barriers to care for patients. Another professional association cited data forecasting an increasing physician shortage and said H-1B physicians fulfill a "vital and irreplaceable role." The commenter said stringent performance and pay thresholds already exist that must be met to even be considered for an H-1B visa and placing additional wage barriers on the cap would garner no benefit and, instead, would harm U.S. patients and health care systems. A university and an

individual commenter stated that physicians enter the field with a level I wage, despite high levels of education and training, and argued that, under the proposal, it would be "virtually impossible" for a new physician to obtain H-1B unless they are employed by a cap-exempt institution. The university and the commenter cited a 2016 Journal of the American Medical Association (JAMA) study, which found that 29 percent of physicians were born outside of the United States, helping to fill the physician shortage, and that this rule ignores problems like this. Another professional association stated that it is an incorrect assumption that skill level is definitively associated with wage amount, as there are many situations where a highly skilled H-1B physician may choose to accept a lower wage (e.g., expand their skillset, altruistic motives, the potential to gain lawful permanent residency in a shorter time span). Therefore, the proposed rule would create a false presupposition that would stop highly qualified physicians from practicing in less affluent institutions. Thus, the proposed rule would create a situation where much needed physician positions remain vacant, only wealthy medical conglomerates are able to afford to sponsor H-1B physicians, or wages become so inflated that far fewer H-1B physicians can be hired. A few individuals noted that a number of rural and/or underserved communities rely on foreign trained dentists, and that this rule would make it difficult to recruit dentist in rural and/or underserved areas.

A couple of professional associations said the rule potentially could eliminate the H-1B visa option for recent graduates, including IMGs and postdoctoral researchers, with serious consequences for the U.S. healthcare workforce. One of these commenters said IMGs compose nearly one-fourth of the U.S. physician workforce and one-fourth of the country's resident physicians in training. The commenter stated that, due to this rule, these highly qualified physicians may choose to go to other countries rather than risk being unable to complete training requirements, build up a medical practice, or perform clinical duties.

A professional association wrote specifically about the impacts of the rule on the availability of primary care physicians. The commenter cited data indicating that the United States is facing a primary care physician shortage and stated that IMGs play a vital role in filling this gap. The commenter went on to say that family medicine and other primary care physicians typically have lower annual salaries than specialty

<sup>29</sup> See Daniel Obst and Joanne Forster, *Perceptions of European Higher Education in Third Countries, Outcome of a Study by the Academic Cooperation Association, Country Report: USA*, Institute of International Education, <https://www.iiie.org/Research-and-Insights/Publications/International-Students-in-the-United-States>.

<sup>30</sup> See 8 CFR 214.2(f)(10)(iii).

<sup>31</sup> See Muzaffar Christhi and Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*, Migration Policy Institute (July 2016), [https://www.migrationpolicy.org/sites/default/files/publications/1990-Act\\_2016\\_FINAL.pdf](https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf) ("Sponsors of [the Immigration Act of 1990 which created the H-1B program as it exists today] believed that facilitating the admission of higher-skilled immigrants would benefit the economy and increase the United States' competitive edge in attracting the 'best and the brightest' in the global labor market.").

<sup>32</sup> See INA section 214(g)(5), 8 U.S.C. 1184(g)(5).

<sup>33</sup> See INA section 214(g)(5), 8 U.S.C. 1184(g)(5).

<sup>34</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division (PRD), *Cap-Exempt H-1B Approvals in Certain Categories*, Dec. 9, 2020. This data shows the following breakdown for cap-exempt H-1B approvals: 20,097 for institution of higher education; 11,847 for affiliated or related non-profit entities; 5,131 for non-profit research organizations or government research organization; and 3,998 for beneficiaries employed at a qualifying cap exempt entity.

physicians, and, since this proposal favors H-1B petitioners with higher annual salaries, it also may discriminate against family physicians unfairly.

*Response:* DHS disagrees with the assertion that this rule will prevent recent medical or dental graduates from obtaining H-1B status, as Congress already exempted from the H-1B cap any alien who is employed or has received an offer of employment at an institution of higher education, a related or affiliated non-profit entity, or a non-profit research organization or a governmental research organization.<sup>35</sup> As stated above, in FY 2019, more than 93 percent of H-1B petitions approved for initial employment for physicians, surgeons, and dentists were cap-exempt and, thus, not subject to the H-1B cap selection process. Because a significant majority are not affected by this rule, this reduction likely will affect a minimal population, if any, of recent foreign medical graduates.

In addition, Congress has established programs meant to encourage certain recent foreign medical graduates to serve in the United States as H-1B nonimmigrants. These programs are exempt from the annual caps and unaffected by this rule. Certain J-1 exchange visitors are subject to a 2-year foreign residence requirement under INA section 212(e), 8 U.S.C. 1182(e), which requires them to return to their country of nationality or country of last residence for at least two years in the aggregate prior to being eligible to apply for an immigrant visa; adjustment of status; or a nonimmigrant visa, such as an H-1B visa (with limited exceptions).<sup>36</sup> However, INA section 214(l), 8 U.S.C. 1184(l), contains provisions authorizing waivers of the 2-year foreign residence requirement for certain aliens, including foreign medical graduates who agree to work full-time (at least 40 hours per week) in H-1B classification for not less than three years in a shortage area designated by the U.S. Department of Health and Human Services (HHS) with a request from an interested federal government agency or state agency of public health or its equivalent, or with the U.S. Department of Veterans Affairs (VA).<sup>37</sup> The petition requesting a change to H-1B nonimmigrant status for these physicians is not subject to the numerical limitations contained in INA section 214(g)(1)(A), 8 U.S.C.

<sup>35</sup> See INA section 214(g)(5), 8 U.S.C. 1184(g)(5); 8 CFR 214.2(h)(8)(iii)(F).

<sup>36</sup> See INA section 212(e), 8 U.S.C. 1182(e); INA section 248, 8 U.S.C. 1258.

<sup>37</sup> See INA section 214(l), 8 U.S.C. 1184(l). See also 8 CFR 212.7(c)(9).

1184(g)(1)(A).<sup>38</sup> While participation in the Conrad State 30 program (relating to waivers based on requests from a state agency of public health or its equivalent for service in an HHS-designated shortage area) is limited to 30 participants per eligible jurisdiction annually, the other programs have no limits on the number of participants.<sup>39</sup>

Further, DHS disagrees with the comment that this rule may unfairly discriminate against family physicians and other primary care physicians who typically have lower annual salaries than specialty physicians. In general, family physicians or other primary care physicians have different SOC codes than specialty physicians. As DOL prevailing wage level calculations generally differ by SOC codes, when wage data is available, the corresponding wage level would necessarily account for the different occupational classification for primary care physicians as opposed to other types of physicians. When such wage level data is unavailable, wage level ranking will be based on the skill, education, and experience requirements for the position, again taking into account the particulars of the relevant occupational classification, such that registrations or petitions for primary care physicians will be ranked in comparison to the normal requirements for primary care physicians and not in comparison to other types of physicians. As such, DHS does not believe that this rule will disadvantage registrations or petitions for primary care physicians or any other subset of physicians.

#### (b) Rural and/or Underserved Communities

*Comments:* Multiple commenters, including several professional associations, said the rule would negatively impact the U.S. health care system in areas that are rural and/or underserved where IMG and non-citizen physicians are particularly essential. A professional association cited data indicating that IMGs are more likely to become primary care physicians and practice in rural and other underserved areas where physician shortages are the direst and that rely heavily on family physicians for ambulatory and emergency care. A couple of professional associations similarly said IMGs typically serve in rural and/or medically underserved communities, providing care to many of our country's most at-risk citizens. One of these

<sup>38</sup> See INA section 214(l)(2)(A), 8 U.S.C. 1184(l)(2)(A).

<sup>39</sup> See INA section 214(l)(1)(B), 8 U.S.C. 1184(l)(1)(B).

commenters stated that, although 20 percent of the country's population resides in rural areas, fewer than 10 percent of U.S. physicians actually practice in those communities, resulting in over 23 million rural Americans living in federally designated primary medical Health Professional Shortage Areas (HPSA). This commenter also stated that recently graduated H-1B physicians participating in pipeline programs in the beginning of their careers, such as Conrad State 30, fall within the first and second tiers of the prevailing wage determination. Therefore, the proposed rule would create a system that removes physicians who are willing and ready to practice in medically underserved areas and cuts off those patients who are most in need from receiving physician care.

A professional association stated that Federally Qualified Healthcare Centers (FQHC), institutions that serve high-risk, medically underserved populations in HPSAs, do not qualify for exemption from the H-1B visa cap. To fill the physician gap, FQHCs utilize H-1B physicians to care for patients in these health care underserved areas. The commenter stated that, if the proposed rule is enacted, these FQHCs would be unable to obtain early-career H-1B physicians and are unlikely to be able to compete with larger, more affluent organizations to offer a higher proffered wage to increase their chances of obtaining H-1B physician candidates and reducing the physician shortages identified by HPSA data.

A company stated that rural hospitals and other health care facilities rely heavily on healthcare-staffing companies to fill their staffing needs, but the rates staffing companies are able to charge rural facilities usually are much lower than the rates they are able to charge facilities in affluent metropolitan areas. Thus, the rule would cause staffing companies to place their professionals where the staffing companies can charge the highest rates, so that staffing companies can maintain sufficient profitability and ensure that their workers are able to obtain H-1B visas. The commenter concluded that the rule would decrease the supply of healthcare labor to rural and other underserved communities, where it is needed most.

*Response:* DHS acknowledges the important role that early career and entry level foreign physicians may play in providing health care in rural and/or underserved communities. As explained in response to the previous comments, Congress has established programs meant to direct foreign medical graduates to those communities.

Also as noted above, physicians whose nonimmigrant status is changed to H-1B through their participation in any of the three waiver programs in INA section 214(l), 8 U.S.C. 1184(l), are not subject to the annual H-1B caps. The Conrad State 30 program (relating to waivers based on requests from a state agency of public health or its equivalent for service in an HHS-designated shortage area) is limited to 30 participants per eligible jurisdiction annually.<sup>40</sup> However, there are no annual limits on the number of aliens who can obtain a waiver through service in an HHS-designated shortage area based on the request of a federal interested government agency. Since these programs are not subject to the annual H-1B caps, they will not be affected by this rule and the programs will continue to provide a pipeline for these physicians to serve in HHS-designated shortage areas.

Congress has established a similar statute in the immigrant context, which also channels physicians to serve in HHS-designated shortage areas, commonly known as the Physician National Interest Waiver Program.<sup>41</sup> That program has no limits on the number of physicians who can participate in a given fiscal year, though there are numerical limitations on the number of employment-based immigrant visas that can be allocated annually. This program is unaffected by this rule and will continue to provide a pipeline for an unlimited number of physicians to serve in HHS-designated shortage areas.

DHS agrees with the commenters who stated that medical institutions in rural and/or underserved areas may not be institutions of higher education, related or affiliated non-profit entities, or non-profit research organizations or governmental research organizations. As a result, aliens who are employed by or who have received an offer of employment from such medical institutions may not be exempt from the annual H-1B numerical limitations under INA section 214(g)(5), 8 U.S.C. 1184(g)(5). However, some of those medical institutions do meet the requirements to be cap-exempt, and their employees will not be subject to the numerical limitations.<sup>42</sup>

<sup>40</sup> See INA section 214(l)(1)(B), 8 U.S.C. 1184(l)(1)(B).

<sup>41</sup> See INA section 203(b)(2)(B)(ii)(I), 8 U.S.C. 1153(b)(2)(B)(ii).

<sup>42</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *Wage Level of H-1B Initial Employment Physician Approvals (Cap-Subject and Cap-Exempt), Fiscal Year 2019*, Database Queried: PETAPP, Report

DHS acknowledges that some alien physicians who currently serve in rural and/or underserved areas as H-1B nonimmigrants are not participating in the waiver programs of INA section 214(l), 8 U.S.C. 1184(l), and they are not working for cap-exempt employers. These physicians may be in positions categorized as prevailing wage levels I or II, depending on their individual circumstances. However, such physicians may avail themselves of alternative pathways to serve in these areas such as the Physician National Interest Waiver Program and not be subject to the annual H-1B numerical limitations.

Further, as with all other cap-subject H-1B visas, DHS will rank and select registrations for these positions generally according to the highest OES prevailing wage level that the proffered wage equals or exceeds, which necessarily takes into account the area of intended employment when such wage level data is available. Where there is no current OES prevailing wage information for the proffered position, which DHS recognizes is the case for some physician positions based on limitations in OES data, the registrant would follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration. The determination of the appropriate wage level in those instances would be based on the skill, education, and experience requirements of the position, and generally does not take into consideration the area of intended employment. Therefore, DHS does not believe that this rule necessarily will disadvantage rural and/or underserved communities relative to registrations or petitions based on offers of employment in other areas.

#### (c) COVID-19

*Comments:* Several commenters stated that the rule would have particularly concerning impacts on the U.S. healthcare workforce as the United States grapples with the COVID-19 pandemic. A professional association said these visa cap requirements come at a most inopportune time, as the United States sustains some of the highest rates of COVID-19 cases worldwide and depends on early career physicians to serve on the frontlines. The commenter said H-1B physicians have played a large role in caring for

those who are seriously ill from COVID-19, including those facing health complications following recovery from this disease. Similarly, another professional association cited data indicating that, currently, the States where H-1B physicians are providing care are also those with some of the highest COVID-19 case counts.

*Response:* DHS certainly appreciates the significant contributions of all healthcare professionals, especially during the current COVID-19 pandemic, but DHS continues to note that many foreign medical professionals are eligible for cap-exempt H-1B status and are not impacted by this rule. Additionally, DHS believes that this rule will provide benefits to the greater U.S. workforce that outweigh any potential negative impacts on the relatively small subset of H-1B cap-subject healthcare workers.

For example, DHS received submissions from unemployed and underemployed U.S. citizen medical graduates who attested to the decades-long problem of displacement of several thousands of qualified U.S. citizen IMGs and graduates of U.S. medical schools for federally funded residency training positions. This rule may benefit these unemployed and underemployed U.S. citizen medical graduates by potentially increasing employment opportunities. Further, DHS notes that this final rule is not a temporary rule that is limited in duration to the COVID-19 pandemic; moreover, this final rule will not have immediate impact on H-1B employment as it will first be applied to the FY 2022 registration and selection process, the beneficiaries of which will not be able to begin employment in H-1B classification until October 1, 2021.

#### (d) Healthcare Facilities

*Comments:* A professional association stated that larger, wealthier companies are much more likely to be able to pay augmented salaries to increase their chances of selection for filing of H-1B cap-subject petitions. In comparison, smaller, less affluent medical practices would not be able to compete with these large conglomerates, despite having a much greater need for physicians. As such, larger hospital systems would be able to buy H-1B visas for their physicians, leaving mid to small size practices even more understaffed.

A trade association stated that its members in the healthcare industry are very concerned about the impact this rule would have on their ability to continue hiring H-1B foreign medical graduates, who are critical for healthcare providers to meet the needs of their patients. The commenter said

Created: 11/18/2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2019 (showing that, in FY 2019, more than 93 percent of H-1B petitions approved for initial employment for physicians, surgeons, and dentists were cap-exempt and not subject to the H-1B cap selection process).

the disruptions caused by the rule would be profound on these employers, as they continue to struggle in confronting the ongoing COVID-19 pandemic.

A law firm stated that the salary market in healthcare is not like the salary market in other fields and explained that, because so much of hospitals' reimbursement processes are governed by Medicare and a tiny handful of large insurance companies, it would be impossible for U.S. healthcare facilities to negotiate reimbursement rates in a manner to significantly raise salaries. The commenter said that this rule is a "blunt object" that would lead to additional Silicon Valley, California, H-1B visas in place of visas that currently help the healthcare of U.S. citizens, and rural facilities would suffer the brunt of this policy.

*Response:* DHS appreciates the significant contributions of all healthcare professionals, especially during the current COVID-19 pandemic, but believes that this rule will provide benefits to the greater U.S. workforce. DHS does not believe that the changes in this rule will have a disproportionately negative impact on small- to mid-sized medical practices as compared to larger hospital systems. It is not necessarily the case that larger hospital systems are more willing or able to provide higher salaries to their employees.<sup>43</sup> DHS also does not believe that the changes in this rule will have a disproportionately negative impact on rural facilities, as it is not necessarily the case that rural facilities are unwilling or unable to provide relatively higher salaries compared to facilities in other areas.<sup>44</sup> With respect to the ability to offer increased wages generally, DHS acknowledges that employers of healthcare professionals, like employers in all industries, must consider a variety of factors in determining employee salaries. However, this rule does not require employers to pay a higher wage, and, as stated in the NPRM and above, employers that might have petitioned for a cap-subject H-1B worker to fill relatively lower-paid, lower-skilled positions may be incentivized to hire available and qualified U.S. workers for those positions. Also as noted above,

DHS believes that selecting by wage level in such years is more consistent with the dominant legislative purpose of the H-1B program, which is to help U.S. employers fill labor shortages in positions requiring highly skilled or highly educated workers.

#### iv. Employers

*Comments:* Multiple commenters said the proposal would have the following negative impacts on employers without providing substantive rationale: Many industries and companies benefit from entry-level employees who bring energy, innovation, and diversity; the proposal would reduce the number of H-1B workers "that employers can access"; the rule may incentivize employers to favor domestic applicants in the short term, but businesses may not be able to hire the people best suited for the job in the long run; companies would suffer because foreign employees will not waste their time with companies that they do not think will be able to sponsor them for a visa; to be competitive in the H-1B registration process, companies would have to pay double the costs for new hires; this rule would be beneficial for a few industries and create biases for other industries; the rule would jeopardize the employers' ability to meet business objectives, develop and provide new products to market, and stay competitive in a global market; this proposal would create "vicious competition cycles" among H-1B candidates and their employers; and, if this proposal were implemented, there would be a shortage in the job market for junior level employees.

*Response:* For the reasons explained above, DHS disagrees with the assertions that this rule will preclude or essentially preclude H-1B status for recent graduates and entry-level workers. The rule is not intended to, and DHS does not expect that it will, reduce the number of cap-subject H-1B workers. As explained in the NPRM and above, DHS believes that the rule will maximize H-1B cap allocations so that they more likely will go to the best and brightest workers, consistent with Congressional intent. DHS believes that this rule will facilitate the admission of higher-skilled workers or those for whom employers proffer wages commensurate with higher prevailing wage levels, which will benefit the economy and increase the United States' competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H-1B program. Finally, as stated in the NPRM and above, employers that might have petitioned for a cap-subject H-1B worker to fill relatively lower-paid,

lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions.

#### (a) Impacts on Companies

*Comments:* A couple of professional associations stated that the proposal would have an adverse impact on petitioners in terms of employment, productivity loss, search and hire costs, lost profits resulting from labor turnover, and more. One of these professional associations added that the use of wage data for selection of H-1B registrants would unfairly discriminate against and burden law-abiding employers. The commenter also argued that the current H-1B registration has been beneficial to employers because it has a much earlier indication of the lottery's outcome, and that the proposal would "diminish predictability" for companies.

A trade association said the rule would place an excessive cost burden on petitioners because they would be required to offer dramatically increased wages to prospective H-1B employees, especially in conjunction with the new increased wage levels implemented through the DOL IFR.<sup>45</sup> The commenter stated that employers would be "forced" to offer prevailing wages above the 95th percentile to equal or exceed level IV prevailing wages. Another trade association argued that the proposal, in conjunction with the DOL IFR, may result in pay that exceeds that of comparable U.S. workers, which may result in personnel strains and new costs for U.S. companies. Several commenters, including a professional association, company, and research organization, stated that employers would be "forced" to either forego hiring foreign professionals or hire foreign workers at a salary level higher than U.S. workers, which would cause problems for the employers such as internal equity issues. An individual commenter stated that the rule would create public relations problems for companies, arguing that "forcing" companies to pay foreign workers more than the market currently dictates would disenfranchise U.S. workers in similar positions.

*Response:* DHS disagrees that this rule will unfairly discriminate against and burden law-abiding employers. While petitioners may initially spend more on search and hire costs to obtain foreign workers who command higher wages or have higher skill levels, DHS believes

<sup>43</sup> See Wayne Lipton, *Is a Bigger Medical Practice Always Better?*, Physicians Practice (June 21, 2012), <https://www.physicianspractice.com/view/bigger-medical-practice-always-better>.

<sup>44</sup> See Bonnie Darves, *Demystifying Urban Versus Rural Physician Compensation*, The New England Journal of Medicine Career Center (Mar. 4, 2019), <https://www.nejmcareercenter.org/article/demystifying-urban-versus-rural-physician-compensation/>.

<sup>45</sup> *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 FR 63872.

these petitioners will see an increase in productivity as a result of hiring such higher-skilled workers. Regarding the benefits of the registration process, this rule will continue to use the same registration process (with the added factor of ranking and selection by wage level), which will continue to provide predictability for companies in the H-1B cap selection process. In fact, this rule may increase predictability for companies offering relatively higher wages in order to increase their chances of selection.

As for the concern about offering prevailing wages above the 95th percentile, DHS notes that the DOL IFR was set aside and no longer is being implemented as of the publication of this final rule.<sup>46</sup> As for the concerns about “internal equity issues” or “public relations problems” caused by paying foreign workers more than the U.S. workers in similar positions, nothing in this rule requires an employer to offer an H-1B worker a higher wage than a U.S. citizen worker for the same position.

#### (b) Impacts on Available Workforce

*Comments:* Several commenters, including a professional association and a trade association, argued that the proposal would harm the ability of U.S. companies to hire aliens for entry-level jobs. A company asserted that the NPRM would diminish U.S. companies’ access to the full range of talent, across all career stages, necessary to build a complete workforce. An advocacy group similarly said that the rule does a disservice to companies struggling to fill talent gaps across multiple levels of employment. An individual commenter said the rule would end the H-1B program “for good” for many professions that are in short supply. An individual commenter argued that the proposal makes the H-1B process more challenging for both small and large employers who have relatively small numbers of H-1B workers compared to the overall workforce, and makes it “almost impossible” to fill certain positions without being able to supplement the U.S. workforce. A trade association said that the proposal is an example of “government heavy-

handedness” which presents U.S. companies with prospective difficulties in meeting workforce needs.

An anonymous commenter said the rule would severely interrupt many U.S. companies’ operations, as it would disqualify many foreign workers fulfilling specialty jobs and make it difficult for companies to find reasonable substitutes for the labor. The commenter stated that DHS’ statement that these disadvantages would be offset by increased productivity and availability of higher wage H-1B petitioners is “optimistic” and lacks support.

An individual commenter said their company would be impacted because entry-level STEM candidates have played critical roles throughout the organization, and the proposal would mean they would be unable to draw from the world’s leading talent. In addition, some of their H-1B employees gain OPT through the company, and it would be detrimental to their business to be forced to terminate these employees after they have received training.

*Response:* DHS acknowledges that, under this final rule, an employer offering a level I wage under the regular cap, and an employer offering a level I or II wage under the advanced degree exemption, may have a reduced chance of selection than under the current random selection process. However, DHS believes that selecting based on wage level is necessary and consistent with the intent of the H-1B statutory scheme to utilize the numerical cap in a way that incentivizes a U.S. employer’s recruitment of beneficiaries for positions requiring the highest prevailing wage levels or proffering wages equaling or exceeding the highest prevailing wage levels relative to their SOC code and area of intended employment, either of which correlate with higher skill levels.<sup>47</sup> Prospective employers who seek to “draw from the world’s leading talent” may maximize their likelihood of selection by offering wages commensurate with such a high skill level rather than offering relatively low wages. Further, DHS disagrees with suggestions that this rule would end the H-1B program’s utility for certain companies or disqualify many foreign workers fulfilling specialty occupation jobs. This rule does not affect current H-1B employees (unless such workers become subject to the H-1B numerical allocations in the limited circumstance that their cap-exempt employment terminates) nor does the rule change the

eligibility criteria to qualify for an H-1B visa.

#### (c) Impacts on Specific Types of Employers

*Comments:* A professional association said that the proposal would negatively impact the information technology (IT) industry, which already is facing a scarcity of high-skilled candidates. The commenter cited a study, which found that there were over 650,000 unfilled computer-related jobs posted between September and October 2020, which often are filled with employees from abroad with degrees. The proposed rule would limit the ability of IT companies to hire foreign workers and would stifle U.S. innovation, harm economic growth and, therefore, impact job opportunities for U.S. workers. An individual commenter discussed how the proposed rule actually would achieve the opposite of its desired outcome, which would be increased wages for H-1B workers, particularly in the IT sector. The commenter explained that companies are realizing that employees can accomplish their jobs at home during the COVID-19 crisis. If this is the case, employers could avoid the costs associated with foreign worker sponsorship and, instead, employ H-1B workers at lower wages while they remain in their respective countries. A research institute explained that the proposed rule is targeting the IT industry to prevent employers in that industry from obtaining H-1B visas or making it too expensive for them to employ H-1B visa holders.

An individual argued that a financial technology company would be negatively impacted, giving the example of a Database Administrator position, which the commenter said does not require a level III or IV prevailing wage, but often is difficult to fill with U.S. workers.

A couple of individual commenters, an advocacy group, and a professional association said that companies need workers through the H-1B program because there are not enough qualified U.S. workers in STEM fields. Another individual commenter cited a STEM worker shortage, arguing that the United States should be “rolling out the welcome mat” for high-skilled talent. A professional association and an individual commenter also addressed the claimed current STEM shortage and explained how the proposed rule would further hurt employers’ ability to hire college-educated foreign workers. A trade association stated that the proposed rule would make the H-1B visa program unusable for many engineering firms. The association,

<sup>46</sup> On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al. v. DHS, et al.*, No. 20-cv-7331, setting aside the DOL IFR, 85 FR 63872. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al. v. Scalia, et al.*, No. 20-cv-14604, applying to the plaintiffs in that case. Also on December 3, 2020, DOL announced that it will no longer implement the IFR, consistent with the above referenced court orders.

<sup>47</sup> See 85 FR 69236, 69239.

citing data from the National Science Foundation, asserted that the engineering workforce is growing slower than the demand for engineers, and is growing older. Therefore, the engineering industry needs to be able to access labor from around the world to fill key positions. A company and a professional association said that U.S. graduates with advanced degrees in STEM, such as computer science, IT, or industrial engineering, are predominately foreign students and that the NPRM would negatively harm companies seeking these employees. A medical device company that employs research and development (R&D) engineers stated that the rule would result in poorer talent to develop medical technologies or higher wages to international talent, which would reduce overall R&D resources and impact their ability to deliver the best healthcare technologies.

A trade association said that restricting H-1B visas to senior professionals with higher wages would negatively impact manufacturers and their ability to hire aliens with STEM education and training to fill roles as researchers, scientists, engineers, and technicians. The commenter explained that the NPRM may deter aliens from attending college in the United States and restrict the talent pipeline. Further, the commenter stated that manufacturers rely on a skilled and innovative workforce that allows them to remain competitive, and that this NPRM will provide other countries a competitive advantage. This is coupled with the claim that the workforce challenge is expected to get worse in the future, with studies showing that nearly half of the 4.6 million manufacturing jobs could go unfilled, according to the commenter.

A university and an individual stated that the proposed system would encourage employers to artificially inflate their job requirements to increase the chance of acceptance through the lottery, creating an unfair advantage for larger employers. An individual commenter similarly said the rule disproportionately favors companies willing to pay the most money to foreign workers. An individual commenter said the rule would pit companies against each other to provide the highest salary, which would give larger tech companies control over the H-1B selection lottery. A law firm stated that start-up companies would be negatively impacted because they do not have the capital to be able to offer “obscenely high salaries” to be competitive in this process.

A few commenters noted that the increased difficulty in obtaining H-1B workers could have a negative effect on R&D or innovation at their companies. For example, a professional association said that companies in the automotive sector that have committed hundreds of millions of dollars to developing fuel-efficient engines no longer would be able to hire and retain recent graduates who have the academic background necessary to drive innovation through the H-1B program. Another professional association wrote that the proposed rule would negatively impact companies developing products that strengthen national security, as it would diminish the ability of U.S. employers to hire workers for the development of technology including artificial intelligence, quantum information science, robotics, and fifth-generation communications technology.

*Response:* DHS does not believe this rule will have a disparate negative impact on IT companies, financial technology companies, engineering firms, manufacturers, or companies in any particular industry. Additionally, DHS does not believe this rule will disadvantage companies developing products that strengthen national security or companies driving innovation in the automotive sector. Instead, DHS believes this rule will incentivize employers to proffer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, thereby attracting the best and the brightest employees and promoting innovation across all industries.

Moreover, DHS disagrees with the assertion that this rule will make the H-1B visa program “unusable” for engineering firms. While DHS acknowledges that some data may show that the engineering workforce is growing slower than the demand for engineers, DHS disagrees with the commenter that this means engineering firms must hire entry-level foreign workers to fill this gap. In fact, DHS data shows that, for “Architecture and Engineering Occupations,” there has been a significant number of petitions filed for level III and IV positions. Specifically, for FYs 2018 and 2019, employers filed 11,519 and 7,045 petitions (total of 18,564) for level III and IV positions, respectively, compared to 15,625 and 25,147 petitions (total of 40,772) for level I and II positions, respectively.<sup>48</sup> While

registrations ranked according to prevailing wage level I and below likely will face reduced chances of selection, those ranked according to level II and greater stand increased chances of selection, as discussed in the NPRM.

DHS also disagrees that the rule will disadvantage the IT industry or stifle innovation. Conversely, DHS believes this rule may increase innovation and productivity.<sup>49</sup> Notably, other commenters claimed that this rule would favor the IT industry (which DHS disputes as well). Again, and as made apparent through these conflicting comments, DHS does not believe this rule will have a disparate negative or positive impact on the IT industry or companies in any particular industry.

*Comment:* An individual commenter stated that the rule would negatively impact non-profit organizations and public schools because they would need to compete with and pay the prevailing wages offered by for-profit businesses. Another individual commenter said that non-profits do not operate to maximize profit, and that their budgets cannot accommodate level III or IV prevailing wages. The commenter also argued that there is a large need for immigrant social workers who are able to better connect with and relate to the large population of noncitizens in the United States. Another commenter claimed that, if the H-1B proposed changes go into effect, many school districts throughout the United States would have a difficult time finding teachers.

*Response:* DHS does not believe that this rule will have a significant negative impact on non-profit organizations or public schools. Congress already exempted from the H-1B cap any alien who is employed or has received an offer of employment at an institution of higher education, a related or affiliated non-profit entity, or a non-profit research organization or a governmental research organization.<sup>50</sup> Thus, many petitions for non-profits will not be affected by this rule. Some public schools also are exempt from the H-1B cap based on their affiliation with

*Petitions for Non Immigrant Worker (I-129) Summarized by SOC CODE Occupation by Wage Level As of August 28, 2020, Database Queried: Aug. 28, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019. This data does not further break down how many of these petitions were for “Architecture” occupations versus “Engineering” occupations.*

<sup>49</sup> See Michael R. Strain, *The link between wages and productivity is strong*, American Enterprise Institute (AEI) and Institute for the Study of Labor (IZA) (Feb. 4, 2019), <https://www.aei.org/research-products/report/the-link-between-wages-and-productivity-is-strong/>.

<sup>50</sup> See INA section 214(g)(5), 8 U.S.C. 1184(g)(5); 8 CFR 214.2(h)(8)(iii)(F).

<sup>48</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *H1B*

institutions of higher education.<sup>51</sup> For those non-profit entities or public school districts that are not cap-exempt and are unable to proffer wages that equal or exceed prevailing wage levels with greater chances of selection, they may be able to find available and qualified workers outside of the H-1B program.<sup>52</sup>

(d) Other Comments on Impacts on Employers

*Comments:* Multiple commenters argued that the rule likely would result in a significant and sudden downturn in immigration casework, and would cause immigration law firms to scale back operations and lay off staff, at a time when the U.S. economy already is in a precarious position and unemployment is high.

*Response:* DHS disagrees with these commenters as this rule is not intended or expected to result in fewer H-1B workers in the United States, and will not affect existing H-1B workers, unless such workers become subject to the numerical allocations, and therefore should not reduce workload for immigration law firms overall. Employers with existing H-1B employees, who are not affected by this rule, may still need immigration law firm services. In addition, while some employers may opt not to participate in the H-1B program as a source for potential new employees and may not require immigration law firm services for those potential new employees as a result, given the high demand for H-1B visas, other employers may have the opportunity to begin participating in the program or to increase their existing participation in the program and may require increased services of immigration firms and attorneys. Therefore, DHS does not anticipate that this rule will have a negative overall impact on law firms and attorneys.

*Comments:* Multiple commenters reasoned that, with a focus on base wages, the proposed rule may result in employers abandoning the use of variable compensation, such as bonuses, profit-sharing payments, stock, and other incentives tied to performance. A

commenter argued that variable pay can benefit a company by focusing on organizations, business units, and individuals on specific goals and objectives. Alternatively, employers offering such compensation packages may be disadvantaged relative to others offering solely wage-based compensation.

*Response:* DHS recognizes that companies may offer various forms of benefits and benefits provided as compensation for services, such as cash bonuses, stock options, paid insurance, retirement and savings plans, and profit-sharing plans. While cash bonuses may, in limited circumstances, be counted towards the annual salary,<sup>53</sup> other forms of benefits such as stock options, profit sharing plans, and flexible work schedules may not be readily quantifiable or guaranteed, which means that they cannot reliably be calculated into proffered wages. Further, as one commenter pointed out, if a beneficiary is highly valued, that beneficiary may be able to discuss with their employer changes to their compensation structure that could result in a more easily quantifiable proffered wage.

v. Economy

*Comments:* Multiple commenters said the proposal would have the following negative impacts on the economy without providing substantive rationale: The rule would hurt the overall economy; the American public would assume the increased cost of labor through hidden corporate taxes or increased costs of services; this would affect U.S. economic development because many young people will be blocked by this new rule; this proposal would increase economic and cultural divisions that already exist because it would eliminate all “interactive possibilities from social and cultural disciplines”; the proposed rule would harm the U.S. economy because the United States needs international students to bring funds to the country to study and live; international students educated at U.S. colleges have better acculturation to U.S. society, which is very important for long-term growth of the economy.

An individual commenter stated that the proposal would “gut the system” and lead to further economic decline. Other commenters argued that this rule would hurt the economy during a global pandemic when the economy is suffering. An individual commenter said that, to rebound from the pandemic and meet the challenges that face the

United States, the country must expand opportunities for skilled workers, particularly in the STEM and health professions. A few individual commenters asserted, without evidence, that the proposal is based on the “false premise” that individuals who earn more contribute more to the economy, and that the rule promotes falsities about the workers who strengthen the U.S. economy. A few individual commenters stated that the proposal provides no evidence that higher wages correspond with labor needs of employers or provide a greater economic benefit.

*Response:* DHS does not agree that this rule will harm the U.S. economy or economic development, increase costs for the American public, or increase cultural or economic divisions. Instead, DHS believes that this rule will facilitate the admission of higher-skilled workers, which will benefit the economy and increase the United States’ competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H-1B program. It may also benefit U.S. workers, as employers that might have petitioned for cap-subject H-1B workers to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions.

*Comments:* A university said that foreign graduates do not take jobs from U.S. citizens, but, rather, they create new jobs and contribute “billions” to the economy. An individual commenter argued that attracting the best and brightest from around the world for education and employment helps to drive innovation and benefits the U.S. economy and nation as a whole, but the proposed rule would not lead to that outcome. An individual cited numerous studies in arguing that the current framework, in contrast to a proposed “best and brightest” prioritization, generates more economic benefits of the type intended by Congress. Several other commenters argued that the rule would cause professionals to seek careers elsewhere. A law firm stated that the rule could halt innovation in the United States, as studies have shown a positive correlation between foreign students and innovation.

An advocacy group said that the rule would risk preventing highly skilled professionals from bringing their talents to the United States, despite their education and skill, which likely would result in the United States missing out on the contributions of needed talent across multiple industries. A trade association stated that “each facet” of the U.S. workforce is enabled by an

<sup>51</sup> See Burr Forman McNair et al., *School Districts Taking Advantage of New H-1B Cap Exempt Regulations*, JDSUPRA (June 1, 2017), <https://www.jdsupra.com/legalnews/school-districts-taking-advantage-of-64663/>.

<sup>52</sup> Data shows that roughly 53 percent of recent college graduates in the United States are currently unemployed or underemployed. See Darko Jacimovic, *College Graduates Unemployment Rate in the US, What to Become* (Nov. 25, 2020), <https://whattobecome.com/blog/college-graduates-unemployment-rate/#:~:text=The%20median%20pay%20for%20those,in%20the%20US%20is%2021.1%25> (citing University of Washington data).

<sup>53</sup> See 20 CFR 655.731(c)(2).

immigration system that allows access to foreign talent to allow employers to remain competitive, and argued that highly-skilled foreign executives and managers help run key aspects of U.S. companies that create thousands of jobs for domestic workers. The commenter said that it is this “synergy” between aliens and U.S. residents that underpins the United States’ “vibrant” economy. An attorney argued that the United States would lose the benefits that come with younger, recently educated professionals whose value already has been assessed against the ease of employing U.S. applicants. An advocacy group said that the U.S. population is aging, and the country needs immigrants to help the economy grow. In addition, the commenter said that, for the United States’ innovation future, the country needs international students. An individual commenter stated that favoring aliens far into their careers over young professionals is “perverse” because they may have only a decade of their careers left, which is not in the country’s best interest. Another commenter said that this proposal could result in future H–1B participants who are older, not necessarily high-skilled, and have no exposure to American culture. The commenter said international students and the H–1B program are key drivers of job growth and economic dynamism, and altering the H–1B program to exclude recent graduates may stymie these positive effects.

*Response:* DHS appreciates the economic contributions that highly skilled aliens make to the United States. Rather than reducing such contributions or halting innovation, DHS believes that this rule will incentivize employers to attract and recruit highly-skilled aliens, as opposed to the current random selection process that “favors companies hiring workers with interchangeable skills en masse over those with a pressing need to hire specific foreign experts,”<sup>54</sup> and, thus, will benefit the economy overall.<sup>55</sup> The

<sup>54</sup> See Drew Calvert, *Companies Want to Hire the Best Employees. Can Changes to the H–1B Visa Program Help?*, KelloggInsight (Feb. 6, 2017), <https://insight.kellogg.northwestern.edu/article/how-to-revamp-the-visa-program-for-highly-skilled-workers> (further noting “[u]nder the current system, U.S. companies are often discouraged from even attempting to hire a foreign worker, despite how uniquely qualified he or she might be”).

<sup>55</sup> See Muzaffar Chrishti and Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*, Migration Policy Institute (July 2016), [https://www.migrationpolicy.org/sites/default/files/publications/1990-Act\\_2016\\_FINAL.pdf](https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf) (“Sponsors of [the Immigration Act of 1990] which created the H–1B program as it exists today] believed that facilitating the admission of higher-skilled immigrants would benefit the

rule is not intended to, and DHS does not expect that it will, reduce the number of H–1B workers. DHS also notes that this rule does not preclude recent graduates from obtaining H–1B status or employers from directly sponsoring a recent foreign graduate for an employment-based immigrant visa. Although this rule will reduce the chance of selection for those at lower wage levels in years of excess demand, DHS believes that selecting by wage level in such years is more consistent with the dominant legislative purpose of the H–1B program, which is to help U.S. employers fill labor shortages in positions requiring highly skilled or highly educated workers. Furthermore, DHS disagrees with the commenter that selecting higher paid and/or more highly skilled workers necessarily means that employers will be selecting those with less time left in their careers and thus those who will not be in the country’s best interest. In addition, DHS does not believe that the time spent in the workforce determines the degree of contribution to the economy or the country. As explained in the NPRM and above, DHS believes that the rule will maximize H–1B cap allocations so that they more likely would go to the best and brightest workers.

*Comments:* Several commenters said that the proposal could have the unintended consequence of “forcing” entire businesses offshore. A professional association said that the proposal would result in more companies outsourcing jobs abroad and would discourage innovation. An individual commenter said that each job that is off-shored will take with it multiple other U.S. positions because the United States will lose the economic contributions of foreign workers, such as rented apartments, home mortgages, cares, groceries, and more. Another commenter said that this rule would make it more expensive for companies to hire in U.S. locations, and they eventually would move entire sections of their operation overseas or outsource labor, hurting U.S. workers in the long run.

*Response:* DHS disagrees with the commenters who state that this rule will cause employers to move operations to other countries. These commenters cited research<sup>56</sup> suggesting that restricting H–

economy and increase the United States’ competitive edge in attracting the ‘best and the brightest’ in the global labor market.”).

<sup>56</sup> See Britta Glennon, *How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H–1B Program*, National Bureau of Economic Research (July 2020), <https://www.nber.org/papers/w27538>; Michelle Marks, *Skilled, foreign workers are giving up on their*

1B immigration is likely to cause multinational firms to offshore their highly skilled labor as the basis for concerns about this rule. However, DHS disagrees that this rule restricts H–1B immigration. Again, this rule does not affect the statutorily mandated annual H–1B cap, nor does it affect substantive eligibility requirements for an H–1B visa. While DHS acknowledges this rule may impose costs to individual employers, neither the comments nor sources cited address the countervailing impact on those level III and IV employers impacted or benefited by this rule. DHS believes that this rule, instead, will facilitate the admission of higher-skilled workers, which will benefit the economy and increase the United States’ competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H–1B program.

*Comments:* A couple of commenters, including a trade association, said that, in many cases, the proposed rule would require employers to pay their H–1Bs more than the actual market wages for U.S. citizens holding comparable positions. An individual commenter argued that prioritizing wages conflicts with the current DOL Prevailing Wage system, which ensures that H–1B holders do not depress the wages of U.S. workers. A company said that artificially raising the amount of money an employer must devote to paying H–1B workers would result in the company employing fewer workers overall, including U.S. workers. The commenter’s reasoning was that, as a salary-focused “arms race” begins, employers would rely less and less on labor and more on technology and other means to avoid the unsustainable wage levels. Another commenter said the proposal would create the issue of wage discrimination against U.S. employees because an employer would have to offer a higher level of pay to H–1B applicants than to citizens for the same position.

*Response:* To the extent that these comments refer to wages required as a result of the DOL IFR, DHS notes that, on December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al. v. DHS, et al.*, No. 20–cv–7331, setting aside the Interim

*American dreams—and turning to Canada*, Business Insider (Mar. 31, 2019), <https://www.businessinsider.com/h-1b-visa-rejects-moving-to-canada-2019-3>. Notably, the latter article focuses on how the current random lottery process disincentivizes prospective high-skilled beneficiaries seeking H–1B visas in the United States and incentivizes them to seek visas in countries with more merit-based selection processes.



Final Rule *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 FR 63872 (Oct. 8, 2020), which took effect on October 8, 2020, and implemented reforms to the prevailing wage methodology for the Permanent Employment Certification, H-1B, H-1B1, and E-3 visa programs. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al. v. Scalia, et al.*, No. 20-cv-14604, applying to the plaintiffs in that case. On December 3, 2020, DOL announced that it is taking necessary steps to comply with the courts' orders and is no longer implementing the IFR.<sup>57</sup>

As explained in the NPRM, the ranking process established by this rule does not alter the prevailing wage level associated with a given position for DOL purposes, which is informed by a comparison of the requirements for the proffered position to the normal requirements for the occupational classification. While DHS acknowledges that this final rule will result in more registrations (or petitions, as applicable) being selected for relatively higher paid, higher-skilled beneficiaries, the rule does not change, and does not conflict with, prevailing wage requirements. This final rule merely fills in a statutory gap regarding how to administer the H-1B numerical allocations in years of excess demand.

DHS disagrees with the contentions that, by raising salaries for H-1B workers, this rule will cause employers to reduce their overall workforce including U.S. workers, rely less on labor, or pay their H-1B workers more than their U.S. workers holding comparable positions. First, by incentivizing employers to use the H-1B program to fill positions requiring higher prevailing wage levels, or proffering wages commensurate with higher prevailing wage levels, employers may see a possible increase in productivity, as explained in the NPRM. Because of the possible increase in productivity, it is not necessarily the case that employers would employ fewer workers overall or rely less on labor. DHS believes that this rule will facilitate the admission of higher-skilled workers, which will benefit the economy and increase the United States' competitive edge in attracting the best and the brightest in the global labor

market, consistent with the goals of the H-1B program.

Second, concerning the contentions that this rule would force employers to pay their H-1B workers more than their U.S. workers or otherwise harm U.S. workers, this final rule does not mandate employers to pay more for their H-1B workers; again, this rule merely fills in a statutory gap regarding how to administer the H-1B numerical allocations in years of excess demand. And as stated in the NPRM, this rule may provide increased opportunities for lower-skilled U.S. workers in the labor market to compete for work as there would be fewer H-1B workers paid at the lower wage levels to compete with U.S. workers, and may incentivize employers to recruit available and qualified U.S. workers.

### c. General Wage-Based Selection Concerns

*Comments:* Many commenters, mostly individual commenters, generally disagreed with the proposed rule and expressed wage-based selection concerns without providing substantive rationale, stating that: Wage is not the only factor to judge the value of a worker, and the rule erroneously assumes that salary is the best indicator of a worker's value to society; H-1B wages are commensurate with experience and should not be used to establish eligibility; basing selection on wage levels violates U.S. values, such as fairness and justice; every position has "many wages," so it is better to distinguish people within a position rather than based on wages; certain locations in the United States, such as rural areas, have lower wages compared to large cities with higher wage levels; the proposed rule would hamper regional development for rural areas because employers in these communities would not be able to pay the high wages to hire H-1B workers; whether an individual can get an H-1B visa depends on how important their work is to the country and does not depend on how much they can earn; the rule will damage U.S. talent capital investments because "current price does not equal to final quality"; ranking by wage is not an accurate reflection of one's skill level because it could simply be based on age or years of experience; there are lower-paying jobs which still need to be filled by H-1B visa workers; basing selection on salary is unfair because the salary starting point and growth speed are different for different industries; the proposed rule does not address abuse in the H-1B program, such as staffing companies filing multiple petitions for each person and

full-time workers filing as part-time so that their salary on file is doubled; this proposal artificially could increase wages, and wages should be determined by supply and demand instead; and, in some industries or locations, the beneficiaries' base salaries are similar enough to fall into one or two categories, which would make them likely to be the same as a random lottery under DOL's new prevailing wage level calculations.

*Response:* DHS believes that an employer who offers a higher wage than required by the prevailing wage level does so because that higher wage is a clear reflection of the beneficiary's value to the employer, which reflects the unique qualities the beneficiary possesses. Thus, DHS believes this rule will benefit the best and brightest workers in all professions. DHS does not agree that this rule will favor certain high-paying professions or companies, as the rule takes into account the wage level relative to the SOC code—as opposed to salary alone—when ranking registrations. Regarding the concern for depressed areas, the rule equalizes geographic differences in salary amounts by taking into account the area of intended employment when ranking registrations. Particularly, as stated in the final rule, USCIS will select H-1B registrations based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code and area(s) of intended employment. In ranking according to the wage level, the final rule makes it so that registrations for the same wage level will be ranked the same regardless of whether their proffered wages are different owing to their areas of intended employment.

Regarding the concerns about fairness, DHS believes that this rule is fair to U.S. workers, H-1B workers, and petitioners. Conversely, the current random selection process is not fair to U.S. workers whose wages may be adversely affected by an influx of relatively lower-paid H-1B workers, or to U.S. employers who have sought to petition for foreign workers at higher OES prevailing wage levels and are not selected.

### 3. Other General Feedback

*Comment:* An immigration practitioner in Guam noted that many H-1B visas are awarded to engineers coming to perform projects for the military realignment in Guam, and that this rule poses a threat to those projects' timely completions.

*Response:* DHS disagrees with this commenter. H-1B workers in Guam (or the Commonwealth of the Northern

<sup>57</sup> U.S. Department of Labor, Employment and Training Administration, Foreign Labor Certification, *Announcements*, <https://www.dol.gov/agencies/eta/foreign-labor> (last visited Dec. 21, 2020).

Mariana Islands (CNMI)) are exempt from the statutory numerical limitation for H-1B classification until December 31, 2029.<sup>58</sup> As this final rule simply modifies the registration requirement applicable to cap-subject H-1B petitions, it will not affect cap-exempt H-1B petitions for engineers or other H-1B workers coming to work in Guam (or the CNMI).

#### B. Basis for Rule

##### 1. DHS Statutory/Legal Authority

*Comments:* A few individuals supported the rule, saying that the changes to H-1B selection are consistent with Congressional intent and statutory language. Another commenter argued that the INA's silence is an "invitation" for USCIS to establish criteria to prioritize petitions. Likewise, a research organization commented that the statutory language is ambiguous and USCIS' proposal would reasonably address the ambiguity.

*Response:* DHS agrees with these comments that the rule is consistent with Congressional intent and statutory language; the statute is silent as to how USCIS must select H-1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand; the term "filed" as used in INA section 214(g)(3), 8 U.S.C. 1184(g)(3), is ambiguous; and these changes are reasonable and within DHS' general authority. DHS, therefore, is relying on its general statutory authority to implement these regulations to design a selection system that prioritizes selection generally based on the highest prevailing wage level that a proffered wage equals or exceeds. See INA section 103(a), 214(a) and (c)(1), 8 U.S.C. 1103(a), 1184(a) and (c)(1).

*Comment:* A business association generally argued that Acting Secretary Chad Wolf's tenure is in violation of the Homeland Security Act and the Federal Vacancies Reform Act (FVRA). Similarly, a professional association commented that Acting Secretary Wolf's tenure also violates Executive Order (E.O.) 13753, which established a DHS order of succession. The commenter added a citation to a U.S. Government Accountability Office (GAO) report concluding that Acting Secretary Wolf's appointment violated the order of succession. The commenter also provided citations to court decisions overturning DHS rulemakings based on Acting Secretary Wolf's authority. Finally, the commenter argued that DHS's attempted corrections of issues concerning Acting Secretary Wolf's

tenure are insufficient to cure rules promulgated under his authority.

*Response:* DHS disagrees with the commenters that Acting Secretary Wolf's tenure is in violation of the HSA and the FVRA; Secretary Wolf is validly acting as Secretary of Homeland Security. On April 9, 2019, then-Secretary Nielsen, who was Senate-confirmed, used the authority provided by 6 U.S.C. 113(g)(2) to establish the order of succession for the Secretary of Homeland Security.<sup>59</sup> This change to the order of succession applied to any vacancy. This exercise of the authority to establish an order of succession for DHS pursuant to 6 U.S.C. 113(g)(2) superseded the FVRA and the order of succession found in Executive Order 13753, 81 FR 90667 (Dec. 9, 2016). As a result of this change, and pursuant to 6 U.S.C. 113(g)(2), Kevin K. McAleenan, who was Senate-confirmed as the Commissioner of U.S. Customs and Border Protection, was the next successor and served as Acting Secretary without time limitation. Acting Secretary McAleenan subsequently amended the Secretary's order of succession pursuant to 6 U.S.C. 113(g)(2), placing the Under Secretary for Strategy, Policy, and Plans position third in the order of succession, below the positions of the Deputy Secretary and Under Secretary for Management.<sup>60</sup> Because the Deputy Secretary and Under Secretary for Management positions were vacant when Mr. McAleenan resigned, Mr. Wolf, as the Senate-confirmed Under Secretary for Strategy, Policy, and Plans, was the next successor and began serving as the Acting Secretary.

Further, because he has been serving as the Acting Secretary pursuant to an order of succession established under 6 U.S.C. 113(g)(2), the FVRA's prohibition on a nominee's acting service while his or her nomination is pending does not apply, and Mr. Wolf remains the Acting Secretary notwithstanding President Trump's September 10, 2020, transmission to the Senate of Mr. Wolf's nomination to serve as DHS Secretary.<sup>61</sup>

<sup>59</sup> DHS, *Orders of Succession and Delegations of Authorities for Named Positions*, Delegation No. 00106, Revision No. 08.5 (Apr. 10, 2019).

<sup>60</sup> DHS, *Orders of Succession and Delegations of Authorities for Named Positions*, Delegation No. 00106, Revision No. 08.6 (Nov. 8, 2019).

<sup>61</sup> Compare 6 U.S.C. 113(a)(1)(A) (cross-referencing the FVRA without the "notwithstanding" caveat), with *id.* 113(g)(1)–(2) (noting the FVRA provisions and specifying, in contrast, that section 113(g) provides for acting secretary service "notwithstanding" those provisions); see also 5 U.S.C. 3345(b)(1)(B) (restricting acting officer service under section 3345(a), in particular, by an official whose nomination has been submitted to the Senate for permanent service in that position).

That said, there have been recent challenges to whether Mr. Wolf's service is invalid, resting on the erroneous contention that the orders of succession issued by former Secretary Nielsen and former Acting Secretary McAleenan were invalid. The Department believes those challenges are not based on an accurate view of the law. But even if those contentions are legally correct—meaning that neither former Secretary Nielsen nor former Acting Secretary McAleenan issued a valid order of succession—under 6 U.S.C. 113(g)(2)—then the FVRA would have applied, and Executive Order 13753 would have governed the order of succession for the Secretary of Homeland Security from the date of former Secretary Nielsen's resignation.

The FVRA provides an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. In that alternate scenario, under the authority of the FVRA, Mr. Wolf would have been ineligible to serve as the Acting Secretary of DHS after his nomination was submitted to the Senate, 5 U.S.C. 3345(b)(1)(B), and Peter Gaynor, the Administrator of the Federal Emergency Management Agency (FEMA), would have—by operation of Executive Order 13753—become eligible to exercise the functions and duties of the Secretary temporarily in an acting capacity. This is because Executive Order 13753 pre-established the President's succession order for DHS when the FVRA applies. Mr. Gaynor would have been the most senior official eligible to exercise the functions and duties of the Secretary under that succession order, and thus would have become the official eligible to act as Secretary once Mr. Wolf's nomination was submitted to the Senate.<sup>62</sup> Then, in this alternate scenario in which, as assumed above, there was no valid succession order under 6 U.S.C. 113(g)(2), the submission of Mr. Wolf's nomination to the Senate would have restarted the FVRA's time limits. 5 U.S.C. 3346(a)(2).

Out of an abundance of caution, and to minimize any disruption to DHS and to the Administration's goal of maintaining homeland security, on November 14, 2020, with Mr. Wolf's nomination still pending in the Senate, Mr. Gaynor exercised the authority of Acting Secretary that he would have had (in the absence of any governing succession order under 6 U.S.C. 113(g)(2)) to designate a new order of succession under 6 U.S.C. 113(g)(2) (the

<sup>62</sup> 5 U.S.C. 3346(a)(2).

<sup>58</sup> See 48 U.S.C. 1806(b)(A).

“Gaynor Order”).<sup>63</sup> In particular, Mr. Gaynor issued an order of succession with the same ordering of positions listed in former Acting Secretary McAleenan’s November 2019 order. The Gaynor Order thus placed the Under Secretary for Strategy, Policy, and Plans above the FEMA Administrator in the order of succession. Once the Gaynor Order was executed, it superseded any authority Mr. Gaynor may have had under the FVRA and confirmed Mr. Wolf’s authority to continue to serve as the Acting Secretary. Hence, regardless of whether Mr. Wolf already possessed authority pursuant to the November 8, 2019, order of succession effectuated by former Acting Secretary McAleenan (as the Departments have previously concluded), the Gaynor Order provides an alternative basis for concluding that Mr. Wolf currently serves as the Acting Secretary.<sup>64</sup>

On November 16, 2020, Acting Secretary Wolf ratified any and all actions involving delegable duties that he took between November 13, 2019, through November 16, 2020, including the NPRM that is the subject of this rulemaking.

Under section 103(a)(1) of the Act, 8 U.S.C. 1103(a)(1), the Secretary is

<sup>63</sup> Mr. Gaynor signed an order that established an identical order of succession on September 10, 2020, the day Mr. Wolf’s nomination was submitted, but it appears he signed that order before the nomination was received by the Senate. To resolve any concern that his September 10 order was ineffective, Mr. Gaynor signed a new order on November 14, 2020. Prior to Mr. Gaynor’s new order, the U.S. District Court for the District of New York issued an opinion concluding that Mr. Gaynor did not have authority to act as Secretary, relying in part on the fact that DHS did not notify Congress of Administrator Gaynor’s service, as required under 5 U.S.C. 3349(a). *Batala Vidal v. Wolf*, No. 16CV4756NGGVMS, 2020 WL 6695076, at \*9 (E.D.N.Y. Nov. 14, 2020). The Departments disagree that the FVRA’s notice requirement affects the validity of an acting officer’s service; nowhere does section 3349 indicate that agency reporting obligations are tied to an acting officer’s ability to serve.

<sup>64</sup> On October 9, 2020, the U.S. District Court for the District of Columbia issued an opinion indicating that it is likely that section 113(g)(2) orders can be issued by only Senate-confirmed secretaries of DHS and, thus, that Mr. Gaynor likely had no authority to issue a section 113(g)(2) succession order. *Nw. Immigrant Rights Project v. United States Citizenship & Immigration Servs.*, No. CV 19–3283 (RDM), 2020 WL 5995206, at \*24 (D.D.C. Oct. 8, 2020). This decision is incorrect because the authority in section 113(g)(2) allows “the Secretary” to designate an order of succession, 6 U.S.C. 113(g)(2), and an “acting officer is vested with the same authority that could be exercised by the officer for whom he acts.” *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019). The Acting Secretary of DHS is accordingly empowered to exercise the authority of “the Secretary” of DHS to “designate [an] order of succession.” 6 U.S.C. 113(g)(2). In addition, this is the only district court opinion to have reached such a conclusion about the authority of the Acting Secretary, and the Departments are contesting that determination.

charged with the administration and enforcement of the INA and all other immigration laws (except for the powers, functions, and duties of the President, the Attorney General, and certain consular, diplomatic, and Department of State officials). The Secretary is also authorized to delegate his or her authority to any officer or employee of the agency and to designate other officers of the Department to serve as Acting Secretary.<sup>65</sup> The Homeland Security Act further provides that every officer of the Department “shall perform the functions specified by law for the official’s office or prescribed by the Secretary.”<sup>66</sup>

*Comments:* Multiple commenters asserted that this rule is *ultra vires*, inconsistent with Congressional intent, and a clear violation of the INA. Specifically, they contend that the INA sets forth the procedure for allocating visas and prioritizes the selection of H–1B cap-subject petitions in the “order in which they are filed[,]” which does not limit selection under the H–1B cap to those employers who pay the most or otherwise authorize DHS to impose substantive selection criteria. Several commenters stated that USCIS lacks the statutory authority to make such a change and cannot use the statute’s purported silence as an invitation to adopt criteria, such as wage level or skill level, to prioritize the selection of H–1B cap subject visas. Some of these commenters also disagreed with DHS about the statute’s silence and stated that Congress has previously made specific modification to the way in which H–1B cap numbers are allocated, specifically, the American Competitiveness in the Twenty-First Century Act of 2000 providing for the numerically limited exemption for beneficiaries who have earned a master’s or higher degree from a U.S. institution of higher education. If Congress intended to make any other changes to the statutory language that H–1B cap numbers “shall be issued . . . in the order in which petitions are filed[,]” it could have done so as part of that or subsequent legislation. One commenter cited several cases in arguing that general rulemaking authority and statutory silence on an issue is not tantamount to Congressional authorization for rulemaking on a given issue; another commenter stated that the statute is neither silent nor ambiguous as it states that H–1B visas shall be issued, or H–1B status granted, “in order in which petitions are filed”; and

<sup>65</sup> See INA 103, 8 U.S.C. 1103, and 6 U.S.C. 113(g)(2).

<sup>66</sup> See 6 U.S.C. 113(f).

a trade association commented that the use of the term “shall” indicates that there is no ambiguity as to how petitions may be sorted. One commenter cited several INA provisions in arguing that, where it intended to do so, Congress made distinctions within classes of potential visa applicants, and thus the statute reflects Congressional intent *not* to distinguish on other bases. One commenter said that the proposed rule would be found unlawful in court, because the law does not make an allowance for basing H–1B visas on salary, and the rule is contrary to the plain language of the statute. A form letter campaign wrote that the law does not require employers to pay H–1B workers more than U.S. workers, and the law does not allow the agency to prioritize petitions for higher-wage applicants.

*Response:* DHS disagrees with the commenters’ assertions that the statute is not silent or ambiguous and that this rulemaking is *ultra vires*. As stated in the NPRM, this rule is consistent with and permissible under DHS’s general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.<sup>67</sup> DHS created the registration requirement, based on its general statutory authority and its discretion to determine how best to handle simultaneous submissions in excess of the numerical allocations, to effectively and efficiently administer the H–1B cap selection process. Congress expressly authorized DHS to determine eligibility for H–1B classification upon petition by the importing employer, and to determine the form and information required to establish eligibility.<sup>68</sup> “Moreover, INA section 214(g)(3) does not provide that petitions must be processed in the order ‘received,’ ‘submitted,’ or ‘delivered.’ Instead, they must be processed in the order ‘filed.’ What it means to ‘file’ a petition and how to handle simultaneously received petitions are ambiguous and were not dictated by Congress in the INA.”<sup>69</sup> Rather, these implementation details are entrusted to DHS to administer. So, while the statute provides annual limitations on the number of aliens who may be issued initial H–1B visas or otherwise provided H–1B nonimmigrant status, the statute does not specify how petitions must be

<sup>67</sup> See 85 FR 69236, 69242.

<sup>68</sup> See INA section 214(c)(1), 8 U.S.C. 1184(c)(1). See also *Walker Macy*, 243 F.Supp.3d at 1176 (“Congress left to the discretion of USCIS how to handle simultaneous submissions, [and accordingly], USCIS has discretion to decide how best to order those petitions.”).

<sup>69</sup> See 243 F.Supp.3d at 1175.

selected and counted toward the numerical allocations when USCIS receives more petitions on the first day than are projected as needed to reach the H-1B numerical allocations. Consequently, “Congress left to the discretion of USCIS how to handle simultaneous submissions” and “USCIS has discretion to decide how best to order those petitions.”<sup>70</sup>

DHS acknowledges that INA section 214(g)(3), 8 U.S.C. 1184(g)(3), states that aliens subject to the H-1B numerical limitation in INA section 214(g)(1), 8 U.S.C. 1184(g)(1), shall be issued H-1B visas or otherwise provided H-1B nonimmigrant status “in the order in which petitions are filed for such visas or status.” Contrary to the commenters’ assertions, this statutory provision, and, more specifically the term “filed” as used in INA section 214(g)(3), 8 U.S.C. 1184(g)(3), is ambiguous.<sup>71</sup> As discussed in the preamble to the *Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens* Final Rule (H-1B Registration Final Rule), an indiscriminate application of this statutory language would lead to absurd or arbitrary results; the longstanding approach has been to project the number of petitions needed to reach the numerical allocations.<sup>72</sup>

A literal application of this statutory language, as suggested by various commenters, would lead to an absurd or impossible 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. To avoid such an absurd result, the longstanding approach to implementing the numerical limitation has been to project the number of petitions needed to reach the numerical limitation. The issue, however, is how to select registrations or petitions, as applicable, when the number of submissions exceeds the number projected as needed to reach the numerical limitation or the advanced degree exemption, particularly when those submissions all occur within the same narrow window of time. DHS is not changing the approach to administering the numerical allocations as it relates to the use of projections. DHS is, however, changing the selection process for selecting registrations or petitions, as applicable, to determine which petitions are properly filed and eligible for further processing consistent with INA section 214(g)(3), 8 U.S.C. 1184(g)(3).

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

While the random selection of registrations or petitions, as applicable, DHS established in the H-1B Registration Final Rule is reasonable, it is neither the optimal nor the exclusive method of selecting petitions or registrations toward the numerical allocations when more registrations or petitions, as applicable, are submitted than projected as needed to reach the numerical allocations.

In that vein, DHS concludes that prioritization and selection based on wage levels “is a reasonable and rational interpretation of USCIS’ obligations under the INA to resolve the issues of processing H-1B petitions”<sup>73</sup> in years of excess demand and is within DHS’s existing statutory authority.

*Comment:* Multiple commenters cited a USCIS response to a comment in the H-1B Registration Final Rule and wrote that USCIS previously supported the position that prioritization of selection based on salary or other substantive factors would require explicit Congressional authorization. Commenters also cited a 1991 rulemaking in arguing that Immigration and Naturalization Service (INS) previously acknowledged that the INA does not authorize establishing criteria to prioritize petitions. These commenters also provided language from a 1990 INS rulemaking indicating that a statutory change would be necessary to exclude entry-level H-1B workers. A law firm argued that the Agency cannot reverse a position of this kind without providing a reasoned explanation.

*Response:* DHS disagrees with the commenters that prior statements by INS or USCIS preclude DHS from making the changes set forth in this final rule. DHS acknowledged in the proposed rule that the preamble to the H-1B Registration Final Rule states that prioritization of registration selection on factors other than degree level, such as salary, would require statutory changes. DHS also explained that the prior statement did not provide further analysis regarding that conclusion and that upon further review and consideration of the issue initially raised in comments to the *Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens* NPRM (H-1B Registration Proposed Rule),<sup>74</sup> DHS concluded that the statute is silent as to how USCIS must select H-1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand. DHS continues to believe that the changes made in this final rule are within its general authority, consistent with the existing statute, and despite prior statements to the contrary, does not require statutory change or explicit congressional authorization. DHS is relying on its general statutory authority to implement the statute and, consistent with that authority, is revising the regulations to implement a selection system that realistically, effectively, efficiently, and more faithfully administers the cap selection process. See INA section 103(a), 214(a) and (c)(1), 8 U.S.C. 1103(a), 1184(a) and (c)(1).

<sup>74</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens*, 83 FR 62406 (proposed Dec. 3, 2018).

<sup>70</sup> See 243 F.Supp.3d at 1176.

<sup>71</sup> See 243 F.Supp.3d at 1167–68 (finding that USCIS’s rule establishing the random-selection process was a reasonable interpretation of the INA that was entitled at least to Skidmore deference because what it means to “file” a petition is ambiguous and undefined under the INA and that Congress left to the discretion of USCIS how to handle simultaneous submissions. Specifically, the court said: “Additionally, because § 1184(g)(3) was passed by Congress in 1990 when there was not widespread public use of electronic submissions, it is logical that Congress anticipated H-1B petitions would be submitted either by U.S. mail or other carriers. Thus, it was reasonable to anticipate multiple petitions would arrive on the same day. It is therefore a reasonable interpretation of ‘filed’ to include some further administrative step beyond mere receipt at a USCIS office to ‘order’ multiple petitions that arrived in such a manner on the same day.”). The availability of electronic submission of H-1B registrations has not alleviated this issue as multiple registrations can still be submitted simultaneously.

<sup>72</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens*, 84 FR 888, 896 (Jan. 31, 2019).

<sup>73</sup> See *Walker Macy*, 243 F.Supp.3d at 1175.

DHS disagrees with the assertion that this rule will exclude entry-level workers. This final rule merely revises how USCIS will select H-1B cap-subject petitions toward the H-1B numerical allocations to determine which petitions are “filed” and eligible for further processing. The rule does not change substantive eligibility requirements. While DHS acknowledges that registrations or petitions, as applicable, based on a proffered wage that corresponds to a level I or level II wage likely will face a reduced chance of selection in the H-1B cap selection process, the rule does not preclude selection of registrations or petitions for entry-level workers.

DHS also disagrees with the commenters’ claim that the prior statements by INS in the preamble to the *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act* final rule are relevant to this final rule.<sup>75</sup> INS was responding to general comments about administering the numerical limitation, but was not considering how to administer the H-1B numerical allocations when the number of submitted petitions exceeds the numerical allocation. Such circumstances did not exist at the infancy of the H-1B program and when the numerical limitation was created, so this issue was not considered at that time. Again, this final rule merely revises how USCIS will select H-1B cap-subject registrations or petitions, as applicable, toward the H-1B numerical allocations to determine which petitions are “filed” and thus eligible for further processing; in addition, this final rule addresses how USCIS will select registrations or petitions, as applicable, when the number of submitted registrations or petitions exceeds the projected number needed to reach the numerical allocations. Once properly filed, H-1B cap-subject petitions generally will be processed in order based on the assigned filing date.

DHS also disagrees that comments made by INS in the preamble to the 1990 final rule,<sup>76</sup> are relevant to the interpretation of DHS’s authority to implement the numerical allocations under the existing statute. The 1990 rule preceded the enactment of the Immigration Act of 1990 (IMMACT 90), Public Law 101-649, 104 Stat. 4978, the

creation of the H-1B classification for specialty occupation workers, and the implementation of a numerical limitation on H-1B workers. As such, the statements cited by the commenter are not relevant to the interpretation of the existing statute, including the authority of DHS to administer the H-1B numerical allocations.

*Comment:* A company stated that USCIS’ ability to interpret the term “filed” is not unlimited and that the proposed, complex prioritization scheme unambiguously exceeds the scope of the term. Similarly, a law firm and individual argued that, according to *Walker Macy v. USCIS*, USCIS does not have “unfettered” discretion to determine which petitions are filed, but, instead, must reasonably interpret the statute. The law firm said the proposed interpretation is unreasonable because of the impacts it would have on U.S. companies and innovation. Multiple commenters said that the current system of putting applicants in a lottery when they apply simultaneously comports with the INA’s language, but that the proposed methodology would impermissibly deviate from the INA. Similarly, a company stated that Congress’ guiding principal for selecting H-1B petitions is timing and that the current lottery system conforms to this principal. An individual commenter similarly argued, citing *Walker Macy v. USCIS*, that the proposed rule deviates from the temporal principal without statutory or judicial basis. Other commenters asserted that USCIS’ reference to the “dominant legislative purpose” of the statute, construed as prioritizing the application of the most skilled workers, is unreasonable. The commenters reasoned that the INA simply prioritizes filling labor shortages, without regard to wage levels. Several commenters stated that the allowance of H-1B visas for aliens with undergraduate degrees precludes prioritizing petitions based on wage levels.

*Response:* DHS disagrees with the commenters’ assertions that this rule misstates the scope of the term “filed” or that the rule is based on an unreasonable interpretation of the statute. As stated in the NPRM and in response to other comments in this preamble, DHS believes that this rule is consistent with and permissible under DHS’s general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.<sup>77</sup> DHS created the registration requirement, based on its general

statutory authority and its discretion to determine how best to handle simultaneous submissions in excess of the numerical allocations (*i.e.*, situations where prioritizing petitions solely in a temporal manner is impossible), to effectively and efficiently administer the H-1B cap selection process. Congress expressly authorized DHS to determine eligibility for H-1B classification upon petition by the importing employer, and to determine the form and information required to establish eligibility.<sup>78</sup> “Moreover, INA section 214(g)(3) does not provide that petitions must be processed in the order ‘received,’ ‘submitted,’ or ‘delivered.’ Instead, they must be processed in the order ‘filed.’ What it means to ‘file’ a petition and how to handle simultaneously received petitions are ambiguous and were not dictated by Congress in the INA.”<sup>79</sup> Rather, these implementation details are entrusted for DHS to administer. So, while the statute provides annual limitations on the number of aliens who may be issued initial H-1B visas or otherwise provided H-1B nonimmigrant status, the statute does not specify how petitions must be selected and counted toward the numerical allocations when USCIS receives more petitions on the first day than are projected as needed to reach the H-1B numerical allocations. Consequently, “Congress left to the discretion of USCIS how to handle simultaneous submissions” and “USCIS has discretion to decide how best to order those petitions.”<sup>80</sup>

DHS believes, contrary to commenters’ assertions, that prioritization and selection generally based on the highest OES wage level that the proffered wage equals or exceeds “is a reasonable and rational interpretation of USCIS’s obligations under the INA to resolve the issues of processing H-1B petitions”<sup>81</sup> in years of excess demand and is within DHS’s existing statutory authority. “It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose.”<sup>82</sup> Yet, under the

<sup>78</sup> See INA section 214(c)(1), 8 U.S.C. 1184(c)(1). See also *Walker Macy*, 243 F.Supp.3d at 1176 (“Congress left to the discretion of USCIS how to handle simultaneous submissions, [and, accordingly], USCIS has discretion to decide how best to order those petitions.”).

<sup>79</sup> See 243 F.Supp.3d at 1175.

<sup>80</sup> See 243 F.Supp.3d at 1176.

<sup>81</sup> See 243 F.Supp.3d at 1175.

<sup>82</sup> See *Spilker v. Shayne Labs., Inc.*, 520 F.2d 523, 525 (9th Cir. 1975) (citing *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968)) (“[W]e cannot, in the absence of an unmistakable directive, construe the

<sup>75</sup> U.S. Department of Justice, Immigration and Naturalization Service, *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act*, 56 FR 61111 (Dec. 2, 1991).

<sup>76</sup> U.S. Department of Justice, Immigration and Naturalization Service, *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act*, 55 FR 2606 (Jan. 26, 1990).

<sup>77</sup> See 85 FR 69236, 69242.

current registration system the majority of H-1B cap-subject petitions have been filed for positions certified at the two lowest wage levels: I and II.<sup>83</sup> This contradicts the dominant legislative purpose of the statute because the intent of the H-1B program is to help U.S. employers fill labor shortages in positions requiring *highly skilled* or *highly educated* workers.<sup>84</sup> By changing the selection process, for these years of excess demand, from a random lottery selection to a wage-level-based selection process, DHS will implement the statute more faithfully to its dominant legislative purpose, increasing the chance of selection for registrations or petitions seeking to employ beneficiaries at wages that would equal or exceed the level IV or level III prevailing wage for the applicable occupational classification.

*Comments:* A couple of commenters said the changes made by the rule should be decided by Congress. Similarly, a few commenters stated generally that the proposal is not authorized by Congress or is in violation of Congressional intent. A few commenters said that 8 U.S.C. 1184(g)(5)(C) (the exemption from the cap for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education) demonstrates that, where Congress intends to target petitions for highly skilled workers, it has done so

Act in a manner which runs counter to the broad goals which Congress intended it to effectuate.”).

<sup>83</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *H-1B Wage Level by Top 25 Metro*, Database Queried: July 10, 2020, Report Created: July 14, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019, Bureau of Labor Statistics: Occupational Employment Statistics for 2018, 2019 (establishing that, for the top 25 metropolitan service areas for which H-1B beneficiaries were sought in FYs 2018 and 2019, all level I wages, 84% of level II wages, and 76% of “No Wage Level” wages fell below the Bureau of Labor Statistics median wages); Daniel Costa and Ron Hira, *H-1B Visas and Prevailing Wage Level*, Economic Policy Institute (May 4, 2020), <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/> (explaining that “three-fifths of all H-1B jobs were certified at the two lowest prevailing wages in 2019...., and, “[i]n fiscal year (FY) 2019, a total of 60% of H-1B positions certified by Department of Labor (DOL) had been assigned wage levels [I and II]: 14% were at H-1B Level 1 (the 17th percentile) and 46% per at H-1B Level 2 (34th percentile)”). Data concerning FY 2018 and 2019 petition filings pre-dates the publication of the DOL IFR, 85 FR 63872.

<sup>84</sup> See H.R. Rep. 101-723(I) (1990), as reprinted in 1990 U.S.C.C.A.N. 6710, 6721 (stating “The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages”).

explicitly. Others commented that, when this cap was legislated, it was clear that petitions still would exceed visa allocations and that the statute should be understood to have intentionally omitted any change to the priority of visa petitions; and one commenter added that the proposed rule would impact the ratio of advanced-degree holders to other H-1B recipients that Congress authorized when providing the 20,000 U.S. advanced degree exemption. A company stated that the proposal is untethered to statutory language, providing examples of Congressional “guidance” and reasoning that nowhere in such guidance or the INA is there reference to salary or the OES prevailing wage level as a basis for selecting H-1B petitions. A professional association stated that effectively imposing an additional wage requirement would be inappropriate, especially for physicians.

*Response:* DHS disagrees with these comments. As stated in the NPRM and as explained above, this rule is consistent with Congressional intent and is permissible under DHS’s general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.<sup>85</sup> Furthermore, DHS disagrees with the commenters’ assertions that the statute, or legislative history, indicates that Congress has spoken to the specific issue addressed by this final rule: how to select petitions toward the numerical allocations when the number of petitions filed is greater than the number of petitions projected as needed to reach the H-1B numerical allocations. As explained in the NPRM and in response to other comments, the statute is silent on this issue. DHS created the registration requirement, based on its general statutory authority and its discretion to determine how best to handle simultaneous submissions in excess of the numerical allocations, to effectively and efficiently administer the H-1B cap selection process. Congress expressly authorized DHS to determine eligibility for H-1B classification upon petition by the importing employer, and to determine the form and information required to establish eligibility.<sup>86</sup> “Moreover, INA section 214(g)(3) does not provide that petitions must be processed in the order ‘received,’ ‘submitted,’ or ‘delivered.’ Instead, they

must be processed in the order ‘filed.’ What it means to ‘file’ a petition and how to handle simultaneously received petitions are ambiguous and were not dictated by Congress in the INA.”<sup>87</sup> Rather, these implementation details are entrusted for DHS to administer. Nor should it be understood that Congress had spoken on this issue when the cap was legislated because it was not clear at that time that petitions would exceed visa allocations on the very first day that petitions could be filed, thus leading to a situation where prioritizing petitions solely in a temporal manner is impossible. So, while the statute provides annual limitations on the number of aliens who may be issued initial H-1B visas or otherwise provided H-1B nonimmigrant status, the statute does not specify how petitions must be selected and counted toward the numerical allocations when USCIS receives more petitions on the first day than are projected as needed to reach the H-1B numerical allocations. Consequently, “Congress left to the discretion of USCIS how to handle simultaneous submissions” and “USCIS has discretion to decide how best to order those petitions.”<sup>88</sup>

<sup>85</sup> 85 FR 69236, 69242.

<sup>86</sup> See INA section 214(c)(1), 8 U.S.C. 1184(c)(1). See also *Walker Macy*, 243 F.Supp.3d at 1176 (“Congress left to the discretion of USCIS how to handle simultaneous submissions, [and accordingly], USCIS has discretion to decide how best to order those petitions.”).

*Comments:* Some commenters expressed that this rule is not consistent with the statutory framework Congress implemented for the admission of foreign workers into the United States, as Congress designated DOL to have the primary authority in protecting and enforcing the statute related to the U.S. labor market and wages. Multiple commenters stated that Congress did not intend for wage levels to serve as a basis for preferring certain petitions, as evidenced by the statute’s prevailing wage requirement. An individual commented that the preamble’s statement that “Congress expressly authorized DHS to determine eligibility for H-1B classification upon petition by the importing employer” fails to recognize that this authorization is for USCIS’ determination regarding specific employers’ applications, rather than for categorically determining which wages or jobs qualify for H-1B visas.

*Response:* DHS disagrees with the commenters assertion that this rule is inconsistent with the statute. As explained in the NPRM and in response to other comments, DHS believes that this rule is consistent with its statutory authority. DHS agrees that DOL has the primary authority to protect the wages and working conditions of U.S. workers consistent with the provisions of INA section 212(n), 8 U.S.C. 1182(n), but

<sup>87</sup> See 243 F.Supp.3d at 1175.

<sup>88</sup> See 243 F.Supp.3d at 1176.

those provisions are separate from INA section 214, 8 U.S.C. 1184, and the statutory provisions pertaining to the form and manner of submitting H-1B petitions and the administration of the H-1B numerical allocations, both of which are within DHS's authority consistent with INA section 214, 8 U.S.C. 1184. Further, the fact that Congress authorized DOL to administer and enforce a wage requirement, including setting prevailing wage levels for the H-1B program, does not speak to or limit DHS' authority to establish an orderly, efficient, and fair system for selecting registrations (or, if applicable, petitions), based on OES prevailing wage levels, toward the projected number needed to reach annual H-1B numerical allocations.

*Comments:* Multiple commenters, as part of a form letter campaign, stated that the legal impact of the proposed rule must be considered together with other recent rules, including the recently published DOL. Another commenter stated that USCIS should work with DOL to appropriately set up the wage levels.

*Response:* On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al. v. DHS, et al.*, No. 20-cv-7331, setting aside the DOL IFR. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al. v. Scalia, et al.*, No. 20-cv-14604, applying to the plaintiffs in that case. DOL has taken necessary steps to comply with the courts' orders and is no longer implementing the DOL IFR. DHS, therefore, disagrees with the commenter's assertion that DHS must consider the DOL IFR in the context of this final rule.

DHS also disagrees with the premise of the commenters' recommendation that DHS work with DOL to set appropriate wage levels. This final rule is not setting wage levels. As explained in the NPRM and in response to other comments, this final rule changes how DHS will select registrations or petitions, as applicable, toward the projected number needed to reach the annual H-1B numerical allocations. While this final rule uses DOL wage levels to determine how to rank and select registrations or petitions, as applicable, based generally on the wage level that the proffered wage equals or exceeds, this final rule is not mandating employers pay a higher wage nor is it changing wage levels.

*Comments:* One commenter noted the proposal would make the H-1B process similar to that of the O-1 visa, but that

Congress knowingly avoided doing so in 1990. According to the commenter, the new rule, in effect, is redrafting the 1990 legislation to make the H-1B visa more closely resemble the O-1 visa and Congress certainly could have ranked H-1Bs in 1990 if it wanted to do so. Other commenters also noted that the O-1 visa is for those with extraordinary ability, not those just starting their careers, and that the H-1B program serves different purposes. Another commenter also cited a House sponsor of the H-1B program as saying that the O-1 program, not H-1B, was the "best and brightest" program.

*Response:* DHS disagrees with the claim that it is reforming the H-1B classification to more closely resemble the O-1 classification.<sup>89</sup> While DHS acknowledges that this rule will result in more registrations (or petitions, as applicable) being selected for relatively higher-paid, higher-skilled beneficiaries, the rule is not changing substantive eligibility requirements for the H-1B classification and is not, in any way, reforming the H-1B classification to more closely resemble the O-1 classification. This final rule merely fills in a statutory gap regarding how to administer the H-1B numerical allocations in years of excess demand. The statute provides annual limitations on the number of aliens who may be issued initial H-1B visas or otherwise provided H-1B nonimmigrant status, but it does not specify how petitions must be selected and counted toward the numerical allocations when USCIS receives more petitions on the first day than are projected as needed to reach the H-1B numerical allocations. Consequently, "Congress left to the discretion of USCIS how to handle simultaneous submissions" and "USCIS has discretion to decide how best to order those petitions."<sup>90</sup> The current scheme of pure randomization of selectees does not optimally serve Congress' purpose for the H-1B program. Therefore, this rule will revise the H-1B cap selection process to better align with the purpose of the H-1B program and Congressional intent, taking into account the pervasive oversubscription of demand for registrations and petitions.

*Comment:* An individual noted that Congress previously considered legislation called the I-Squared Act that

<sup>89</sup> The O-1 nonimmigrant classification is for aliens with extraordinary ability in the sciences, arts, education, business, or athletics, or who have a demonstrated record of extraordinary achievement in the motion picture and television industry. See INA section 101(a)(15)(O), 8 U.S.C. 1101(a)(15)(O); 8 CFR 214.2(o).

<sup>90</sup> See *Walker Macy*, 243 F.Supp.3d at 1176.

sought to alter the selection process by ranking H-1Bs based on a number of factors rather than having a random lottery. That legislation has not passed, which is an indicator that Congress does not see the change as a priority. Conversely, an individual commenter wrote that Congress intended to delegate H-1B visa allocation to USCIS and that the I-Squared bill failed because of other provisions it contained.

*Response:* DHS disagrees with the assertion that the fate of the I-Squared bill is relevant to interpretation of the existing statute. While Congress has considered such legislation, the failure of such legislation (or any other proposed legislation) to be passed and signed into law does not change the existing authority DHS has under the INA. As explained in response to other comments, DHS believes that selection of registrations or petitions, as applicable, based on corresponding wage level is consistent with the discretion provided to DHS in the current statute to administer the annual H-1B numerical allocations.

*Comment:* A few commenters cited the Senate Report for The American Competitiveness Act as demonstrating Congressional opposition to granting H-1B visas on a preferential basis to the highest-paid aliens. The commenters argued that the language of the Senate Report contradicts E.O. 13788 and that E.O. 13788 does not establish Congressional purpose or policy, and its emphasis on highly paid beneficiaries as applied in this context would be inconsistent with Congress' direction.

*Response:* DHS disagrees with these comments because they ignore the fact that DHS has proposed to modify the registration requirement within the context of the annual demand for H-1B cap-subject petitions, including those filed for the advanced degree exemption, consistently exceeding annual statutory allocations.

Although Congress instructed that cap-subject H-1B visas (or H-1B nonimmigrant status) be allocated based on the order in which petitions are filed, it was silent with regard to the allocation of simultaneously submitted petitions. While the random lottery selection process is a reasonable solution, DHS believes that an allocation generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds better fulfills Congress' stated intent that the H-1B program help U.S. employers fill labor shortages in positions requiring highly skilled workers.<sup>91</sup>

<sup>91</sup> H.R. Rep. 101-723(I) (1990), as reprinted in 1990 U.S.C.C.A.N. 6710, 6721 (stating "The U.S.

This legislative history, as cited in the proposed rule, is consistent with the Senate Report the commenters cite.<sup>92</sup> Both support the notion that Congress intended the H-1B program to fill labor shortages in positions requiring highly skilled workers. Contrary to the commenter's assertion that DHS only cited to E.O. 13788 to support this priority, DHS cited to the legislative history of the Immigration Act of 1990, the legislation that created the H-1B program, to support the priority to allocate generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds.<sup>93</sup> DHS cited to E.O. 13788 solely to note that a wage-level based selection was consistent with the administration's policy goals, not as legal authority for the proposed rule.

*Comment:* An individual commenter and a professional association argued that Presidential Proclamation 10052 is not authoritative to the extent that it conflicts with the INA, and that the proposal fails to explain how it "is consistent with applicable law or is practicable at this point in time," especially in light of the forthcoming change in administration.

*Response:* DHS disagrees with the assertion that Presidential Proclamation 10052 conflicts with the INA.<sup>94</sup> In any event, the authority for this regulation stems not from that proclamation but from DHS's general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.

*Comment:* One commenter stated that salary also is a proxy variable for age, as, in most industries, more experienced individuals get paid higher wages. This commenter asked whether USCIS has the authority to apply "salary" as a secondary sorting mechanism for H-1B registrations, and if so, what would prevent USCIS also from using arbitrary sorting mechanisms such as age, geography, country of birth, race, religion, or gender.

*Response:* DHS disagrees that salary is a proxy for age. While salary is a reasonable proxy for skill, level of skill

is not necessarily correlated to age. DHS also disagrees with the commenter's implied assertion that wage level is an arbitrary sorting mechanism. As explained in the NPRM and in response to other comments, corresponding wage level is an objective way to prioritize selection in a manner consistent with the general purpose of the H-1B classification. DHS has not proposed, and does not intend to propose, selecting registrations or petitions, as applicable, based on factors that are unreasonable, inappropriate, or inconsistent with the purpose of the H-1B classification.

## 2. Substantive Comments on the Need for the Rule/DHS Justification

*Comments:* An anonymous commenter wrote that the proposed rule's wage standard for H-1B visa eligibility is arbitrary and capricious. The commenter said that DHS does not explain the rationale behind making wages the sole indicator of a worker's eligibility for visa sponsorship. The commenter also argued that the rule's rationale is flawed because it would not protect U.S. workers, since the H-1B visa applies only to specialty occupations. Another commenter opined that this rule is an attempt to add a new wage requirement as a part of H-1B eligibility. This commenter stated that this attempt is inconsistent with Congressional intent and would be an abuse of discretion by the Department.

*Response:* DHS believes these commenters misstate the scope of this rule. This rule does not make "wages the sole indicator of a worker's eligibility for [H-1B] visa sponsorship" and does not otherwise change the substantive standards for H-1B eligibility. DHS stated in the NPRM that registration, when required, is merely an antecedent procedural step that must be completed by prospective petitioners *before they are eligible to file an H-1B cap-subject petition* (emphasis added).<sup>95</sup> Even if registration were suspended, the rule merely revises how USCIS would select H-1B cap-subject petitions toward the H-1B numerical allocations to determine which petitions are "filed" and thus eligible for further processing. But the rule does not change substantive eligibility requirements. DHS also disagrees with the commenter's assertion that the rule would not better

protect U.S. workers. As explained in response to other comments, prioritizing the selection of H-1B registrations or petitions, as applicable, based generally on the highest OES prevailing wage level that the proffered wage equals or exceeds will incentivize employers to offer higher wages or higher-skilled positions to H-1B workers and disincentivize the existing widespread use of the H-1B program to fill relatively lower-paid or lower-skilled positions, for which there may be available and qualified U.S. workers. DHS, therefore, believes that this rule will benefit U.S. workers who compete against entry-level H-1B workers and will incentivize H-1B petitioners to offer higher wages, further benefiting U.S. workers whose wages might otherwise be depressed by an influx of relatively lower-paid, lower-skilled H-1B workers.

### a. Support for the DHS Rationale

*Comments:* Many commenters expressed support for the proposed rule and DHS justification. Several commenters stated that the proposed rule is based on a true premise that salary equates with value. A research organization stated that there is no evidence to suggest that the H-1B program was designed to fill entry-level jobs at entry-level wages, and prioritizing H-1B petitions at high wage levels will safeguard U.S. wage standards and increase labor efficiency. The commenter went on to state that prioritizing higher H-1B wage levels will not undermine the program, but, rather, will incentivize recruitment and retention, while also helping U.S. workers in labor categories that have seen stagnant wage growth in recent history. The commenter reasoned that, because employers do not have to test the market before hiring H-1B workers, wages are a good indicator of the actual market need for workers in a given field.

*Response:* DHS agrees with these commenters and thanks them for their support.

### b. Rule Is Based on False Premises/Rationale

*Comment:* Many commenters, including those who participated in an orchestrated form letter campaign, stated that the proposal is based on the false premise that salary alone equates with value and that individuals who earn more in their profession contribute more to the economy. An individual commenter discussed the fundamental flaw in associating level I and level II workers with low-paying, low-skilled work, where in reality, entry-level doctors, lawyers, engineers, and

labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages").

<sup>92</sup> 85 FR 69236, 69238.

<sup>93</sup> 85 FR 69236, 69238.

<sup>94</sup> See Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 FR 38263 (June 25, 2020).

<sup>95</sup> 85 FR 69236, 69243. See also H-1B Registration Final Rule, 84 FR 888, 900 ("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.").



architects are professionals performing specialty occupations. A professional association stated that the salaries associated with each wage level do not fully capture an individual's contribution to society; in fact, there often is an inverse correlation. A professional association said DHS has created a condition where employers would be able to buy their way into the proposed H-1B visa cap selection system by offering a higher wage to the beneficiary regardless of skill, which would negate the stated purpose of the proposed rule to garner more high-skilled workers in the U.S. workforce.

Some commenters said the proposed rule is based on the false premise that foreign workers depress wages and take away jobs from U.S. workers. A university stated that the foreign workers this rule targets fill critical needs in the U.S. labor market, bolster innovation, create jobs, and drive economic growth. The commenter, along with an individual commenter, stated that some studies show foreign workers have a positive impact on wages overall. Similarly, an advocacy group said limiting the amount of high-skilled foreign workers in the United States does not mean that there will be more jobs available to U.S. workers; rather, it would mean many companies would shift jobs overseas. The commenter stated that, if the H-1B program were expanded, it could result in up to 1.2 million new jobs for U.S. workers. The commenter went on to state that the program does not have a "depressive effect" on U.S. worker wages, and concluded by saying that, by restricting the H-1B program, the proposed rule would not have the intended effects of boosting American jobs and wages. An individual commenter stated that USCIS already has protected U.S. workers by increasing fees and updating the definition of "specialized knowledge," and there is no need to distort the labor markets and harm U.S. competitiveness at a time when the U.S. can once again be a leader in technology development.

*Response:* DHS disagrees with these comments. DHS believes that salary generally is a reasonable proxy for skill level.<sup>96</sup> As stated in the NPRM, in most

cases where the proffered wage equals or exceeds the prevailing wage, a prevailing wage rate reflecting a higher wage level is a reasonable proxy for the higher level of skill required for the position, based on the way prevailing wage determinations are made. DHS believes that an employer who offers a higher wage than required by the prevailing wage level does so because that higher wage is a clear reflection of the beneficiary's value to the employer, which, even if not related to the position's skill level *per se*, reflects the unique qualities the beneficiary possesses. While we believe that the rule may incentivize an employer to proffer a higher wage to increase their chances of selection, we also believe the employer only would do so if it was in their economic interest to do so based on the beneficiary's skill level and relative value to the employer.

DHS acknowledges that aliens may be offered salaries at level I or level II prevailing wages to work in specialty occupations and may be eligible for H-1B status. However, DHS also believes that, in years of excess demand exceeding annual limits for H-1B visas subject to the numerical allocations, the current process of random selection does not optimally serve Congress' purpose for the H-1B program. Instead, in years of excess demand, selection of H-1B cap-subject petitions on the basis of the highest OES prevailing wage level that the proffered wage equals or exceeds is more consistent with the purpose of the H-1B program and with the administration's goal of improving policies such that H-1B classification is more likely to be awarded to petitioners seeking to employ higher-skilled and higher-paid beneficiaries.<sup>97</sup>

have higher wages and low skill levels have lower wages.); DOL IFR, 85 FR 63872 (it is a "largely self-evident proposition that workers in occupations that require sophisticated skills and training receive higher wages based on those skills.").

<sup>97</sup> See Kirk Doran et al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries*, University of Notre Dame (Feb. 2016), <https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf> (noting that "additional H-1Bs lead to lower average employee earnings and higher firm profits" and the authors' "results are more supportive of the narrative about the effects of H-1Bs on firms in which H-1Bs crowd out alternative workers, are paid less than the alternative workers whom they crowd out, and thus increase the firm's profits despite no measurable effect on innovation"); John Bound et al., *Understanding the Economic Impact of the H-1B Program on the U.S.*, Working Paper 23153, National Bureau of Economic Research (Feb. 2017), <http://www.nber.org/papers/w23153> ("In the absence of immigration, wages for US computer scientists would have been 2.6% to 5.1% higher and employment in computer science for US workers would have been 6.1% to 10.8% higher in 2001.").

DHS does not agree that the rule will limit or restrict the number of H-1B workers, and that is not the rule's intent. DHS also does not agree that this rule will result in companies shifting jobs overseas or will harm U.S. competitiveness. Rather, DHS believes that the admission of higher-skilled workers would benefit the economy and increase the United States' competitive edge in the global labor market.

*Comment:* An individual commenter stated that the lowest paid H-1B worker makes more than H-2 workers, and yet, the administration has expanded the H-2 guest worker program and is presently seeking to lower prevailing wages for these workers, suggesting that "increasing the wages paid to foreign workers is not actually a consistent policy or priority for the administration." The commenter also said the NPRM's reference to incidents of long-time U.S. employees being laid off in favor of younger workers are actually more complicated and show the declining enrollment in IT and STEM fields by U.S. students. The commenter went on to say that H-1B workers are more costly than U.S. workers, which demonstrates that there are not enough similarly situated U.S. workers.

*Response:* DHS disagrees with the commenter's assertions. Regarding the H-2 program, DHS disagrees that the administration's policies have been inconsistent, as these programs serve different purposes. As DHS has stated above and in the NPRM, the intent of the H-1B program is to help U.S. employers fill labor shortages in positions requiring highly skilled or highly educated workers. DHS believes that this rule reflects that intent more faithfully than a random selection process. DHS also disagrees that the instances cited in the NPRM of U.S. employers replacing qualified and skilled U.S. workers with relatively lower-skilled H-1B workers shows declining enrollment in STEM fields by U.S. students, and does not agree with the commenter's assessment regarding insufficient U.S. workers.<sup>98</sup> Actually,

<sup>98</sup> See e.g., Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, *Guestworkers in the High-Skill U.S. Labor Market: An analysis of supply, employment, and wage trends*, Economic Policy Institute (Apr. 24, 2013), at 26, <https://files.epi.org/2013/bp359-guestworkers-high-skill-labor-market-analysis.pdf> ("In other words, the data suggest that current U.S. immigration policies that facilitate large flows of guestworkers appear to provide firms with access to labor that will be in plentiful supply at wages that are too low to induce a significantly increased supply from the domestic workforce."); Ron Hira and Bharath Gopalaswamy, *Reforming US' High-Skilled Guestworker Program*, Atlantic Council (Jan. 2019), at 11, [https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming\\_US\\_High-Skilled\\_Guestworkers\\_Program.pdf](https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming_US_High-Skilled_Guestworkers_Program.pdf) ("By every

<sup>96</sup> U.S. Department of Labor, *Education and Pay Level*, <https://www.dol.gov/general/topic/wages/educational> ("Generally speaking, jobs that require high levels of education and skill pay higher wages than jobs that require few skills and little education.") (last visited Dec. 21, 2020). See also Ed Andrews, *Relationship between Skills and Wages*, Smart Solutions Group (Dec. 2015), <http://smartsolutionsgroup.net/wp-content/uploads/2015/12/Relationship-Between-Skills-and-Wages.pdf> ("There is a very strong correlation between Skills Levels and Wages—as expected, higher skills levels

the fact that more than a third of recent American graduates with STEM degrees do not obtain work in a STEM field indicates that there is no shortage of qualified recent American graduates to fill STEM jobs.<sup>99</sup>

Finally, concerning the comment that H-1B workers are more costly than U.S. workers, DHS recognizes that employers often incur upfront costs to file H-1B petitions (including filing fees and preparation fees). However, DHS believes these upfront costs are offset by the employer's ability to legally pay their H-1B employees relatively low wages below the local median wage. Data show that the majority of H-1B cap-subject petitions have been filed for positions certified at the level I or level II prevailing wages, both of which are set below the local median wage.<sup>100</sup> Employers may realize additional cost savings over the span of several years as they continue to employ these H-1B workers at below-median wages without any statutory requirement to increase the workers' wage levels or wages beyond the minimum required wages. Unlike U.S. workers, H-1B workers are tied to their specific employer, and, therefore, may lack the negotiating power of similarly skilled U.S. workers

objective measure, most H-1B workers have no more than ordinary skills, skills that are abundantly available in the US labor market. That means they are likely competing with (and substituting for) US workers, rather than complementing them as was the program's intention . . . H-1B workers are underpaid and placed in substandard working conditions, while US workers' wages are depressed, and they lose out on job opportunities").

<sup>99</sup> See Ron Hira and Bharath Gopalaswamy, *Reforming US' High-Skilled Guestworker Program*, Atlantic Council (Jan. 2019), at 7, [https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming\\_US\\_High-Skilled\\_Guestworkers\\_Program.pdf](https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming_US_High-Skilled_Guestworkers_Program.pdf) ("Further examining the career transitions of these graduates, we look at the reasons why a third of computer science graduates, and nearly half of engineering graduates, do not go into a job directly related to their degree (Figure E). For computer science graduates employed one year after graduation (*i.e.*, excluding those unemployed or in graduate school), about half of those who took a job outside of IT say they did so because the career prospects were better elsewhere, and roughly a third because they couldn't find a job in IT. For engineering graduates, it's about an even split, with approximately one-third each saying they did not enter an engineering job either because of career prospects or they couldn't find an engineering job. In short, of those graduates with the most IT-relevant education, a large share report they were unable to find an IT job while others found IT jobs to be paying lower wages or offering less attractive working conditions and career prospects than other, non-STEM jobs.").

<sup>100</sup> See Daniel Costa and Ron Hira, *H-1B Visas and Prevailing Wage Level*, Economic Policy Institute (May 4, 2020), <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/> (explaining that the H-1B allows employers to use the H-1B program "to pay [H-1B] workers well below market wages" and "undercut local wages").

to request wage increases.<sup>101</sup> DHS believes that the random selection process is not fair to U.S. workers whose wages may be adversely impacted by relatively lower-paid H-1B workers.

#### c. Lack of Evidence To Support Rulemaking

*Comments:* An advocacy group stated that the evidence provided in the NPRM is not robust enough to justify such a dramatic change in policy. According to the commenter, the agency failed to consider multiple sources that suggest the current H-1B program benefits U.S. workers and the economy. Similarly, a trade association said that the Agency "selectively cherrypicked a small minority of studies" from sources that regularly object to the use of temporary highly-skilled foreign talent, asserting that, had USCIS completed a more comprehensive review of literature, it would have been clear that the H-1B visa program and workers make significant contributions to the U.S. economy and society.

A joint submission from multiple organizations said that DHS even communicates its failure to gather sufficient evidence before publication, and that DHS appears to be operating under the misconception that anything can be published as an NPRM and the burden shifts to the public to analyze the potential impacts. The commenters said that DHS should gather more data before restarting the regulatory process. An individual commenter similarly said that the agency provides inadequate justifications for the proposed changes, while another individual commenter said that the proposed rule is "half-baked and flawed in a number of ways" and requires proper rule-making procedures. An individual commenter stated that the proposed rule does not explain how giving priority to higher wage levels is a more efficient allocation process than the current random lottery process. The commenter said the H-1B lottery is a fair solution to the issue of many petitions arriving on the same day or time, and the proposed rule would "go beyond the principle of fairness."

A trade association stated that the APA does not allow an agency to make significant change without completing an accurate cost-benefit analysis, which the agency did not do, nor did it allow

<sup>101</sup> See Ron Hira and Bharath Gopalaswamy, *Reforming US' High-Skilled Guestworker Program*, Atlantic Council (Jan. 2019), [https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming\\_US\\_High-Skilled\\_Guestworkers\\_Program.pdf](https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming_US_High-Skilled_Guestworkers_Program.pdf) ("The current system not only harms Americans; it also enables H-1B workers to be exploited. H-1B workers themselves are underpaid, vulnerable to abuse, and frequently placed in poor working conditions.").

sufficient time for stakeholders to conduct their own assessments. A company similarly stated that the Department's "scant justification" for wage-based selection of H-1B petitions violates the APA because a Level I or II prevailing wage does not mean that the worker is not highly skilled or vital. The company said that the Department's reasoning for the proposed rule lacks a "rational connection between the facts found and the choice made." An anonymous commenter wrote that the proposal is arbitrary and capricious, asserting that DHS does not explain the rationale behind making wages the sole indicator of a worker's eligibility for visa sponsorship.

*Response:* DHS disagrees with these comments. DHS conducted a comprehensive review of the issues, relying on both internal data and external studies and reports.<sup>102</sup> DHS acknowledges the articles, studies, and reports submitted by commenters that purport to show the overall benefits of H-1B workers.<sup>103</sup> DHS recognizes that some H-1B workers do fill gaps in the labor market and make contributions to the overall economy. However, while some studies show the benefits of H-1B workers overall, DHS also believes that sufficient evidence demonstrates that a prevalence of relatively lower-paid and lower-skilled H-1B workers is

<sup>102</sup> See, e.g., Kirk Doran et al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries*, University of Notre Dame (Feb. 2016), <https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf>; John Bound et al., *Understanding the Economic Impact of the H-1B Program on the U.S.*, Working Paper 23153, National Bureau of Economic Research (Feb. 2017), <http://www.nber.org/papers/w23153>; Daniel Costa and Ron Hira, *H-1B Visas and Prevailing Wage Level*, Economic Policy Institute (May 4, 2020), <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/>.

<sup>103</sup> See, e.g., Neil G. Ruiz and Jens Manuel Krogstad, *Salaries Have Risen for High-Skilled Foreign Workers in U.S. on H-1B Visas*, Pew Research Center (Aug. 16, 2017), <https://www.pewresearch.org/facttank/2017/08/16/salaries-have-risen-for-high-skilled-foreign-workers-in-u-s-on-h-1b-visas/>; A. Nicole Kreisberg, *H-1B Visas: No Impact on Wages*, American Institute for Economic Research (Sept. 2014), <https://www.aier.org/research/h-1b-visas-no-impact-on-wages/>; Jonathan Rothwell and Neil G. Ruiz, *H-1B Visas and the STEM Shortage*, The Brookings Institution (May 10, 2013), <https://www.brookings.edu/research/h-1b-visas-and-the-stem-shortage/>; Neil G. Ruiz et al., *The Search for Skills: Demand for H-1B Immigrant Workers in U.S. Metropolitan Areas*, The Brookings Institution (July 18, 2012), <https://www.brookings.edu/research/the-search-for-skills-demand-for-h-1b-immigrant-workers-in-u-s-metropolitan-areas/>; Madeline Zavodny, *The H-1B Program and Its Effects on Information Technology Workers*, Federal Reserve Bank of Atlanta (Sept. 2003), [https://www.frbatlanta.org/research/publications/economic-review/2003/q3/vol88no3\\_H-1B-program-and-effects-on-information-technology-workers.aspx](https://www.frbatlanta.org/research/publications/economic-review/2003/q3/vol88no3_H-1B-program-and-effects-on-information-technology-workers.aspx).

detrimental to U.S. workers.<sup>104</sup> As discussed in the NPRM and above, DHS further believes that the influx of relatively lower-skilled and lower-paid H-1B workers is not consistent with the dominant legislative purpose of the statute. Prioritizing registrations based on wage level likely would increase the average and median wage levels of H-1B beneficiaries who would be selected for further processing under the H-1B allocations. Moreover, it would maximize H-1B cap allocations, so that they more likely would go to the best and brightest workers.

Based on its comprehensive review of the submitted comments and available evidence, DHS has concluded that, by changing the selection process, in these years of excess demand, from a random lottery selection to selection generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds, DHS will implement the statute more faithfully to its dominant legislative purpose. DHS further believes that this will benefit the economy and increase the United States' competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H-1B program. It may also benefit U.S. workers as employers that might have petitioned for a cap-subject H-1B worker to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions. DHS believes that the available data and information support this rulemaking and that it is not necessary to gather more data or to restart the regulatory process.

### C. Proposed Changes to the Registration Process for H-1B Cap-Subject Petitions

#### 1. Proposed Wage-Based Selection (Selection Process for Regular Cap and Advanced Degree Exemption, Preservation of Random Selection Within a Prevailing Wage)

*Comment:* A business association commented that adding in a non-random variable to the H-1B cap selection process would open the door to pre-adjudication, which may add new burdens to the petitioners and USCIS. The commenter also said the addition of the wage factor may cause potential enforcement or audit actions if USCIS does not agree with a petitioner's

assessment of "corresponding wage level," either when adjudicating the petition or in the course of a post-adjudication audit. In addition, the commenter said the "corresponding wage level" listed on the lottery registration would not necessarily match the "wage level" designated on the Labor Condition Application (LCA) form, creating confusion.

*Response:* DHS disagrees that ranking according to the highest OES prevailing wage level that the proffered wage equals or exceeds will be a pre-adjudication, as submission of the electronic registration is merely an antecedent procedural requirement to properly file the petition. It is not intended to replace the petition adjudication process or assess substantive eligibility. With respect to new burdens resulting from the additional information provided, these are captured below in section V. Statutory and Regulatory Requirements. DHS believes that the additional burden, which is relatively small, is necessary to ensure that USCIS implements the registration system in a manner that realistically, effectively, efficiently, and more faithfully administers the cap selection process.

DHS acknowledges that the "wage level" listed by the petitioner on the registration form may not always match the "wage level" indicated on the LCA. However, DHS believes that the instructions provided in the registration system and on the H-1B petition are sufficiently clear to avoid confusion. Further, USCIS officers will be sufficiently trained on the reasons why the wage level on the registration form may not always match the LCA, and may request additional evidence from the petitioner, as appropriate, to resolve material discrepancies in this regard. However, DHS notes that USCIS may deny or revoke a petition if USCIS determines that the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct.<sup>105</sup>

*Comment:* A professional association noted that DHS proposes to abruptly and unnecessarily change the selection process for H-1B cap-subject petitions by prioritizing registrants based on the highest OES prevailing wage level, and consider applicants solely based on the amount of money that they would be paid, rather than the utility that they would bring to the U.S. workforce.

*Response:* DHS believes that ranking and selecting by the highest OES prevailing wage level that the proffered

wage equals or exceeds is a practical way to achieve the administration's goal of improving policies such that H-1B classification is more likely to be awarded to petitioners seeking to employ higher-skilled and higher-paid beneficiaries. As stated previously, the new ranking system takes into account the wage level relative to the SOC code and area(s) of intended employment—as opposed to salary alone—when ranking registrations. While DHS agrees that the utility an H-1B beneficiary brings to the U.S. workforce is important, there is no practical, objective way to measure utility such that DHS could use this quality to rank and select H-1B registrations or petitions.

#### 2. Required Information From Petitioners

##### a. OES Wage Level

##### i. Highest OES Wage Level That the Proffered Wage Would Equal or Exceed

*Comments:* Several commenters said DHS should rank registrations at OES prevailing wage level I separate from those falling below OES prevailing wage level I, so that registrations who meet wage level I are prioritized for H-1B selection over those falling below level I. Some commenters noted that the DOL IFR placed the level I wage at the 45th percentile (close to previous level III), creating vast differentiation within this large group. Therefore, the benefits of the rule of differentiating candidates would fail for at least 90 percent of registrations, as the DOL IFR would result in the prevailing wage level I and below group being much larger and DHS needing to select from that group completely at random. With that lack of differentiation, the new rule would not accomplish its purpose of retaining the best talent. Therefore, these commenters urged DHS to consider separating those registrations at or above level I wages from those falling below, as opposed to putting them into one giant group.

*Response:* DHS does not agree with the suggestions to separate OES wage level I from a wage below level I. DHS expects that all petitioners offering a wage lower than the OES wage level I wage will be using another legitimate source other than OES or an independent authoritative source, including a private wage survey. Therefore, such a change effectively could preclude petitioners that utilize one of those other sources from being selected for registration. By grouping OES wage level I and below together, those petitioners have a fair chance of selection and are not precluded from using a private wage survey as appropriate. Since the DOL IFR was set

<sup>104</sup> See The National Academies of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration* 258 (Washington, DC: The National Academies Press 2017), <https://doi.org/10.17226/23550> (noting that differing results across certain studies "may reflect immigrant heterogeneity generally and among H-1B workers in particular").

<sup>105</sup> See new 8 CFR 214.2(h)(8)(iii)(D)(1)(ii).

aside on December 1, 2020, and is no longer being implemented, DHS will not be considering the impact of the DOL IFR in the context of this final rule.<sup>106</sup>

*Comments:* A professional association remarked that petitioners who use private survey data would be disadvantaged by the proposed rule and said that, even when private wage surveys provide an accurate prevailing wage, the proposed rule requires the employer to “downgrade” the H-1B registration to the lower OES prevailing wage level. The commenter concluded that, as a result, the proposed rule’s artificial preference in the registration system to what is admittedly incomplete or possibly inaccurate OES wage data reduces the chance that employers intending to pay the H-1B required wage based on the statutory “best information available”—in this case a private industry survey—will see their registration selection chances materially reduced. A law firm questioned which factors contributed to DHS’s decision to use the OES wage levels as opposed to wage leveling from a permissible private wage survey.

*Response:* DHS appreciates the commenter’s question. When determining how to rank and select registrations (or petitions) by wage level, DHS decided to use OES prevailing wage levels because they are the most comprehensive and objective source for comparing wages. The OES program produces employment and wage estimates annually for nearly 800 occupations.<sup>107</sup> Additionally, most petitioners are familiar with the OES wage levels since they are used by DOL and have been used in the foreign labor certification process since 1998.<sup>108</sup> OES wage level data is publicly available through the Foreign Labor Certification Data Center’s Online Wage Library. Private wage surveys are not publicly available and do not always have four wage levels.

<sup>106</sup> On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al. v. DHS, et al.*, No. 20-cv-7331, setting aside the DOL IFR, 85 FR 63872. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al. v. Scalia, et al.*, No. 20-cv-14604, applying to the plaintiffs in that case. Also, on December 3, 2020, DOL announced that it would no longer implement the IFR, consistent with the above referenced court orders.

<sup>107</sup> See U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics*, <https://www.bls.gov/oes/home.htm> (last visited Dec. 14, 2020).

<sup>108</sup> See U.S. Department of Labor, Employment and Training Administration, *Prevailing Wages (PERM, H-2B, H-1B, H-1B1, and E-3)*, <https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage> (last visited Dec. 14, 2020).

DHS disagrees with the commenter’s assertion that petitioners who use private survey data would be disadvantaged by the rule. Petitioners may continue to use private wage surveys, if they choose to do so, to establish that they will be paying the beneficiary a required wage. This rule, however, will rank and select registrations or petitions, as applicable, based on the highest OES wage level that the proffered wage equals or exceeds as OES wage data is the most comprehensive and objective source for comparing wages.

*Comment:* An individual commenter stated that the requirement to designate the wage level is confusing because DHS is asking petitioners to designate not the wage level associated with the job opportunity, but the highest OES wage level for which the proffered wage exceeds the OES wage. The commenter said asking petitioners to determine two different wage levels makes the process deliberately complex and ripe for error, which could be fatal given the proposed increased authority of USCIS to deny petitions for discrepancies in wage levels. The commenter also expressed concern that the position, its substantive job duties, its occupational classification, the intended worksite, the prevailing wage, and the actual wage are now required at the registration stage in order to comply with the “complicated ranking-wage-level calculation.”

*Response:* DHS does not agree with the comment stating that asking petitioners to specify the highest corresponding OES wage level that the proffered wage would equal or exceed on the registration is confusing or burdensome. Further, DHS disagrees with the comment stating that the position, its substantive job duties, its occupational classification, the intended worksite, the prevailing wage, and the actual wage are now required at the registration stage. In addition to the information required on the current electronic registration form (and on the H-1B petition) and for purposes of this selection process and to establish the ranking order, a registrant (or a petitioner if registration is suspended) would be required to provide only the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended employment. While the OES wage level assessment would be based on the SOC code, area of intended employment, and proffered wage, the registrant would not need to supply the SOC code, area of intended employment, and proffered wage at the registration stage.

*Comment:* A professional association asserted that the U.S. Bureau of Labor Statistics’ (BLS) OES wage survey skews wage data higher for several professions, including physician specialties. The commenter suggested that wage survey data collected from employees has significant issues, including that the data is collected voluntarily, wage data is grouped rather than provided for individual employees, larger urban centers are overrepresented compared to smaller practices, and physicians in rural areas are underreported. The association added that, in situations where there is less wage data, DHS will be unable to accurately adjudicate cap slots, citing data from the American Immigration Council and the Foreign Labor Certification Data Center. The association also said the DOL IFR increases the prevailing wage requirements and exacerbates the issue by establishing a default wage for physicians of \$208,000 where data is unavailable. The professional association stated that the BLS prevailing wage does not comply with DHS’s claim that higher skill level positions must be paid higher wages. The association asserted that statistical analysis problems with the BLS OES survey would cause the population of H-1B physicians to be paid equally regardless of skill or experience. The commenter further stated that rural and other underserved areas will not meet the wage requirements and will lose access to critically needed physicians.

*Response:* On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al. v. DHS, et al.*, No. 20-cv-7331, setting aside the DOL IFR, which took effect on October 8, 2020, and implemented reforms to the prevailing wage methodology for the Permanent Employment Certification, H-1B, H-1B1, and E-3 visa programs. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al. v. Scalia, et al.*, No. 20-cv-14604, applying to the plaintiffs in that case. On December 3, 2020, DOL announced that it was taking necessary steps to comply with the courts’ orders and will no longer implement the IFR. These steps include making required technical changes to the Foreign Labor Application Gateway (FLAG) system to replace the October 8, 2020, through June 30, 2021, wage source year data that was implemented under the DOL IFR with the OES prevailing wage data that was in effect on October 7, 2020, and reflecting such data updates in the Foreign Labor

Certification Data Center Online Wage Library<sup>109</sup> at <https://www.flcdatcenter.com/> with the correct prevailing wage data for each SOC and area of intended employment through June 30, 2021.<sup>110</sup>

While prevailing wage level data remains unavailable for some SOC codes in some areas of intended employment, DHS believes that its solution in that limited circumstance, as proposed in the NPRM and retained in this final rule, still will allow DHS to select registrations according to the metric of the registrant's self-identified prevailing wage level as calculated using DOL's prevailing wage level guidance.<sup>111</sup> DHS recognizes that this solution is imperfect as it does not provide a means for those registrants to proffer wages that equal or exceed higher prevailing wage levels than those commensurate with the position requirements. However, DHS concludes that it is the best available option to serve the overarching goal of revising the selection process to ensure that H-1B petitions are filed for positions requiring relatively higher skill levels or proffering wages commensurate with higher skill levels. The commenter's statements that limitations in OES data would cause the population of H-1B physicians to be paid equally regardless of skill or experience, or that such limitations undermine the premise that higher skill level positions must be paid higher wages, is beyond the scope of this rulemaking. This rule does not require an employer to pay a certain wage. This rule merely pertains to ranking and selection of registrations or petitions, as applicable, based on corresponding wage level. In the limited instance where OES data is unavailable, the registrant would follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration, notwithstanding the proffered salary.

<sup>109</sup> The Foreign Labor Certification Data Center, a component of the U.S. Department of Labor Office of Foreign Labor Certification, is the location of the Online Wage Library for prevailing wage determinations. U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, <https://www.flcdatcenter.com/> (last visited Dec. 15, 2020).

<sup>110</sup> DOL, Employment and Training Administration, Foreign Labor Certification, Announcements <https://www.dol.gov/agencies/eta/foreign-labor> (last visited Dec. 21, 2020).

<sup>111</sup> U.S. Department of Labor, Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Revised Nov. 2009), [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf).

ii. Highest OES Wage Level When There Is No Current OES Prevailing Wage Information

*Comment:* A business association commented that, although using the prevailing wage worksheet to determine wage level makes sense, there is no way to escalate to a higher corresponding wage level by paying more, unlike when an OES wage is used. The commenter added that the unavailability of an OES wage may be an indication that a job is new or novel, and therefore may be even more in need of H-1B workers to fulfill employment needs.

*Response:* DHS recognizes that some occupations do not have current OES prevailing wage information available on DOL's Online Wage Library. In the limited instance where there is no current OES prevailing wage information for the proffered position, the registrant would follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration. While petitioners may not be able to increase their chance of selection by increasing the proffered wage, they can increase their chance of selection by petitioning for positions requiring higher skill, experience, or education levels.

DHS believes that, in the absence of current OES prevailing wage information, selecting according to wage level is the best way to ensure that registrations (or petitions) are selected consistent with the primary purpose of the H-1B program, which is to help U.S. employers fill labor shortages in positions requiring highly skilled or highly educated workers. DHS data shows a correlation between higher salaries and higher wage levels.<sup>112</sup> Thus, even in those limited instances where no OES prevailing wage information is available, DHS believes that selecting according to wage level is likely to result in selection of the highest-paid or highest-skilled beneficiaries, consistent with the goals of the H-1B program. DHS will not comment on whether the unavailability of OES wage indicates that a job is new, novel, or in more demand, as that is outside the scope of this rule.

*Comment:* One commenter asked, where the OES wage levels are missing, what penalties, if any, will be applied to petitioners or beneficiaries if USCIS

<sup>112</sup> For example, in Computer and Mathematical Occupations, the 2019 national median salary for level I was \$78,000; for level II was \$90,000; for level III was \$115,000; and for level IV was \$136,000. Department of Homeland Security, USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, VIBE, DOL OFLC TLC Disclosure Data queried 9/2020 TRK 6446.

disagrees with the wage level selected by the petitioner after selection has occurred.

*Response:* DHS expects each registrant would be able to identify the appropriate SOC code for the proffered position because all petitioners are required to identify the appropriate SOC code for the proffered position on the LCA, even when there is no applicable wage level on the LCA. Using the SOC code and established DOL guidance, all prospective petitioners would be able to determine the appropriate OES wage level for purposes of completing the registration or petition, as applicable, regardless of whether they were to specify an OES wage level or utilize the OES program as the prevailing wage source on an LCA.

During the adjudication process, if USCIS disagrees with the wage level selected by the petitioner, USCIS will comply with 8 CFR 103.2(b)(8) and may provide the petitioner an opportunity to explain the selected wage level, as applicable. If USCIS determines that the petitioner failed to meet its burden of proof in establishing that it selected the appropriate SOC code for the position, or if USCIS determines that the petition was not based on a valid registration (e.g., if there is a discrepancy in wage levels between the registration and the petition), USCIS may deny the petition. If USCIS determines that the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct, USCIS may reject or deny the petition or, if approved, may revoke the approval of a petition that was filed based on that registration.<sup>113</sup> If USCIS determines that the statement of facts contained in the petition or on the LCA was not true and correct, inaccurate, fraudulent, or misrepresented a material fact, USCIS may revoke the approval of that petition.<sup>114</sup>

*Comment:* A professional association stated that, because the registration system does not contemplate a real-time adjudication of whether occupations lacking current OES prevailing wage information are correctly slotted under USCIS' selection system, there would be no fail-safe mechanism for employers to confirm that the wage-preference selection process in fact operated as USCIS predicted in the proposed rule. The commenter stated that, before any further rule is published, DHS, DOL and OMB should investigate and determine whether any proposed wage-preference H-1B selection process relying upon

<sup>113</sup> See new 8 CFR 214.2(h)(8)(iii)(D)(1)(ii).

<sup>114</sup> See 8 CFR 214.2(h)(11)(iii)(A)(2).

incomplete OES data can be established, notwithstanding these apparent data gaps and deficiencies. The commenter concluded that, despite the inadequacy or unavailability of OES data, the proposed rule ignores the requirement that wage data be sourced from “the best information available,” placing unwarranted and artificial reliance on OES data despite its faults or lack of availability.

*Response:* DHS recognizes that prevailing wage level data remains unavailable for some SOC codes in some areas of intended employment. However, DHS still believes that OES provides the most comprehensive and objective publicly available source for obtaining prevailing wage information and, thus, is still the best available option to serve the overarching goal of improving policies such that H-1B classification is more likely to be awarded to petitioners seeking to employ higher-skilled and higher-paid beneficiaries.<sup>115</sup>

### iii. Lowest OES Wage Level That the Proffered Wage Would Equal or Exceed When Beneficiary Would Work in Multiple Locations or Positions

*Comment:* A commenter said employers may relocate an employee to temporarily work remotely in a location where average salary is low to keep wages low while increasing the H-1B wage level and the chance of being selected. The commenter suggested that the area code used for the selection of H-1B registrations only should be the registered official address of the company, instead of anywhere where the employee will work, concluding that employers should be fined for misrepresenting work locations to take advantage of lower wages.

*Response:* DHS appreciates this commenter’s concern, but believes the commenter misunderstood how the new H-1B cap selection process will work

<sup>115</sup> See Kirk Doran et al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries*, University of Notre Dame (Feb. 2016), <https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf> (noting that “additional H-1Bs lead to lower average employee earnings and higher firm profits” and the authors’ “results are more supportive of the narrative about the effects of H-1Bs on firms in which H-1Bs crowd out alternative workers, are paid less than the alternative workers whom they crowd out, and thus increase the firm’s profits despite no measurable effect on innovation”); John Bound et al., *Understanding the Economic Impact of the H-1B Program on the U.S.*, Working Paper 23153, National Bureau of Economic Research (Feb. 2017), <http://www.nber.org/papers/w23153> (“In the absence of immigration, wages for US computer scientists would have been 2.6% to 5.1% higher and employment in computer science for US workers would have been 6.1% to 10.8% higher in 2001.”).

and the limitations contained in the proposed rule to limit the potential for abuse or gaming of the selection process. If the H-1B beneficiary will work in multiple locations or multiple positions, the registrant or petitioner must specify on the registration or petition, as applicable, the *lowest* corresponding OES wage level that the proffered wage will equal or exceed for the relevant SOC code in the area of intended employment, and USCIS will rank and select based on the *lowest* corresponding OES wage level.

DHS provides the following example for illustrative purposes only. A prospective employer intends to employ an H-1B beneficiary as a level I “Civil Engineer” position (SOC code 17-2051) at two locations: San Francisco, California and Montgomery, Alabama. The Alabama location was specifically chosen because of that locality’s generally lower prevailing wages. The required level I prevailing wage for each area of intended employment is \$77,147 per year<sup>116</sup> and \$62,858 per year,<sup>117</sup> respectively. In this scenario, to meet the level I prevailing wage for the San Francisco area of intended employment, the minimum annual wage the prospective petitioner must offer to the beneficiary is \$77,147. While an annual salary of \$77,147 would exceed the level II prevailing wage for the Montgomery, Alabama, area of intended employment,<sup>118</sup> the prospective petitioner still must select Level I for purposes of the registration because that is the *lowest* corresponding OES wage level that the proffered wage will equal or exceed for the relevant SOC code in all areas of intended employment. This rule also includes provisions authorizing USCIS to deny an H-1B petition if USCIS determines that the statements on the registration or petition were inaccurate, fraudulent or

<sup>116</sup> U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, <https://www.flcdatcenter.com/OesQuickResults.aspx?code=17-2051&area=41860&year=21&source=1> (last visited Dec. 21, 2020) (providing prevailing wage level values for SOC code 17-2051 in San Francisco-Oakland-Hayward, CA, in the All Industries database for 7/2020-6/2021).

<sup>117</sup> U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, <https://www.flcdatcenter.com/OesQuickResults.aspx?code=17-2051&area=33860&year=21&source=1> (last visited Dec. 21, 2020) (providing prevailing wage level values for SOC code 17-2051 in Montgomery, AL, in the All Industries database for 7/2020-6/2021).

<sup>118</sup> U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, <https://www.flcdatcenter.com/OesQuickResults.aspx?code=17-2051&area=33860&year=21&source=1> (last visited Dec. 21, 2020) (showing that a level II wage = \$74,901).

misrepresented a material fact.<sup>119</sup> USCIS also may deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner’s attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the original petition.<sup>120</sup>

*Comment:* A professional association expressed concern with the proposed rule’s language stating, “if the beneficiary will work in multiple locations, or in multiple positions if the registrant is an agent, USCIS will rank and select the registration for the lowest corresponding OES wage level that the proffered wage will equal or exceed.”<sup>121</sup> The commenter stated that, basing the chance for selection on the lower wage figure is an “arbitrary” protocol without explanation. Likewise, an individual commenter said the provision is unfairly discriminatory and lacks adequate justification, adding that it is “unconscionable to use an inverted system” for ranking.

*Response:* DHS chose to use the lowest corresponding OES wage level that the proffered wage will equal or exceed in the case of multiple locations or multiple positions to prevent gaming of the registration process. If DHS were to invert the process and rank based on the highest corresponding OES wage level that the proffered wage were to equal or exceed, then petitioners could place the beneficiary in a lower-paying position for most of the time and a higher-paying position for only a small percent of the time, but use that higher-paying position to rank higher in the selection process and increase their chances of being selected in the registration process. Similarly, in the case of multiple locations, petitioners could place the beneficiary in a higher-paying locality for only a small percent of time, but use that higher-paying locality to rank higher in the selection process and increase their chances of being selected in the registration process.

### iv. Other Comments on OES Wage Level

*Comment:* Several commenters said that the proposed rule’s changes to prevailing wage levels are in direct opposition to established guidance set forth in the DOL Employment and

<sup>119</sup> See new 8 CFR 214.2(h)(10)(ii).

<sup>120</sup> See new 8 CFR 214.2(h)(10)(ii).

<sup>121</sup> 85 FR 69236, 69263.

Training Administration Prevailing Wage Determination Policy Guidance.<sup>122</sup>

*Response:* This rule does not conflict with or change established DOL guidance. DHS clearly stated in the NPRM that this ranking and selection process will not alter the prevailing wage levels associated with a given position for DOL purposes, which are informed by a comparison of the requirements for the proffered position to the normal requirements for the occupational classification.<sup>123</sup>

*Comment:* A professional association wrote that the OES wage data has various shortcomings, and there are advantages to using a variety of wage data. Prevailing wage data can originate from multiple sources, including wage surveys published by private organizations and employer-conducted surveys. The association said that BLS OES survey data used to calculate prevailing wages is not designed for foreign labor certification, and OES survey data captures no information about differences based on skills, training, experience or responsibility levels of the workers, all of which are factors the INA requires DHS to consider. The association said that the OES survey is the best available source of wage data for the Department's purposes, but it is not perfectly suited to the H-1B, H-1B1, and E-3 classifications, nor to the Permanent Labor Certification Program (PERM). The professional association also commented that the proposed rule does not describe the cases when OES prevailing wage data would be unavailable or how USCIS officials would be trained to interpret DOL guidance, and petitioners who cannot use Online Wage Library data would have no way to know whether USCIS officials misinterpreted the DOL guidance and mistakenly disagreed with an employer's wage level selection.

*Response:* When determining how to rank and select registrations (or petitions, as applicable) by the highest OES prevailing wage level that the proffered wage equals or exceeds, DHS decided to use OES prevailing wage levels because OES is the most comprehensive and objective source for comparing wages. The OES program produces employment and wage estimates annually for nearly 800

occupations.<sup>124</sup> Additionally, most petitioners are familiar with the OES wage levels since they are used by DOL and have been used in the foreign labor certification process since 1998.<sup>125</sup> During the adjudication process, if USCIS disagrees with the wage level selected by the petitioner, USCIS will comply with 8 CFR 103.2(b)(8) and may provide the petitioner an opportunity to explain the wage level, as applicable. If USCIS determines that the petitioner failed to meet its burden of proof in establishing that it selected the appropriate SOC code for the position, or if USCIS determines that the petition was not based on a valid registration (e.g., if there is a discrepancy in wage levels between the registration and the petition), USCIS may deny the petition.<sup>126</sup> If USCIS determines that the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct, USCIS may reject or deny the petition or, if approved, may revoke the approval of a petition that was filed based on that registration.<sup>127</sup> If USCIS determines that the statement of facts contained in the petition or on the LCA was not true and correct, inaccurate, fraudulent, or misrepresented a material fact, USCIS may revoke the approval of that petition.<sup>128</sup>

b. Attestation to the Veracity of the Contents of the Registration and Petition (Including Comments on Rejections, Denials, and Revocations)

*Comments:* One commenter noted the need to ensure that ranking and selection as described would not enable attempts to increase the chance of selection by representing one wage level at the registration stage and a lower wage level at the H-1B petition filing stage.

*Response:* DHS appreciates and shares the commenter's concern. New 8 CFR 214.2(h)(8)(iii)(D)(1)(iii), (h)(10)(ii), and (h)(11)(iii)(A)(2) address the concern that registrants could misrepresent wage levels at the registration stage to increase chances of selection. Specifically, this final rule empowers USCIS to deny a petition if USCIS determines that the statements on the

registration or petition were inaccurate, fraudulent, or misrepresented a material fact. The rule also authorizes USCIS to deny or revoke approval of a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that would be equivalent to a lower wage level, after listing a higher wage level on the registration to increase the odds of selection. The ability to deny or revoke approval of an H-1B petition in such a context will defend against registrants and petitioners attempting to abuse the H-1B cap selection process by misrepresenting wage levels.

*Comment:* One commenter asked what factors DHS will use to determine if a petitioner attempted to circumvent the proposed rule by filing a subsequent new petition with a lower wage under a related entity, and whether DHS will consider that related entities may have different compensation ranges for similar positions in making this determination.

*Response:* DHS thanks this commenter for the question. Under new 8 CFR 214.2(h)(10)(ii), USCIS may deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the original petition. Whether the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process is an issue of fact that USCIS will determine based on the totality of the record. As such, DHS cannot provide an exclusive list of factors that USCIS will consider in such adjudications. In general, however, the petitioner or a related entity bears the burden of proof to demonstrate that: the new or amended petition is not part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process; the initial H-1B petition and the underlying registration, when applicable, was based on a legitimate

<sup>122</sup> U.S. Department of Labor, Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Revised Nov. 2009), [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>123</sup> 85 FR 69236, 69237.

<sup>124</sup> U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Occupational Employment Statistics*, <https://www.bls.gov/oes/home.htm> (last visited on Dec. 11, 2020).

<sup>125</sup> U.S. Department of Labor, Employment and Training Administration, *Prevailing Wages (PERM, H-2B, H-1B, H-1B1, and E-3)*, <https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage> (last visited Dec. 11, 2020).

<sup>126</sup> See new 8 CFR 214.2(h)(8)(iii)(D)(1)(i).

<sup>127</sup> See new 8 CFR 214.2(h)(8)(iii)(D)(1)(ii).

<sup>128</sup> See new 8 CFR 214.2(h)(11)(iii)(A)(2).

job offer;<sup>129</sup> and the new or amended petition is nonfrivolous.<sup>130</sup>

Further, DHS notes that, under the current registration system, the petitioner identified at the registration stage must match the petitioner of the subsequently filed petition. 8 CFR 214.2(h)(8)(iii)(D) states that a petitioner may not substitute the beneficiary named in the original registration or transfer the registration to another petitioner. This rule has not changed this requirement. Accordingly, USCIS may deny an H–1B cap-subject petition if an entity other than the petitioner identified at the registration stage, including a related entity, files the petition.

*Comment:* An individual suggested allowing future H–1B extensions or renewals only with a wage level that is equal or greater than the wage level selected in the lottery for the first time.

*Response:* H–1B extensions or renewals are not impacted by this rule, and DHS declines to impose a universal requirement that all extension or renewal requests must be for a position at the equal or greater wage level. Employers are permitted to file an extension petition requesting continuation of previously approved employment without change with the same employer, which most likely involves a position at the same wage level. Furthermore, employers are permitted to file extension or amended petitions requesting new employment, change in previously approved employment, new concurrent employment, change of employer, or amended employment. All of these petition types could involve positions with different SOC codes, which makes a straight comparison of wage levels impractical.

However, under new 8 CFR 214.2(h)(10)(ii), USCIS may deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner’s attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a

lower wage level than that indicated on the original petition.

*Comment:* An individual commenter said that the formal certification requirement, whereby the petitioner’s authorized signatory certifies “that the proffered wage on the petition will equal or exceed the wage level on the applicable registration,” does not recognize that registrations are submitted in March for a fiscal year beginning the following October. Therefore, particularly in years such as FY 2021 where there is a second round of selections, H–1B cap petitions may be filed after OES wages have changed. The commenter said the new question added to the registration seems to address this concern, by specifying “[a]s of the date of this submission . . . ,” but the formal certification that is binding on the employer does not make this distinction, which could lead to unnecessary and inappropriate liability. The commenter said that the certification should be revised to reflect only an attestation that the wage “will equal or exceed the prevailing wage, in effect at the time of submission, that is associated with the wage level selected in the registration.”

*Response:* DHS thanks the commenter, but declines to adopt the suggestion. As the commenter notes, the registration form makes sufficiently clear that the information provided on the registration is “as of the date of submission of this registration.” DHS believes that further changes to the form are unnecessary and could potentially lead to gaming of the registration system.

### 3. Requests for Comments on Alternatives

*Comment:* A research organization and a labor union recommended having staggered filing deadlines for petitions by wage levels as an alternative in case the proposed rule is met with legal challenges. Under this alternative, USCIS could have a first filing period, where only petitions with jobs paying level IV are considered. Once all the level IV petitions are submitted and approved, then a second filing period at a later date could be set to receive only petitions with jobs paying level III wages. After those are collected and approved, if there are any visas remaining under the H–1B cap, then a filing period for level II wages would be next, and finally a filing period for level I. This way, all of the petitions would not be submitted at once, thereby still allowing DHS to adjudicate and allocate petitions “in the order in which” they were filed, as the statute requires. If there were more petitions than available

H–1B slots at a particular wage level, there could be a “mini-lottery” within that wage level.

*Response:* DHS appreciates the commenters’ suggestions to use staggered filing deadlines. However, DHS believes it is not necessary to create staggered filing deadlines since, as stated in the NPRM and as explained above, this rule is consistent with and permissible under DHS’s general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.<sup>131</sup> Further, DHS believes that staggered filing deadlines may create operational challenges for managing the cap and adjudicating petitions in a timely manner. Staggered filing periods could also have unintended consequences for petitioners filing H–1B cap-subject petitions for beneficiaries who are in F–1 status and seeking a change of status.<sup>132</sup> Therefore, DHS declines to adopt this suggestion.

*Comment:* One commenter suggested using only the beneficiary’s annual wage to prioritize the selection of registrations.

*Response:* DHS appreciates the commenter’s suggestion to prioritize selection based on annual wage. However, DHS believes that selecting registrations or petitions, as applicable, solely based on the highest salary would unfairly favor certain professions, industries, or geographic locations. Therefore, DHS believes that prioritizing generally based on the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment is the better alternative.

*Comment:* Several commenters were concerned about the possibility of abuse by companies who would offer part-time positions at greater hourly wages, but would reduce overall working hours, to increase their chance of selection. Other commenters expressed similar concerns about potential abuse of part-time positions, indicating that review should be stricter for part-time H–1B applicants.

*Response:* This final rule authorizes USCIS to reject or deny a petition or, if approved, revoke the approval of a petition, if the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct.<sup>133</sup> Similarly, this final rule authorizes USCIS to deny or revoke approval of a subsequent new or

<sup>129</sup> See new 8 CFR 214.2(h)(10)(ii) (“A valid registration must represent a legitimate job offer.”); U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Memorandum PM–602–0114, *Rescission of Policy Memoranda* (June 17, 2020), <https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114-ITServeMemo.pdf> (“A bona fide job offer must exist at the time of filing [the H–1B petition].”).

<sup>130</sup> See 8 CFR 214.2(h)(2)(i)(H).

<sup>131</sup> 85 FR 69236, 69242.

<sup>132</sup> See 8 CFR 214.2(f)(5)(vi).

<sup>133</sup> See new 8 CFR 214.2(h)(8)(iii)(D)(1)(ii).



amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that would be equivalent to a lower wage level, after listing a higher wage level on the registration to increase the odds of selection.<sup>134</sup> Thus, if USCIS finds that an employer misrepresented the part-time or full-time nature of a position, the number of hours the beneficiary would work, or the proffered salary, then USCIS could deny or revoke the petition. The ability to deny or revoke approval of an H-1B petition in this context will militate against registrants and petitioners attempting to abuse the H-1B cap selection process through misrepresentation.

*Comment:* One commenter suggested that, if USCIS were to receive and rank more registrations (or petitions, in any year in which the registration process is suspended) at a particular prevailing wage level than the projected number needed to meet the numerical limitation, then USCIS should rank and choose registrations by the highest prevailing wage within that wage level. Another commenter stated that visas should be allocated by the prevailing wage, even within each level.

*Response:* DHS does not believe that selecting the highest prevailing wage within a wage level is a better alternative to randomly selecting within a single wage level when USCIS receives more registrations (or petitions, in any year in which the registration process is suspended) at a particular prevailing wage level than the projected number needed to meet the numerical limitation. DHS prefers to give all registrations ranked at the particular wage level the same chance of selection because those registrations generally would represent workers at the same skill level. If DHS were to select the highest prevailing wage within a wage level, that could unfairly advantage registrations or petitions for positions in higher-paying metropolitan areas or occupations.

*Comment:* One commenter suggested giving preference to beneficiaries with U.S. degrees. Another commenter stated that DHS should consider adding an advantage to candidates who receive a U.S. education as this will benefit U.S. institutions of higher education.

*Response:* DHS declines to adopt the commenters' suggestions. Registrations or petitions, as applicable, submitted for beneficiaries who have earned a

master's or higher degree from a U.S. institution of higher education already have a higher chance of selection through the administration of the selection process. DHS reversed the order in which USCIS selects registrations or petitions, as applicable, which was expected to 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 up to 16 percent each year<sup>135</sup> and resulted in an 11 percent increase in FY 2020.<sup>136</sup>

*Comment:* Some commenters said that DHS should consider ranking by years of experience, rather than by wage. One commenter asked DHS to give an advantage to candidates who have work experience in the United States.

*Response:* DHS declines to adopt these alternatives, as ranking by years of experience would not best accomplish the goal of attracting the most highly skilled workers. DHS believes that salary, relative to others in the same occupational classification and area of intended employment, rather than years of experience, is generally more indicative of skill level and the relative value of the worker to the United States.

*Comment:* A few commenters said that DHS should consider providing quotas for each wage level, rather than simply ranking and selecting in descending order by wage levels. Other commenters suggested setting a limit or quota on the number of registrations submitted by certain types of employers, such as staffing agencies or H-1B dependent companies. Another commenter supported measures to prevent staffing companies from filing multiple registrations for offshore workers and stated that companies should not be able to submit more than one registration per beneficiary. Another commenter stated that it is "crucial" to regulate consulting companies and staffing agencies.

*Response:* DHS declines to pursue the alternative of setting quotas for each wage level or for certain types of companies as this alternative would not best accomplish the goal of attracting the most highly skilled workers. With respect to comments about prohibiting staffing companies from filing multiple registrations, DHS declines to adopt the commenters' suggestions as DHS regulations already prohibit an

employer from submitting more than one registration per beneficiary in any fiscal year.<sup>137</sup> Comments about the need to further regulate consulting and staffing companies are outside the scope of this final rule.

*Comment:* A few commenters suggested that DHS prohibit multiple H-1B petitions for the same beneficiary by different employers.

*Response:* DHS regulations already prohibit a petitioner, or related entities, from submitting more than one H-1B cap-subject petition for the same beneficiary in the same fiscal year, absent a legitimate business need.<sup>138</sup> Because registration is not intended to replace the petition adjudication process or to assess eligibility, USCIS cannot feasibly determine at the registration stage whether different entities that submit registrations on behalf of the same beneficiary are "related" or have a "legitimate business need." Further, INA section 214(g)(7), 8 U.S.C. 1184(g)(7), allows for "multiple petitions [to be] approved for 1 alien." For these reasons, DHS declines to adopt the commenters' suggestion.

*Comment:* One commenter stated that DHS should consider increasing the numerical cap exemption for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education as most of the highly skilled positions do not depend entirely on the number of years of experience, but on the higher education degree requirements.

*Response:* This rule does not affect either the statutorily mandated annual H-1B numerical limitation of 65,000 on the number of aliens who may be issued initial cap-subject H-1B visas or otherwise provided initial H-1B status, or the annual cap exemption for 20,000 aliens who have earned a master's or higher degree from a U.S. institution of higher education.<sup>139</sup> As the numerical allocations are set by statute, DHS lacks the authority to adopt the commenter's suggestion.

*Comment:* An individual suggested DHS implement a "market based cap and selection system" by first identifying areas of the job market, like medical workers, that are most in need at the moment and, from there, ranking by wage or wage level.

*Response:* DHS believes that identifying areas of the job market that are most in need is not feasible, as it is subjective and would be subject to constant change. This rule is not a

<sup>135</sup> H-1B Registration Final Rule, 84 FR 888, 890.

<sup>136</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *DHS Proposes Minimal Registration Fee for Petitioners Seeking to File H-1B Cap-Subject Petitions* (Sept. 3, 2019), <https://www.uscis.gov/news/alerts/dhs-proposes-minimal-registration-fee-for-petitioners-seeking-to-file-h-1b-cap-subject-petitions>.

<sup>137</sup> See 8 CFR 214.2(h)(8)(iii)(A)(2).

<sup>138</sup> See 8 CFR 214.2(h)(2)(i)(G).

<sup>139</sup> See INA section 214(g)(1)(A) and (5)(C), 8 U.S.C. 1184(g)(1)(A) and (5)(C).

<sup>134</sup> See new 8 CFR 214.2(h)(8)(iii)(D)(1)(iii).

temporary rule that is limited in duration to the COVID-19 pandemic, and regularly adjusting selection criteria based on the needs of the job market would be administratively burdensome. Therefore, DHS declines to adopt the commenter's suggestion.

*Comments:* A few commenters proposed that DHS prioritize selection based on multiple factors, including the prospective beneficiary's degree from a U.S. institution, the length of time legally studying or working in the United States, skills, wages, and other qualifications. Other commenters stated that the DHS should weigh other desirable factors, such as whether H-1B employees are U.S. university graduates and whether the petitioner is a small business contributing a significant amount of their income to wages. This would allow small businesses to compete for H-1B visas and prevent larger corporations from being the only employers to benefit from the H-1B program. Another comment urged DHS to create a prioritization system that incentivizes employers to petition for permanence for H-1B workers, among other desirable employer behavior in addition to fair compensation.

*Response:* DHS believes that identifying and weighing multiple factors is not feasible, as such an approach could be overly complicated, unpredictable, and subjective. Therefore, DHS declines to adopt the commenters' suggestions.

*Comment:* A professional association requested that DHS exempt physicians from this rule. An individual suggested providing exceptions or waivers for certain industries, such as the healthcare/pharmaceutical fields, due to the different experience requirements in those fields.

*Response:* DHS declines to exempt physicians or other specific occupations or fields from the rule. While DHS certainly appreciates the significant challenges faced by healthcare professionals, especially during the current COVID-19 pandemic, DHS recognizes that there are many other occupations that can be considered critical now and at various times in the future. Carving out exceptions for some occupations would be highly problematic, particularly as this rule is not a temporary rule that is limited in duration to the COVID-19 pandemic.

*Comment:* An individual commented on the alternative proposal of weighting registrations such that "a level IV position would have four times greater chance of selection than a level I position, a level III position would have three times greater chance of selection than a level I position, and so on." The

commenter questioned why DHS set the multiples at 4 times, 3 times, and 2 times.

*Response:* The multiples of 4 times, 3 times, and 2 times, correspond to wage levels IV, III, and II, respectively. As this commenter did not provide additional rationale in support of or against this alternative, DHS will not further consider this alternative.

#### D. Other Issues Relating to Rule

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

*Comments:* A few commenters and a professional association stated that the public has not been given sufficient time to comment on the proposed rule. One commenter said that there is no substantiated reason to limit the comment period and that doing so degrades the rulemaking process. An individual commenter stated that implementing these changes for the FY 2022 H-1B cap filing season would cause even more uncertainty for international students who already have faced enough uncertainty over the past year due to COVID-19, the Student and Exchange Visitor Program proposed rule,<sup>140</sup> and USCIS processing times.

An individual commenter and a university requested that the comment period be extended to 60 days because of the proposed rule's magnitude and the impacts of COVID-19 on employers' resources. A professional association requested the same extension to allow for meaningful public comment, citing the language of E.O. 12866 and E.O. 13563, explaining that those executive orders recommend a comment period of no less than 60 days. The association listed six issues for which the proposed rule requests feedback and asserted that a 30-day comment period does not allow adequate time to address these issues. The association also said that, since this rule was published during the Thanksgiving season, the comment period was effectively shortened even further, undercutting the purpose of the notice and comment process. An individual commenter questioned why DHS was "rushing" the proposed rule during the holiday season as opposed to providing more time for public comment.

*Response:* While DHS acknowledges that E.O. 12866 and 13563 indicate that agencies generally should provide 60 days for public comment, DHS believes

that the 30-day comment period was sufficient and declines to extend the comment period. This 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, employers, and organizations. 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. Rulemaking Process

###### a. Multiple H-1B Rulemakings

*Comments:* An anonymous commenter stated that the proposed rule does not discuss the DOL IFR,<sup>141</sup> or explain whether DHS and DOL consulted with each other in drafting the rules. The commenter added that Congress has given DOL the primary authority in protecting U.S. labor, and the proposed rule does not address how it would interact with the DOL rule, or why the proposed rule was necessary given the DOL IFR.

An advocacy group stated that the proposed rule should not be implemented while the DOL IFR and the DHS IFR, *Strengthening the H-1B Nonimmigrant Visa Classification Program (H-1B Strengthening IFR)*,<sup>142</sup> were pending and being challenged in court. The commenter said it would be impossible to comment on the proposed rule without considering the impacts of the other two rules that will affect the H-1B process as well. Similarly, a research organization wrote that recently proposed rules by Federal agencies with respect to wages for foreign workers in work visa programs have been inconsistent and confusing. An anonymous commenter stated that their workplace has been overworked for months responding to the multiple regulatory changes to the H-1B program.

*Response:* On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al. v. DHS, et al.*, No. 20-cv-7331, setting aside the DOL IFR and the DHS IFR. Similarly, on December 3, 2020, the U.S. District

<sup>140</sup> DHS, U.S. Immigration and Customs Enforcement, *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media*, 85 FR 60526 (Sept. 25, 2020).

<sup>141</sup> 85 FR 63872.

<sup>142</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 FR 63918 (Oct. 8, 2020).

Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al. v. Scalia, et al.*, No. 20-cv-14604, applying to the plaintiffs in that case. DOL has taken necessary steps to comply with the courts' orders and is no longer implementing the DOL IFR. DHS also took necessary steps to comply with the order in *Chamber of Commerce, et al. v. DHS, et al.*, and is not implementing the DHS IFR. DHS, therefore, disagrees with the commenter's assertions that DHS must consider the DOL and DHS IFRs in the context of this final rule as both IFRs were set aside and are no longer being implemented.

#### b. Other Rulemaking Process Comments

*Comments:* A joint submission from multiple organizations opposed the proposed rule and said that they were willing to participate in an informal dialogue with DHS or formally participate in an Advance Notice of Proposed Rulemaking process to help DHS determine whether a rule is needed, what regulation to develop, and viable alternative suggestions. A trade association also opposed the rule and advised USCIS to pursue a formal rulemaking effort that provides stakeholders with more input before the formal rulemaking process begins.

*Response:* DHS believes that the public has had sufficient opportunity to review and comment on this rule, as demonstrated by the number of high-quality comments received from the public, including individuals, attorneys, employers, and organizations. 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 public has had sufficient opportunity to participate in the rulemaking process.

*Comment:* A professional association commented that the public had no advance notice that the proposed rule was forthcoming because it was never listed on the Unified Agenda. The association also said USCIS had previously concluded that the policy now being proposed was not a permissible agency action, and therefore stakeholders were not prepared to conduct the sophisticated analysis necessary to assess the policy now being proposed in this rule.

*Response:* DHS believes that the public has had sufficient opportunity to review and comment on this rule, as demonstrated by the number of high-quality comments received from the public, including individuals, attorneys, employers, and organizations. Further, DHS explained in the NPRM that this

rule is consistent with and permissible under DHS's general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112, and DHS believes that the comment period provided sufficient time to assess the rule.

*Comment:* A research organization wrote that the administration waited until the 2020 election to take substantive action on the H-1B program, and while DOL and USCIS have legal authority to make the regulatory changes, the timing and regulatory process have made them susceptible to legal challenges. An individual commenter said that the administration will change in a few weeks and suggested that the proposed rule is being rushed into implementation before that happens. An individual commenter said USCIS should wait to promulgate the rule until the new presidential administration takes over and the Senate confirms a new head of both USCIS and DHS.

*Response:* DHS agrees that it has the legal authority to amend its regulations governing the selection of registrations submitted by prospective petitioners seeking to file H-1B cap-subject petitions (or the selection of petitions, if the registration process is suspended). DHS believes that the public has had sufficient opportunity to review and comment on this rule, as demonstrated by the number of high-quality comments received from the public, including individuals, attorneys, employers, and organizations. DHS believes that the public has had sufficient opportunity to participate in the rulemaking process.

#### 3. Effective Date and Implementation

*Comments:* A few individual commenters supported the proposed rule's immediate implementation to protect U.S. jobs. Another individual commenter contradicted claims that it is too late in the year for employers to accommodate changes in the registration system, saying that many companies wait until the new year to reach out to employees anyway, and recent changes to the H-1B process have made it easier to petition.

*Response:* DHS agrees that this rule is being published with sufficient time to implement it for the FY 2022 registration period.

*Comments:* Many commenters, including a form letter campaign, said that, if USCIS were to finalize the proposed rule, it should not implement the proposed rule for the FY 2022 H-1B cap filing season (set to begin in March 2021) because changes so close to the

beginning of that season would adversely impact U.S. employers, immigration lawyers, and individuals. Multiple commenters said companies have already made hiring decisions based on the existing registration system, so delaying implementation until the FY 2023 cap filing season (set to begin in March 2022) would give the regulated community time to adjust. A company commented that implementing the rule for the upcoming H-1B cap filing season would create uncertainty and confusion. A few commenters added that stakeholders have had to adapt to the new online registration system, which has ongoing issues, so it is unlikely that further modifications to the registration system will be implemented to run smoothly for the upcoming H-1B season. An individual commenter opposed implementing the proposed rule at this time because the U.S. economy needs time and stability to recover.

*Response:* DHS believes that this rule is being published with sufficient time to allow employers to plan appropriately prior to the start of the registration period for FY 2022. DHS does not believe that petitioners will face significant adverse impacts with the implementation of this change in the selection process and believes that employers have sufficient time to make any decisions they believe are needed as a result of this rule, such as increasing proffered wages to increase the odds of selection. Further, DHS believes that there is sufficient time to allow for testing and modification and that delaying implementation at this time is not necessary.

#### E. Statutory and Regulatory Requirements

##### 1. Impacts and Benefits (E.O. 12866, 13563, and 13771)

##### a. Methodology and Adequacy of the Cost-Benefit Analysis

*Comments:* Multiple commenters provided input on the wage data DHS used to analyze the impact of the proposed rule. A couple of commenters referenced that the economic analysis conducted in the proposed rule was based on previous OES wage levels, rather than the new ones implemented as a result of the DOL IFR. One of these commenters stated that, with the huge changes in the wage levels resulting from the DOL IFR, the H-1B data would be much more skewed, and the economic impact analysis in the proposed rule was completely invalid. Another commenter explained that all of the analysis done in the proposed rule was based on previous OES wage

levels and there has not been any economic impact analysis based on the new wage rules. One commenter expressed that this rule must be read in concert with the DOL IFR, which reset how prevailing wage levels were calculated for H-1Bs. To get selected in the H-1B registration process under the proposed rule, the employer would have to pay a level III or IV prevailing wage, but those wages would be so artificially high that employers would not be able to pay them. The commenter concluded that DHS should push the proposed rule back at least one year to allow time for next year's H-1B data to become available. Another commenter said 96 percent of total applicants still would fall into the new OES wage "level 1 below" and would be eligible for random selection, so the proposed rule would not have an impact. A commenter echoed concerns about the use of previous OES wage levels, writing that DHS's analysis in the proposed rule was invalid.

*Response:* The NPRM analysis was written using the appropriate baseline and the best information that was available to DHS at that time, which was prior to the publication of the DOL IFR.<sup>143</sup> On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al. v. DHS, et al.*, No. 20-cv-7331, setting aside the DOL IFR. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al. v. Scalia, et al.*, No. 20-cv-14604, applying to the plaintiffs in that case. DOL has taken necessary steps to comply with the courts' orders and no longer is implementing the DOL IFR. DHS, therefore, disagrees with the commenter's assertion that DHS must analyze the DOL IFR in the context of this final rule. This final rule does not require employers pay a higher wage, instead it prioritizes selection of registrations or petitions, as applicable, generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code and area(s) of intended employment. The selection of H-1B registrations or petitions, as applicable, will be based on the existing OES wage levels at the time of submission, and the economic analysis in the proposed rule properly accounted for OES prevailing wage levels that were in effect at the time the analysis was conducted and remain in effect at this time.

*Comments:* An anonymous commenter stated that Table 13 of the

NPRM is inconsistent with the proposed rule's language. The commenter questioned why there would be level III and IV registrations selected in the advanced degree exemption if level III and IV registrations would be "100% selected" in the regular cap, and the proposed rule would not affect the order of selection between the regular cap and advanced degree exemption.

*Response:* This final rule will not affect the order of selection between the regular cap and advanced degree exemption or the number of registrations that will be selected for each allocation. USCIS first selects registrations toward the number projected as needed to reach the regular cap, from among all registrations properly submitted, including those indicating that the beneficiary will be eligible for the advanced degree exemption. USCIS then selects registrations indicating eligibility for the advanced degree exemption using the same process. With the revised selection method based on corresponding OES wage level and ranking shown in Table 13, the approximated average indicates that all registrations with a proffered wage that corresponds to OES wage level IV or level III would be selected and 58,999, or 75 percent, of the registrations with a proffered wage that corresponds to OES wage level II would be selected toward the regular cap projections. None of the registrations with a proffered wage that corresponds to OES wage level I or below would be selected toward the regular cap projections. For the advanced degree exemption, DHS estimates all registrations with a proffered wage that corresponds to OES wage levels IV and III would be selected and 12,744, or 20 percent, of the registrations with a proffered wage that corresponds to OES wage level II would be selected. DHS estimates that none of the registrations with a proffered wage that corresponds to OES wage level I or below would be selected.

*Comments:* A couple of commenters wrote that DHS took wage levels specified as "N/A" and consolidated them with level I wages in its Table 7 calculations even though there is no evidentiary basis for assuming that characterization or correlation to be accurate or appropriate. Wages negotiated under a collective bargaining agreement often exceed market rates, and private wage surveys frequently have more than 4 wage levels, which makes direct analogy to OES impractical, if not impossible. Since there was no way to determine the true ranking of the N/A petitions, they should have been excluded from the

allocation rather than arbitrarily added to the level I share. Consolidating them had the prejudicial effect of attributing 31.5 percent of regular cap and 37 percent of advanced degree cap to level I, when, in fact, those numbers would have been 22.8 percent and 27.5 percent, respectively, had level I counts not included the petitions whose wage level was N/A. An individual commenter similarly wrote that DHS's analysis incorrectly claims that a number of petitions are categorized as having a wage level of N/A due to modifications to DOL's SOC structure in 2018. The commenter stated that all FY 2019 and FY 2020 petitions were filed using the 2010 SOC structure and thus the 2018 SOC structure would not impact those petitions. The commenter said that the N/A designations are likely because Question 13 on Form 9035 only requires a designation of OES wage levels when relying on a prevailing wage and is left blank when petitions rely on a permissible alternative. This commenter also stated that, according to DHS's analysis in Table 6, the OES Wage Level was unavailable about 12 percent of the time for cap-subject H-1B petitions selected for adjudication in FYs 2019 and 2020. DHS labels these petitions as ones where the OES Wage Level is "N/A" and then, curiously, includes all such "N/A" OES Wage Level petitions as level I petitions for purposes of its analysis when they are not particularly likely to be all or mostly level I jobs.

*Response:* DHS understands and agrees with the commenter that N/A designations are likely when registrants rely on a permissible alternative private wage source that is not based on the OES survey. For these registrants choosing to rely on a prevailing wage that is not based on the OES survey, if the proffered wage is less than the corresponding level I OES wage, the registrant would select the "Wage Level I and below" box on the registration form. DHS deliberately chose to group these registrations together with level I registrations so that petitioners relying on non-OES sources would have a fairer chance of selection than if they were ranked below level I registrations, and to avoid penalizing prospective petitioners who properly rely on a private wage survey to determine the required wage for the proffered position.

As explained in response to other comments, DHS does not agree with the suggestions to separate OES prevailing wage level I from those falling below level I. DHS expects that all petitioners offering a wage lower than the OES wage level I wage will be using a legitimate source other than OES or an

<sup>143</sup> See DOL IFR, 85 FR 63872.

independent authoritative source, including a private wage survey. Therefore, such a change effectively could preclude petitioners that utilize one of those other sources from being selected for registration. By grouping OES wage level I and below OES wage level I together, those petitioners have a fairer chance of selection. DHS was unable to estimate how many registrations, initially classified as N/A, would end up in each wage level classification as a result of this rule. Due to data limitations and missing data, DHS may have included some N/A wage information into OES wage level I and below that could be classified as a wage higher than level I in the future. If DHS did not incorporate the petitions that fell into the N/A category, then the overall total of petitions would have been understated. DHS analysis used estimates in the Unquantified Costs & Benefits section to show a possible outcome and distribution of registrations once this rule is implemented.

*Comments:* A trade association wrote that DHS conducted insufficient data collection to assess the impact of the proposed rule, given that it has OES skill wage level data for only 56 percent of registered H-1B petitions selected in the lottery. The commenter wrote that DHS should review data on all H-1B adjudications to better assess the relative distribution of H-1B petitions by OES level, or conduct a survey of H-1B employers to better quantify the impact of the proposed rule by OES level.

*Response:* USCIS analyzed the impacts of this rule in an objective manner using the best available data at the time the analysis was written. DHS has OES wage level data only on the 56 percent of petitions that were selected toward the numerical allocations from FY 2019 and FY 2020. DHS does not have the wage level break down for the 44 percent of petitions that were not selected since those petitions were returned to petitioners without entering data into DHS databases. The wage level break downs for the 56 percent that were selected for adjudication had a similar distribution for both FY 2019 and FY 2020. DHS used this distribution as an estimate of what the future registrations split out by wage levels may look like for the missing 44 percent of petitions.

*Comments:* An individual commenter said the proposed rule does not analyze the indirect impact the rule will have on the wages of employees, only those directly impacted by the rule. The commenter also wrote that the proposed rule does not consider its impact on

employers whose higher marginal costs cause them to forego expansion or close down. An individual commenter said that DHS does not provide evidence to support its statement that the proposed rule will have no effect on wages or growth, writing that it is unlikely that the rule will not depress wages and growth.

*Response:* DHS acknowledges that some petitioners might be impacted in terms of employment, productivity loss, search and hire costs, and profits resulting from labor turnover. The current random lottery system does not guarantee registrants that they will be able to petition for H-1B workers, and it could have the same effects and cause companies to search for alternative options. In cases where companies cannot find reasonable substitutes for the labor the H-1B beneficiaries would have provided, if selected under the random lottery process, affected petitioners also could lose profits from the lost productivity. In such cases, employers would incur opportunity costs by having to choose the next best alternative to immediately fill the job the prospective H-1B worker would have filled. The commenter provided neither an explanation nor a basis to support the claim that wages would be depressed. DHS acknowledges that some employers' growth (profit) could be affected; however, asserting that economic growth would be harmed fails to account for the fact that this rule will not reduce or otherwise affect the statutorily authorized number of initial H-1B visas granted per year. USCIS analyzed the impacts of this rule in an objective manner using the best available data at the time the analysis was written and does not have quantifiable data on the effect on wages or growth.

*Comment:* A law firm stated that the DHS does not sufficiently quantify the impact of costs to petitioners, including training, labor for substitute workers, loss of productivity, and loss of revenue. The commenter wrote that, to meet the requirements of E.O. 12866, DHS should explain its justification for proposing changes recognized to have a negative impact on productivity and revenue of petitioners. The commenter also asked DHS to explain how the proposed rule was tailored to ensure it imposed the least possible burden on society as required under E.O. 12866.

*Response:* Executive Orders 12866 and 13563 direct agencies to assess the costs, benefits, and transfers of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic,

environmental, public health and safety effects, distributive impacts, and equity). DHS analyzed all potential costs, benefits, and transfers of this rule. While DHS understands there are costs to some populations, there also are benefits to other populations.

*Comment:* An advocacy group wrote that DHS states that an increase in H-1B recipients with higher salaries will compensate for any loss in international students and early career professionals under the proposed rule. However, the commenter states that DHS does not provide any analysis to this effect and should provide a more precise estimate of the costs associated with changes, particularly whether the rule would have an impact on the ability of employers to attract talented employees.

*Response:* DHS does not believe that this rule will negatively impact the ability of employers to attract talented employees. Rather, DHS believes that this rule will allow employers to attract the best and the brightest employees.

*Comment:* A law firm said the costs of the proposal are inconsistent with the aggregate cost savings the agency expected unselected petitions and the government to realize from registration. OMB designated the proposed rule as an "economically significant" regulatory action. In the NPRM, DHS estimated that, for a ten-year implementation period, the costs to the public would be more than \$15.9 million annualized at 3-percent, and more than \$16 million annualized at 7-percent. DHS also acknowledged the possibility that the proposed regulation "could result in private sector expenditures exceeding \$100 million, adjusted for inflation to \$168 million in 2019 dollars, in any 1 year." The costs likely are higher, as the agency has grossly underestimated the time-burden of this proposed regulation, such as suggesting that it will take a mere 20 minutes more to prepare the registration.

*Response:* DHS acknowledges that this final rule has been designated an economically significant regulatory action by the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget. However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A). DHS disagrees that it will take more than 20 minutes to complete the additional information collection associated with the registration tool. Registrants or petitioners, as applicable, only will be required to provide, in addition to the information already to be collected, the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended

employment. In the limited instance where there is no current OES prevailing wage information for the proffered position, the registrant will follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration, and USCIS will rank and select based on the highest OES wage level.

#### b. Costs

*Comments:* An individual commenter stated that, under the proposed rule, USCIS would incur additional costs related to maintaining records detailing how USCIS processed each H-1B petition to document the correct handling and prioritization of all petitions. The commenter also wrote that USCIS's cost for processing petitions will increase significantly, as it will have to review each petition for salary, location, and job code to determine sorting order. Another commenter wrote that the proposed rule indicates that DHS would not incur additional costs to the government because the agency could increase filing fees to cover costs, but that, itself, indicates the proposed rule would result in costs to DHS that should have been fully analyzed.

*Response:* The INA provides for the collection of fees through USCIS's biannual fee schedule review, at a level that will ensure recovery of the full costs of providing adjudication and naturalization services by DHS. This includes administrative costs and services provided without charge to certain applicants and petitioners.<sup>144</sup> DHS notes the time necessary for USCIS to review the information submitted with the forms relevant to this final rule includes the time to adjudicate the benefit request. These costs are captured in the fees collected for the benefit request from petitioners. DHS accounts for familiarization cost and additional costs due to the increased burden per response for the petitioners, which is shown as costs in the Regulatory Impact Analysis. Other form applications and petition fees will cover the increased adjudication costs until the fee rule is reassessed.

*Comment:* One commenter wrote that the proposed rule likely would require technical changes to USCIS's registration system that the agency has already implemented for the FY 2021 H-1B cap season. The commenter added that it is noteworthy that the proposed rule follows a recent announcement that USCIS must furlough 70 percent of its workforce. Another commenter said

that, if this rule is put in place, companies will stop hiring foreign workers and USCIS will lose the revenue from this program as it is already in a fiscal crisis.

*Response:* The President of the United States signed into law the Continuing Appropriations Act, 2021 and Other Extensions Act, H.R. 8337,<sup>145</sup> which became Public Law 116-159, on October 1, 2020. This public law includes language from the Emergency Stopgap USCIS Stabilization Act, which allows USCIS to establish and collect additional premium processing fees, and to use those additional funds for expanded purposes. Because of the authorization to increase premium processing fees, and cost-savings measures taken by the agency, USCIS is in a better place financially. As a result, USCIS was able to avoid all potential furloughs, and, barring unforeseen changes in circumstances, any potential furloughs in FY 2021.<sup>146</sup>

#### c. Benefits

*Comment:* An individual commenter wrote that the proposed rule has been criticized for favoring larger firms over smaller businesses and startups, but it is unlikely that these types of businesses would immediately need the types of high salaried workers who would qualify for an H-1B visa. Instead, the commenter said there should be sufficient domestic talent under this rule to meet those labor needs. An individual commenter wrote that the proposed rule would have the benefit of curbing the practice of employers underpaying H-1B petitioners by offering level I wages to those with sufficient experience for higher wages. As a result, employers will not be able to favor cheaper international labor and would consider domestic labor.

*Response:* DHS agrees with this commenter that there should be sufficient replacement labor available in the U.S. workforce that can meet domestic labor needs. This rule will help the U.S. workforce, as employers that might have petitioned for cap-subject H-1B workers to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions.

<sup>145</sup> Continuing Appropriations Act, 2021 and Other Extensions Act, Public Law 116-159, 134 Stat. 709 (Oct 1, 2020).

<sup>146</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *USCIS Averts Furlough of Nearly 70% of Workforce* (Aug. 25, 2020), <https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce>.

*Comment:* Referencing DHS's suggestion that one of the proposed rule's unquantified benefits is increased opportunities for lower-skilled U.S. workers in the labor market, an individual commenter stated that low-skilled workers cannot replace H-1B specialty occupation workers.

*Response:* DHS disagrees. If an employer is hiring an entry-level employee at a level I prevailing wage, then an available and qualified U.S. worker can be a substitute.

#### 2. Paperwork Reduction Act

*Comments:* A commenter stated that requiring an employer to provide a wage level at the time of electronic registration for the H-1B cap seems to violate the Paperwork Reduction Act (PRA), which generally only permits the collection of information needed to meet a legally supported objective. The commenter indicated DHS has not adequately explained how collecting the OES prevailing wage level at the time of electronic registration is consistent with the PRA, as employers are not required to obtain an LCA at the time of the electronic registration for the H-1B cap.

*Response:* DHS disagrees that requiring the registrant to provide the wage level that the proffered wage corresponds to for the relevant SOC and area of employment, or that corresponds to the position requirements when OES wage data is unavailable, at the time of electronic registration for the H-1B cap would violate the PRA. Once this rule becomes effective, collection of such information would be needed to implement the rule and to select registrations in accordance with this rule, and thus would be a legally supported objective. As noted in the NPRM, an LCA is not a requirement for registration. However, consistent with the registrant's attestation that the registration is submitted for a valid offer of employment, DHS expects each registrant (*i.e.*, the prospective petitioner or the attorney or accredited representative submitting the registration for the prospective petitioner) to know and be able to provide the relevant corresponding wage level when submitting a registration, regardless of whether they have a certified LCA at that time.

#### F. Out of Scope

An individual commenter called for relief for those who need housing and food, "instead of bringing in foreigners." Another individual commenter said that the increase in H-1B visas and outsourcing to foreign contractors caused their spouse's wages to stagnate despite increased responsibility, and

<sup>144</sup> See INA section 286(m), 8 U.S.C. 1356(m).

fewer U.S. born entry-level employees were hired. Yet another individual commenter wrote that the agency should make it easier to report visa fraud, and that stricter, more comprehensive punishments should be in place for visa fraud. A few anonymous commenters said that the H-1B visa is a “scam.” A trade association wrote in opposition to two other rules related to the H-1B visa published by DOL and DHS, the latter of which revised the definition of “specialty occupations” eligible for H-1B visas, limited visas to one year for third party worksites, and expanded DHS worksite oversight.<sup>147</sup> Another trade association also wrote in opposition to the DOL and DHS IFRs, objecting specifically to the DHS IFR’s revisions to the definitions of “specialty occupations” and “U.S. employer,” the requirements for corroborating evidence for specialty occupations, and the amended validity period for third-party placement at worksites.<sup>148</sup> The commenter provided background information and a summary of the DHS IFR. One commenter said the lottery system is unfair, and USCIS should instead focus on limiting fraud and abuse of the lottery system. Yet another trade association opposed the proposed rule and suggested that the Agency implement reforms as discussed in the National Association of Manufacturer’s “A Way Forward” plan, including statutory changes to the H-1B program, border security measures, asylum, and other immigration programs. A union argued that due to the “timing and rushed nature” of the DOL IFR and this proposed rule, any changes are vulnerable to procedural challenge and are likely politically motivated. The commenter went on to provide extensive feedback on the DOL and DHS IFRs and the H-1B program at large, calling for immigration reform and urging the Departments of Labor and Homeland Security to make structural changes to the H-1B program that protect workers’ rights. A research organization wrote about the H-1B

program in general, saying that allowing outsourcing companies to hire H-1B workers lets employers use the immigration system to “degrade labor standards for skilled workers” and exploit H-1B employees. Additionally, the commenter argued that outsourcing companies are using the H-1B program to underpay H-1B workers, replace U.S. workers, and send tech jobs abroad. A submission on behalf of U.S. citizen medical graduates urged expanding the H-1B and J-1 visa ban to include the healthcare sector, prioritizing U.S. citizens for placement in residency programs, or that the Accreditation Council for Graduate Medical Education (ACGME) consider opening up more residency spots and new residency programs. A professional association recommended that USCIS modify its regulation at 8 CFR 214.2(h)(8)(iii)(A)(4) (“*Limitation on requested start date*”) permitting a requested start date on or after the first day for the applicable fiscal year.

*Response:* DHS appreciates these comments; however, DHS did not propose to address these issues in the proposed rule, so these comments fall outside of the scope of this rulemaking. DHS is finalizing this rule as proposed.

## V. Statutory and Regulatory Requirements

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

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs, benefits, and transfers of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Pursuant to Executive Order 12866 (Regulatory Planning and Review), the

Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget, has determined that this final rule is an economically significant regulatory action. However, OIRA has waived review of this regulation under section 6(a)(3)(A) of Executive Order 12866.

### 1. Summary of Economic Effects

DHS is amending its regulations governing the selection of registrants eligible to file H-1B cap-subject petitions, which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to allow for ranking and selection based on OES wage levels corresponding to their SOC codes. USCIS will rank and select the registrations properly submitted (or petitions in any year in which the registration process is suspended) generally on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment. USCIS will begin with OES wage level IV and proceed in descending order with OES wage levels III, II, and I. DHS is amending the relevant sections of DHS regulations to reflect these changes.

The described change in selection is expected to result in a different allocation of H-1B visas (or grants of initial H-1B status) favoring petitioners that proffer relatively higher wages. In the analysis that follows, DHS presents its best estimate for how H-1B petitioners will be affected by and will respond to the increased probability of selection of registrations of petitions proffering the highest wages for a given occupation and area of employment. DHS estimates the net costs that will result from this final rule compared to the baseline of the H-1B visa program. For the 10-year implementation period of the rule, DHS estimates the annualized costs to the public would be \$15,968,792 annualized at 3-percent, \$16,089,770 annualized at 7-percent.

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

<sup>147</sup> DOL IFR, 85 FR 63872; H-1B Strengthening IFR, 85 FR 63918.

<sup>148</sup> H-1B Strengthening IFR, 85 FR 63918.

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

Provision	Description of changes to provision	Estimated costs of provisions	Estimated benefits of provisions
<p>Currently, USCIS randomly selects H-1B registrations or cap-subject petitions, as applicable. USCIS will change the selection process to prioritize selection of registrations or cap-subject petitions, as applicable, based on corresponding OES wage level.</p> <p>DHS regulations currently address H-1B cap allocation in various contexts:</p> <ol style="list-style-type: none"> <li>1. Fewer registrations than needed to meet the H-1B regular cap.</li> <li>2. Sufficient registrations to meet the H-1B regular cap during the initial registration period.</li> <li>3. Fewer registrations than needed to meet the H-1B advanced degree exemption numerical limitation.</li> <li>4. Sufficient registrations to meet the H-1B advanced degree exemption numerical limitation during the initial registration period.</li> <li>5. Increase to the number of registrations projected to meet the H-1B regular cap or advanced degree exemption allocations in a FY.</li> <li>6. H-1B cap-subject petition filing following registration—(1) Filing procedures.</li> <li>7. Petition-based cap-subject selections in event of suspended registration process.</li> <li>8. Denial of petition.</li> <li>9. Revocation of approval of petition.</li> </ol>	<p>USCIS will rank and select H-1B registrations (or H-1B petitions if the registration requirement is suspended) generally based on the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and area(s) of intended employment. This final rule will add instructions and a question to the registration form to select the appropriate wage level. This final rule also will add instructions and questions to the H-1B petition seeking the same wage level information and other information concerning the proffered position to assess the prevailing wage level. This final rule will not affect the order of selection as between the regular cap and the advanced degree exemption.</p> <p>If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations needed to reach the numerical limitation.</p> <p>USCIS is authorized to deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary for a lower wage level if USCIS determines that the new or amended petition was filed to reduce the wage level listed on the original petition to unfairly increase the odds of selection during the registration selection process.</p> <p>In any year in which USCIS suspends the H-1B electronic registration process for cap-subject petitions, USCIS will, instead, allow for the submission of H-1B cap-subject petitions. After USCIS receives a sufficient number of petitions to meet the H-1B regular cap and were to complete the selection process of petitions for the H-1B regular cap following the same method of ranking and selection based on corresponding OES wage level, USCIS will determine whether there is a sufficient number of remaining petitions to meet the H-1B advanced degree exemption numerical limitation.</p>	<p><i>Quantitative:</i> Petitioners—</p> <ul style="list-style-type: none"> <li>• \$3,457,401 costs annually for petitioners completing and filing Form I-129 petitions with an additional time burden of 15 minutes.</li> <li>• \$11,795,997 costs annually for prospective petitioners submitting electronic registrations with an additional time burden of 20 minutes.</li> </ul> <p>DHS/USCIS—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul> <p><i>Qualitative:</i> Petitioners—</p> <ul style="list-style-type: none"> <li>• Petitioners may incur costs to seek out and train other workers, or to induce workers with similar qualifications to consider changing industry or occupation.</li> <li>• Petitioners that would have hired relatively low-paid H-1B workers, but were unable to do so because of non-selection (and ineligibility to file petitions), may incur reduced labor productivity and revenue.</li> <li>• Petitioners may incur costs from offering beneficiaries higher wages for the same work to achieve greater chances of selection.</li> </ul> <p>DHS/USCIS—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul>	<p><i>Quantitative:</i> Petitioners—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul> <p>DHS/USCIS—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul> <p><i>Qualitative:</i> U.S. Workers—</p> <ul style="list-style-type: none"> <li>• A possible increase in employment opportunities for similarly skilled unemployed or underemployed U.S. workers seeking employment in positions otherwise offered to H-1B cap-subject beneficiaries at wage levels corresponding to lower wage positions.</li> </ul> <p>H-1B Workers—</p> <ul style="list-style-type: none"> <li>• A possible increase in productivity, measured in increased H-1B wages, resulting from the reallocation of a fixed number of visas from positions classified as lower-level work to employers able to pay the highest wages for the most highly skilled workers.</li> <li>• A possible increase in wages for positions offered to H-1B cap-subject beneficiaries for the same work to improve the prospective petitioner's chance of selection.</li> </ul> <p>Petitioners—</p> <ul style="list-style-type: none"> <li>• Level I and level II beneficiaries may see increased wages. Companies who have historically paid level I wages may be incentivized to offer their H-1B employees higher wages, so that they could have a greater chance of selection at a level II or higher.</li> <li>• Employers who offer H-1B workers wages that corresponds with level III or level IV OES wages may have higher chances of selection.</li> </ul> <p>DHS/USCIS—</p> <ul style="list-style-type: none"> <li>• Submitting additional wage level information on both an electronic registration and on Form I-129 will allow USCIS to maintain the integrity of the H-1B cap selection and adjudication processes.</li> <li>• Registrations or petitions, as applicable, will be more likely to be selected under the numerical allocations for the highest paid, and presumably highest skilled or highest-valued, beneficiaries.</li> </ul>
Familiarization Cost .....	Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule to fully comply with the new regulation(s).	<p><i>Quantitative:</i> Petitioners—</p> <ul style="list-style-type: none"> <li>• One-time cost of \$6,285,527 in FY 2022.</li> </ul> <p>DHS/USCIS—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul> <p><i>Qualitative:</i> Petitioners—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul> <p>DHS/USCIS—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul>	<p><i>Quantitative:</i> Petitioners—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul> <p>DHS/USCIS—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul> <p><i>Qualitative:</i> Petitioners—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul> <p>DHS/USCIS—</p> <ul style="list-style-type: none"> <li>• None.</li> </ul>

In addition to the impacts summarized here, Table 2 presents the

accounting statement as required by OMB Circular A-4.<sup>149</sup>

TABLE 2—OMB A-4 ACCOUNTING STATEMENT  
[\$, 2019 for FY 2022–FY 2032]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
Benefits:				
Annualized Monetized Benefits over 10 years (discount rate in parenthesis).	N/A N/A	N/A N/A	N/A N/A	

<sup>149</sup> White House, Office of Management and Budget, *Circular A-4* (Sept. 17, 2003), available at

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

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



TABLE 2—OMB A-4 ACCOUNTING STATEMENT—Continued  
[\$, 2019 for FY 2022–FY 2032]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
Annualized quantified, but un-monetized, benefits	0	0	0	
Unquantified Benefits .....	This final rule will benefit petitioners agreeing to pay H-1B workers a proffered wage corresponding to OES wage level III or IV, by increasing their chance of selection in the H-1B cap selection process. These changes align with the Administration's goals of improving policies such that the H-1B classification more likely will be awarded to the highest paid or highest skilled beneficiaries. These changes will also better align the administration of the H-1B program with the dominant Congressional intent. This final rule may provide increased opportunities for similarly skilled U.S. workers in the labor market to compete for work as there will be fewer H-1B workers paid at the lower wage levels to compete with U.S. workers. <sup>150</sup> Further, assuming demand outpaces the 85,000 visas currently available for annual allocation, DHS believes that the potential reallocation of visas to favor those petitioners able to offer the highest wages to recruit the most highly skilled workers will result in increased marginal productivity of all H-1B workers. This final rule may provide increased wages for positions offered to H-1B cap-subject beneficiaries.			RIA.
Costs:				
Annualized monetized costs over 10 years (discount rate in parenthesis).	(3 percent) \$15,968,792 (7 percent) \$16,089,770	N/A N/A	N/A N/A	RIA.
Annualized quantified, but un-monetized, costs .....	N/A			
Qualitative (unquantified) costs .....	This final rule is expected to reduce the number of petitions for lower wage H-1B workers. This may result in increased recruitment or training costs for petitioners that seek new pools of talent. Additionally, petitioners' labor costs or training costs for substitute workers may increase. DHS also acknowledges that some petitioners might be impacted in terms of the employment, productivity loss, search and hire cost per employer of \$4,398, and profits resulting from labor turnover. In cases where companies cannot find reasonable substitutions for the labor the H-1B beneficiary would have provided, affected petitioners will also lose profits from the lost productivity. In such cases, employers will incur opportunity costs by having to choose the next best alternative to immediately filling the job the prospective H-1B worker would have filled. There may be additional opportunity costs to employers such as search costs and training. Such possible disruptions to companies will depend on the interaction of a number of complex variables that are constantly in flux, including national, state, and local labor market conditions, economic and business factors, the type of occupations and skills involved, and the substitutability between H-1B workers and U.S. workers. Petitioners that would have hired relatively lower-paid H-1B workers, but were unable to do so because of non-selection (and ineligibility to file a petition), may incur reduced labor productivity and revenue.			RIA.
Transfers:				
Annualized monetized transfers: "on budget" .....	N/A	N/A	N/A	
From whom to whom? .....				
Annualized monetized transfers: "off-budget" .....	N/A	N/A	N/A	
From whom to whom? .....	N/A	N/A	N/A	
Miscellaneous analyses/category	Effects			Source citation
Effects on state, local, and/or tribal governments .....	N/A			RFA.
Effects on small businesses .....	N/A			RFA.
Effects on wages .....	N/A			None.
Effects on growth .....	N/A			None.

2. Background and Purpose of the Final Rule

The H-1B visa program allows U.S. employers to temporarily hire foreign workers to perform services in a specialty occupation, services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, or

<sup>150</sup> DHS acknowledges, however, that some employers may increase the wages of existing H-1B workers without changing job requirements or requiring higher levels of education, skills, training, and experience. In those cases, there may not be anticipated vacancies at wage levels I and II for U.S. workers to fill.

services of distinguished merit and ability in the field of fashion modeling.<sup>151</sup> A specialty occupation is defined as an occupation that requires the (1) theoretical and practical application of a body of highly specialized knowledge and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum qualification

<sup>151</sup> See INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); Public Law 101-649, section 222(a)(2), 104 Stat. 4978 (Nov. 29, 1990); 8 CFR 214.2(h).

for entry into the occupation in the United States.<sup>152</sup>

The number of aliens who may be issued initial H-1B visas or otherwise provided initial H-1B nonimmigrant status during any FY has been capped at various levels by Congress over time, with the current numerical limit generally being 65,000 per FY.<sup>153</sup> Congress has also provided for various exemptions from the annual numerical allocations, including an exemption for

<sup>152</sup> See INA section 214(i)(1), 8 U.S.C. 1184(i)(1).

<sup>153</sup> See INA section 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A).

20,000 aliens who have earned a master's or higher degree from a U.S. institution of higher education.<sup>154</sup>

Under the current regulation, all petitioners seeking to file an H-1B cap-subject petition must first electronically submit a registration for each beneficiary on whose behalf they seek to file an H-1B cap-subject petition, unless USCIS suspends the registration requirement.<sup>155</sup> USCIS monitors the number of H-1B registrations submitted during the announced registration period of at least 14 days and, at the conclusion of that period, if more registrations are submitted than projected as needed to reach the numerical allocations, randomly selects from among properly submitted registrations the number of registrations projected as needed to reach the H-1B numerical allocations.<sup>156</sup> Under this random H-1B registration selection process, USCIS first selects registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption. USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption. A prospective petitioner whose registration is selected is notified of the selection and instructed that the petitioner is eligible to file an H-1B cap-subject petition for the beneficiary named in the selected registration within a filing period that is at least 90 days in duration and begins no earlier than 6 months ahead of the actual date of need (commonly referred to as the employment start date).<sup>157</sup> When

registration is required, a petitioner seeking to file an H-1B cap-subject petition is not eligible to file the petition unless the petition is based on a valid, selected registration for the beneficiary named in the petition.<sup>158</sup>

Prior to filing an H-1B petition, the employer is required to obtain a certified Labor Condition Application (LCA) from the Department of Labor (DOL).<sup>159</sup> The LCA form collects information about the employer and the occupation for the H-1B worker(s). The LCA requires certain attestations from the employer, including, among others, that the employer will pay the H-1B worker(s) at least the required wage.<sup>160</sup> This final rule amends DHS regulations concerning the selection of electronic registrations submitted by or on behalf of prospective petitioners seeking to file H-1B cap-subject petitions (or the selection of petitions, if the registration process is suspended), which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to allow for ranking and selection based on OES wage levels. When applicable, USCIS will rank and select the registrations received generally on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area(s) of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I and below.<sup>161</sup> For registrants relying on a private wage survey, if the proffered wage is less than the corresponding level I OES wage, the registrant will select the "Wage Level I

and below" box on the registration form.<sup>162</sup> If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the applicable numerical allocation, USCIS will randomly select from all registrations within that wage level a sufficient number of registrations needed to reach the applicable numerical limitation.<sup>163</sup>

3. Historic Population

The historic population consists of petitioners who file on behalf of H-1B cap-subject beneficiaries (in other words, beneficiaries who are subject to the annual numerical limitation, including those eligible for the advanced degree exemption). DHS uses the 5-year average of H-1B cap-subject petitions received for FYs 2016 to 2020 (211,797) as the historic estimate of H-1B cap-subject petitions that were submitted annually.<sup>164</sup> Prior to publication of *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements* (Fee Schedule Final Rule),<sup>165</sup> H-1B petitioners submit Form I-129 with applicable supplements for H-1B petitions. Through the Fee Schedule Final Rule, DHS created a new Form I-129 for H-1B petitioners.<sup>166</sup> Form I-129 does not include separate supplements as relevant data collection fields have been incorporated into Form I-129. DHS assumes that the number of petitioners who previously filled out the Form I-129 and H-1B supplements is the same as the number of petitioners who will complete the new Form I-129H1.

TABLE 3—H-1B CAP-SUBJECT PETITIONS SUBMITTED TO USCIS FOR FY 2016—FY 2020

Fiscal year	Total number of H-1B cap-subject petitions submitted	Total number of H-1B petitions selected	Number of petitions filed with Form G-28
2016 .....	232,973	97,711	72,292
2017 .....	236,444	95,818	68,743
2018 .....	198,460	95,923	78,900

<sup>154</sup> See INA section 214(g)(5) and (7), 8 U.S.C. 1184(g)(5) and (7).

<sup>155</sup> See 8 CFR 214.2(h)(8)(iii)(A).

<sup>156</sup> See 8 CFR 214.2(h)(8)(iii)(A)(5)–(6).

<sup>157</sup> See 8 CFR 214.2(h)(8)(iii)(D)(2).

<sup>158</sup> See 8 CFR 214.2(h)(8)(iii)(A)(1).

<sup>159</sup> See 8 CFR 214.2(h)(4)(i)(B).

<sup>160</sup> See 20 CFR 655.731 through 655.735.

<sup>161</sup> See new 8 CFR 214.2(h)(8)(iii)(A)(1)(i).

<sup>162</sup> See new 8 CFR 214.2(h)(8)(iii)(A)(1)(i).

<sup>163</sup> See new 8 CFR 214.2(h)(8)(iii)(A)(5)–(6).

<sup>164</sup> In FY 2018, 198,460 H-1B petitions were submitted in the first five days that cap-subject petitions could be submitted, a 16 percent decline in H-1B cap-subject petitions from FY 2017. Though the receipt of H-1B cap-subject petitions fell in FY 2018, the petitions received still far

exceeded the numerical limitations, continuing a trend of excess demand since FY 2011. For H-1B filing petitions data prior to FY 2014, see U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Reports and Studies*, <https://www.uscis.gov/tools/reports-studies/reports-and-studies> (last visited Sept. 2, 2020).

<sup>165</sup> DHS estimates the costs and benefits of this final rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, final rule (Fee Schedule Final Rule), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule

Final Rule. See *Immigrant Legal Resource Center v. Wolf*, No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). In addition, on October 8, 2020, DHS was also preliminarily enjoined from implementing and enforcing the Fee Schedule Final Rule by the U.S. District Court for the District of Columbia, including by adopting any form changes associated with the rule. See *Northwest Immigrant Rights Project v. U.S. Citizenship and Immigration Servs.*, 1:19-cv-03283-RDM (D.D.C. Oct. 8, 2020). DHS intends to vigorously defend these lawsuits and is not changing the baseline for this final rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this final rule may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I-129.

<sup>166</sup> See Fee Schedule Final Rule, 85 FR 46788.

TABLE 3—H-1B CAP-SUBJECT PETITIONS SUBMITTED TO USCIS FOR FY 2016—FY 2020—Continued

Fiscal year	Total number of H-1B cap-subject petitions submitted	Total number of H-1B petitions selected	Number of petitions filed with Form G-28
2019 .....	190,098	110,376	93,495
2020 .....	201,011	109,283	92,396
Total .....	1,058,986	509,111	405,826
5-year average .....	211,797	101,822	81,165

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

Table 3 also shows historical Form G-28 filings by attorneys or accredited representatives accompanying selected H-1B cap-subject petitions. DHS notes that these forms are not mutually exclusive. Based on the 5-year average, DHS estimates 79.7 percent<sup>167</sup> of selected petitions will be filed with a Form G-28. Table 3 does not include data for FY 2021 as the registration requirement was first implemented for the FY 2021 H-1B cap selection process, and petition submission was ongoing at the time of this analysis.

The H-1B selection process changed significantly after the publication of the H-1B Registration Final Rule.<sup>168</sup> That rule established a mandatory electronic registration requirement that requires petitioners seeking to file cap-subject H-1B petitions, including those eligible for the advanced degree exemption, to first electronically register with USCIS during a designated registration period. That rule also reversed the order by which USCIS counts H-1B registrations (or petitions, for any year in which the registration requirement is suspended) toward the number projected to meet the H-1B numerical allocations, such that USCIS first selects registrations submitted on behalf of all beneficiaries, including those eligible for the advanced degree exemption. USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption. The registration requirement was first implemented for the FY 2021 H-1B cap. During the initial registration period for the FY 2021 H-1B cap selection process, DHS received 274,237 registrations.

4. Cost-Benefit Analysis

Through these changes, petitioners will incur costs associated with additional time burden in completing the registration process and, if selected

<sup>167</sup> Calculation: 81,165 Forms G-28/101,822 Form I-129 petitions = 79.7 percent

<sup>168</sup> See H-1B Registration Final Rule, 84 FR 888.

for filing, the petition process. In this analysis, DHS estimates the opportunity cost of time for these occupations using average hourly wage rates of \$32.58 for HR specialists and \$69.86 for lawyers.<sup>169</sup> However, average hourly wage rates do not account for worker benefits such as paid leave, insurance, and retirement. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the most recent DOL, BLS report detailing average compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.46.<sup>170</sup> For purposes of this final rule, DHS calculates the average total rate of compensation as \$47.57 per hour for an HR specialist, where the average hourly wage is \$32.58 per hour worked and average benefits are \$14.99 per hour.<sup>171</sup> Additionally, DHS calculates the average total rate of compensation as \$102.00 per hour for an in-house lawyer, where the average hourly wage is \$69.86 per hour worked and average benefits are \$32.14 per hour.<sup>172</sup> Moreover, DHS recognizes that a firm may choose, but is not required, to

<sup>169</sup> See U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2019 National Occupational Employment and Wage Estimates-National, *SOC 13-1071—Human Resources Specialist and SOC 23-1011—Lawyers*, [https://www.bls.gov/oes/2019/may/oes\\_nat.htm](https://www.bls.gov/oes/2019/may/oes_nat.htm) (last visited Sept. 2, 2020).

<sup>170</sup> The benefits-to-wage multiplier is calculated as follows: (\$37.10 Total Employee Compensation per hour) ÷ (\$25.47 Wages and Salaries per hour) = 1.457 = 1.46 (rounded). See U.S. Department of Labor, Bureau of Labor Statistics, Economic News Release, *Employer Cost for Employee Compensation (December 2019)*, Table 1. *Employer Costs for Employee Compensation by ownership* (Dec. 2019), [https://www.bls.gov/news.release/archives/eccec\\_03192020.pdf](https://www.bls.gov/news.release/archives/eccec_03192020.pdf) (last visited Sept. 2, 2020).

<sup>171</sup> Calculation of the weighted mean hourly wage for HR specialists: \$32.58 per hour × 1.46 = \$47.5668 = \$47.57 (rounded) per hour.

<sup>172</sup> Calculation of weighted mean hourly wage for in-house lawyers: \$102.00 average hourly total rate of compensation for in-house lawyer = \$69.86 average hourly wage rate for lawyer (in-house) × 1.46 benefits-to-wage multiplier.

outsource the preparation and submission of registrations and filing of H-1B petitions to outsourced lawyers.<sup>173</sup> Therefore, DHS calculates the average total rate of compensation as \$174.65, which is the average hourly U.S. wage rate for lawyers multiplied by 2.5 to approximate an hourly billing rate for an outsourced lawyer.<sup>174</sup> Table 4 summarizes the compensation rates used in this analysis.

TABLE 4—SUMMARY OF ESTIMATED WAGES FOR FORM I-129 FILERS BY TYPE OF FILER

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

Source: USCIS analysis.

a. Costs and Cost Savings of Regulatory Changes to Petitioners

i. Methodology Based on Historic FYs 2019–2020

This final rule primarily will change the manner in which USCIS selects H-1B registrations (or H-1B petitions for any year in which the registration requirement is suspended), by first

<sup>173</sup> DHS uses the terms “in-house lawyer” and “outsourced lawyer” to differentiate between the types of lawyers that may file Form I-129 on behalf of an employer petitioning for an H-1B beneficiary.

<sup>174</sup> Calculation of weighted mean hourly wage for outside counsel: \$174.65 average hourly total rate of compensation for outsourced lawyer = \$69.86 average hourly wage rate for lawyer (in-house) × 2.5 conversion multiplier. DHS uses a conversion multiplier of 2.5 to estimate the average hourly wage rate for outsourced lawyer based on the hourly wage rate for an in-house lawyer. DHS has used this conversion multiplier in various previous rulemakings. The DHS analysis in *Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 83 FR 24905 (May 31, 2018), used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages.

selecting registrations generally based on the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and area(s) of intended employment. In April 2019, DHS added an electronic registration requirement for petitioners seeking to file H-1B petitions on behalf of cap-subject aliens.<sup>175</sup> Under the current regulation, all petitioners seeking to file an H-1B cap-subject petition must first electronically submit a registration for each beneficiary on whose behalf they seek to file an H-1B cap-subject petition, unless the registration requirement is suspended. If the registration is selected, the petitioner is eligible to file an H-1B cap-subject petition for the beneficiary named in the selected registration during the associated filing period. The registration requirement was suspended for the FY 2020 H-1B cap and first implemented for the FY 2021 H-1B cap. The initial H-1B registration period for the FY 2021 H-1B cap was March 1, 2020, through March 20, 2020. A total of

274,237 registrations were submitted during the initial registration period, of which 123,244<sup>176</sup> registrations were for beneficiaries eligible for the advanced degree exemption and 145,950 were for beneficiaries under the regular cap.<sup>177</sup>

Prior to implementing the registration requirement, USCIS administered the H-1B cap by projecting the number of petitions needed to reach the numerical allocations. H-1B cap-subject petitions were randomly selected when the number of petitions received on the final receipt date exceeded the number projected as needed to reach the numerical allocations. All petitions eligible for the advanced degree exemption had an equal chance of being selected toward the advanced degree exemption, and all remaining petitions had an equal chance of being selected toward the regular cap. In FY 2019, USCIS first selected petitions toward the number of petitions projected as needed to reach the advanced degree exemption. If the petition was not selected under the advanced degree

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

Table 5 shows the number of petitions submitted and selected in FYs 2019 and 2020. It also displays the approximated 2-year averages of the petitions that were submitted and selected for the H-1B regular cap or advanced degree exemption. On average, DHS selected 56 percent<sup>178</sup> of the H-1B cap-subject petitions submitted, with 82,900 toward the regular cap and 26,930 toward the advanced degree exemption.

TABLE 5—H-1B CAP-SUBJECT PETITIONS SUBMITTED TO USCIS, FOR FY 2019–FY 2020

Fiscal year	Total number of H-1B cap-subject petitions submitted	Total petitions selected	Regular cap	Advanced degree exemption
2019 .....	190,098	110,376	82,956	27,420
2020 .....	201,011	109,283	82,843	26,440
Total .....	391,109	219,659	165,799	53,860
2-Year Average .....	195,555	109,830	82,900	26,930

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

DHS does not have data on the OES wage levels for selected petitions prior to FY 2019.<sup>179</sup> While there are some challenges to using OES wage data as a timeseries, DHS uses the wage data to provide some insight.<sup>180</sup> Table 6 shows the petitions that were selected for FYs 2019 and 2020, categorized by OES wage level. The main difference between the FY 2019 and FY 2020 data sets is that there are more petitions classified as not applicable (N/A) in the FY 2019 data compared to the FY 2020

data. Since DOL's Standard Occupational Classification (SOC)<sup>181</sup> structure was modified in 2018, some petitions were categorized as N/A in FY 2019. In 2019, DOL started to use a hybrid OES<sup>182</sup> occupational structure for classifying the petitions for FY 2020.

Another data limitation was that some of the FY 2020 data was incomplete with missing fields, and could not be classified into the specific wage levels; therefore, the petitions were categorized as N/A. DHS expects each registrant that

is classified as N/A will be able to identify the appropriate SOC code for the proffered position because all petitioners are required to identify the appropriate SOC code for the proffered position on the LCA, even when there is no applicable wage level on the LCA. Using the SOC code and the above-mentioned DOL guidance, all registrants will be able to determine the appropriate OES wage level for purposes of completing the registration, regardless of whether they specify an

<sup>175</sup> See H-1B Registration Final Rule, 84 FR 888.

<sup>176</sup> The total number of registrations for the advanced degree exemption and the regular cap do not equal the total 274,237 submitted registrations because the remaining 5,043 submitted registrations were invalid (e.g., as prohibited duplicate registrations).

<sup>177</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division (PRD), Form I-129 H-1B, FY 2021 Data, Claims 3 (Aug. 31, 2020) & USCIS Analysis.

<sup>178</sup> Calculation: 109,830 2-year average of Petitions Randomly Selected in FYs 2019–2020/195,555 2-year average of Total Number of H-1B

Cap-Subject Petitions Filed in FYs 2019–2020 = 56%

<sup>179</sup> USCIS created the tool to link USCIS H-1B data to the DOL data for FY 2019.

<sup>180</sup> U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *Frequently Asked Questions*, [https://www.bls.gov/oes/oes\\_qes.htm](https://www.bls.gov/oes/oes_qes.htm) (last visited Sept. 2, 2020) (Can OES data be used to compare changes in employment or wages over time? Although the OES survey methodology is designed to create detailed cross-sectional employment and wage estimates for the U.S., States, metropolitan and nonmetropolitan areas, across industry and by industry, it is less useful for comparisons of two or more points in time. Challenges in using OES data as a time series

include changes in the occupational, industrial, and geographical classification systems, changes in the way data are collected, changes in the survey reference period, and changes in mean wage estimation methodology, as well as permanent features of the methodology).

<sup>181</sup> U.S. Department of Labor, Bureau of Labor Statistics, Standard Occupational Classification <https://www.bls.gov/soc/2018/home.htm> (last visited Oct. 27, 2020).

<sup>182</sup> U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *Implementing the 2018 SOC in the OES program—May 2019 and May 2020 Hybrid Occupations*, [https://www.bls.gov/oes/soc\\_2018.htm](https://www.bls.gov/oes/soc_2018.htm) (last visited Sept. 2, 2020).

OES wage level or utilize the OES program as the prevailing wage source on an LCA. While there are limitations

to the data used, DHS believes that the estimates are helpful to see the current

wage levels and estimate the future populations in each wage level.

TABLE 6—SELECTED PETITIONS BY WAGE LEVEL FY 2019–FY 2020

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

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

DHS has OES wage level data only on the petitions that were selected toward the numerical allocations and does not have the wage level break down for the 85,725<sup>183</sup> (44 percent) of petitions that were not selected since those petitions were returned to petitioners without

entering data into DHS databases. Due to data limitations, DHS estimated the wage level break down for the 44 percent of petitions that were not selected because wage levels vary significantly between occupations and localities. Table 7 shows the 2-year

approximated average of H–1B cap-subject petitions that were selected, separated by OES wage level, and percentages of accepted petitions by each wage category. The wage category with the most petitions, as estimated, is OES wage level II.

TABLE 7—CURRENT ESTIMATED NUMBER OF SELECTED PETITIONS BY WAGE LEVEL AND CAP TYPE FY 2019–FY 2020

Level	Regular cap		Advanced degree exemption	
	Selected	% of total	Selected	% of total
Level I & N/A .....	26,140	31.50	9,962	36.99
Level II .....	44,530	53.70	14,181	52.66
Level III .....	8,622	10.40	2,164	8.04
Level IV .....	3,608	4.40	623	2.31
Total .....	82,900	100	26,930	100

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

ii. FY 2021 Data<sup>184</sup>

The population affected by this final rule consists of prospective petitioners seeking to file H–1B cap-subject petitions, including those eligible for the advanced degree exemption. DHS regulations require all petitioners seeking to file H–1B cap-subject petitions to first electronically submit a registration for each beneficiary on whose behalf they seek to file an H–1B cap-subject petition, unless USCIS suspends the registration requirement.<sup>185</sup> A prospective petitioner whose registration is selected is eligible to file an H–1B cap-subject petition for the beneficiary named in the selected

registration during the associated filing period.<sup>186</sup> Under the current H–1B registration selection process, USCIS first randomly selects registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption.<sup>187</sup> USCIS then randomly selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption.<sup>188</sup> Prior to the implementation of the H–1B registration requirement for the FY 2021 H–1B cap selection process, petitioners submitted an annual average of 211,797 cap-subject H–1B petitions over FYs 2016 through 2020. The number of

registrations submitted for the FY 2021 H–1B cap selection process, however, was 274,237. Because the number of registrations submitted for the FY 2021 H–1B cap selection process was significantly higher than the number of petitions submitted in prior years, DHS will use the total number of registrations submitted for the FY 2021 H–1B cap selection process as the population to estimate certain costs for this final rule.<sup>189</sup> There were many factors that led to an increased number of registrations for FY 2021; one possible factor is that the cost and burden to submit the registration is less than the

<sup>183</sup> Calculation: 195,555 2-year average of Total Number of H–1B Cap-Subject Petitions received in FYs 2019–2020 – 109,830 2-year average of Petitions Randomly Selected in FYs 2019–2020 = 85,725

<sup>184</sup> FY 2021 data pertains to the registrations received during FY 2020 for the FY 2021 H–1B cap season.

<sup>185</sup> See 8 CFR 214.2(h)(8)(iii)(A).

<sup>186</sup> See 8 CFR 214.2(h)(8)(iii)(D).

<sup>187</sup> See 8 CFR 214.2(h)(8)(iii)(A)(5).

<sup>188</sup> See 8 CFR 214.2(h)(8)(iii)(A)(6).

<sup>189</sup> DHS uses FY 2021 H–1B cap selection data as the population to estimate certain costs for this final rule because FY 2021 is the first year that registration was required. As explained above, DHS added the registration requirement on April 19, 2019, but the registration requirement was suspended for the FY 2020 H–1B cap.

cost and burden to submit complete Form I-129 packages.  
 For the FY 2021 H-1B cap selection process, 106,100 registrations initially were selected to submit a petition. Prospective petitioners with selected registrations only were eligible to file H-1B petitions based on the selected registrations during a 90-day filing

window. USCIS did not receive enough H-1B petitions during the initial filing period to meet the number of petitions projected as needed to reach the H-1B numerical allocations, so the selection process was run again in August 2020. An additional 18,315 registrations were selected in August 2020 for a total of 124,415 selected registrations for FY

2021. While the current number of registrations selected toward the FY 2021 numerical allocations is 124,415, DHS estimates certain costs for this final rule using the number of registrations initially selected (106,100) as the best estimate of the number of petitions needed to reach the numerical allocations.

TABLE 8—H-1B CAP-SUBJECT REGISTRATIONS SUBMITTED, FOR FY 2021

Fiscal year	Total number of H-1B registrations submitted	Round 1 number of H-1B registrations selected	Round 2 number of H-1B registrations selected	Total number of H-1B registrations selected*	Number of registrations submitted with form G-28**
2021 .....	274,237	106,100	18,315	124,415	N/A
Total .....	274,237	106,100	18,315	124,415	N/A

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 31, 2020 USCIS Analysis.  
 \* **Note:** USCIS administered the selection process twice because an insufficient number of petitions were filed following initial registration selection to reach the number of petitions projected as needed to reach the numerical allocations. USCIS has not finished processing H-1B cap-subject petitions for FY 2021.  
 \*\* **Note:** Complete data is still unavailable for FY 2021. USCIS used FYs 2019–2020 from Table 3 to estimate the percentage of submitted G-28s below.

Table 3 shows historical Form G-28 filings by attorneys or accredited representatives accompanying selected H-1B cap-subject petitions. DHS notes that these forms are not mutually exclusive. Based on the historical 5-year average from earlier in this analysis, DHS estimates 79.7 percent<sup>190</sup> of selected registrations will include Form G-28. DHS applies those percentages to the number of total registrations and estimates 218,567<sup>191</sup> Form G-28 were submitted with total registrations received. DHS uses the total registrations received for the FY 2021 H-1B cap selection process (274,237) as

the estimate of registrations that will be received annually.  
 Additionally, DHS assumes that petitioners may use human resources (HR) specialists (or entities that provide equivalent services) (hereafter HR specialist) or use lawyers or accredited representatives<sup>192</sup> to complete and file H-1B petitions. A lawyer or accredited representative appearing before DHS must file Form G-28 to establish their eligibility and authorization to represent a client (applicant, petitioner, requestor, beneficiary or derivative, or respondent) in an immigration matter before DHS. DHS estimates that approximately 80

percent<sup>193</sup> of H-1B petitions typically will be completed and filed by a lawyer or other accredited representative (hereafter lawyer). DHS assumes the remaining 20 percent of H-1B petitions will be completed and filed by HR specialists.  
 Petitioners who use lawyers to complete and file H-1B petitions may either use an in-house lawyer or hire an outsourced lawyer. Of the total number of H-1B petitions filed in FY 2021, DHS estimates that 26 percent were filed by in-house lawyers, while the remaining 54 percent were filed by outsourced lawyers.<sup>194</sup>

TABLE 9—SUMMARY OF ESTIMATED AVERAGE NUMBER OF PETITIONS/REGISTRATIONS SUBMITTED ANNUALLY BY TYPE OF FILER

Affected population	Estimated average population affected	Number of petitions/registrations submitted by HR specialists	Number of petitions/registrations submitted by in-house lawyers	Number of petitions/registrations submitted by outsourced lawyers
	A	B = A × 20%	C = A × 26%	D = A × 54%
Estimated number of H-1B registrations submitted annually .....	274,237	54,847	71,302	148,088

<sup>190</sup> Calculation: 81,165 Forms G-28/101,822 Form I-129 petitions = 79.7 percent = 80 percent (rounded).  
<sup>191</sup> Calculation: 274,237 \* 79.7 percent = 218,567 Form G-28.  
<sup>192</sup> 8 CFR 292.1(a)(4) (defining an accredited representative as "a person representing an organization described in § 292.2 of this chapter who has been accredited by the Board").  
<sup>193</sup> Calculation: 81,165 petitions filed with Form G-28/101,822 average petitions selected = 79.7 percent petitions completed and filed by a lawyer or other accredited representative (hereafter lawyer)  
<sup>194</sup> DHS uses data from the longitudinal study conducted in 2003 and 2007 on legal career and placement of lawyers, which found that 18.6, 55,

and 26.2 percent of lawyers practice law at government (federal and local) institutions, private law firms, and private businesses (as inside counsel), respectively. See Dinovitzer et al. *After the JD II: Second Results from a National Study of Legal Careers*, The American Bar Foundation and the National Association for Law Placemen (NALP) Foundation for Law Career Research and Education (2009), Table 3.1, p. 27, <https://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf>. Among those working in private law firms and private businesses (54 and 26 percent, respectively), DHS estimates that, while 67.7 percent of lawyers practice law in private law firms, the remaining 32.3 percent practice in private businesses (54 percent + 25.7 percent = 79.7 percent, 67.7 percent = 54/79.7 \* 100, 32.2 percent

= 25.7/79.7 \* 100). Because 79.7 percent of the H-1B petitions are filed by lawyers or accredited representatives, DHS multiplies 79.7 percent by 32.3 and 67.7 percent to estimate the proportion of petitions filed by in-house lawyers (working in private businesses) and outsourced lawyer (working in private law firms), respectively.  
 26 (rounded) percent of petitions filed by in-house lawyers = 80 percent of petitions filed by lawyers or accredited representatives × 32.3 percent of lawyers work in private businesses.  
 54 (rounded) percent of petitions filed by outsourced lawyer = 80 percent of petitions filed by lawyers or accredited representatives × 67.7 percent of lawyers work in private law firms.

TABLE 9—SUMMARY OF ESTIMATED AVERAGE NUMBER OF PETITIONS/REGISTRATIONS SUBMITTED ANNUALLY BY TYPE OF FILER—Continued

Affected population	Estimated average population affected	Number of petitions/registrations submitted by HR specialists	Number of petitions/registrations submitted by in-house lawyers	Number of petitions/registrations submitted by outsourced lawyers
	A	B = A × 20%	C = A × 26%	D = A × 54%
Estimated number of H-1B registrations selected to file H-1B cap petitions annually ...	106,100	21,220	27,586	57,294

Source: USCIS analysis.

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

iii. Unquantified Costs & Benefits

Given that the demand for H-1B cap-subject visas, including those filed for the advanced degree exemption, frequently has exceeded the annual H-1B numerical allocations, this final rule will increase the chance of selection for registrations (or petitions, if registration were suspended) seeking to employ

beneficiaries at level IV or level III wages. DHS believes this incentive for petitioners to offer wages that maximize their probability of selection is necessary to address the risk that greater numbers of U.S. employers could rely on the program to access relatively lower-cost labor, precluding other employers from benefitting from the H-1B program's intended purpose of providing high-skilled nonimmigrant labor to supplement domestic labor. This final rule could result in higher proffered wages or a reduction in the downward pressure on wages in industries and occupations with concentrations of relatively lower-paid H-1B workers. Additionally, this final rule may lead to an increase in employment opportunities for unemployed or underemployed U.S. workers seeking employment in positions otherwise offered to H-1B

cap-subject beneficiaries at wage levels corresponding to lower wage positions. Employers that offer H-1B workers wages that correspond with level IV or level III OES wages will have higher chances of selection.

For the FY 2021 H-1B cap selection process, USCIS initially selected 106,100 (39 percent)<sup>195</sup> of H-1B registrations submitted toward the numerical allocations; of those 80,600 were selected toward the number projected as needed to reach the regular cap, and 25,500 were selected toward the number projected as needed to reach the advanced degree exemption. The total number of H-1B registrations submitted was 274,237; however, 5,043 were invalid. Of the 269,194 valid registrations, 145,950 were submitted toward the regular cap and 123,244 were eligible for selection under the advanced degree exemption.

TABLE 10—H-1B CAP-SUBJECT REGISTRATIONS SUBMITTED FOR FY 2021

Fiscal year	Total number of valid H-1B registrations submitted	Regular cap	Advanced degree exemption
2021 .....	269,194	145,950	123,244
Total .....	269,194	145,950	123,244

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

\* **Note:** The total number of registrations in this table does not equal 274,237 because 5,043 of the registrations were invalid.

DHS estimated the wage level distribution for FY 2021 based on the average distribution observed in FYs 2019 and 2020. At the time of analysis, the wage level data was unavailable for

FY 2021 because the petition filing process was ongoing. Table 11 displays the historic 2-year (FY 2019 and FY 2020) approximated average of H-1B cap-subject petitions that were selected,

separated by OES wage level, and percentages of selected petitions by each wage category.

TABLE 11—HISTORIC NUMBER OF SELECTED PETITIONS BY WAGE LEVEL AND CAP TYPE

Level	Regular cap		Advanced degree exemption	
	Selected	% of total	Selected	% of total
Level I & Below .....	26,140	31.50	9,962	36.99
Level II .....	44,530	53.70	14,181	52.66
Level III .....	8,622	10.40	2,164	8.04

<sup>195</sup> Calculation: 106,100 Registrations Randomly Selected/274,237 Total Number of H-1B Cap-Subject registrations Filed in 2020 = 39%.

TABLE 11—HISTORIC NUMBER OF SELECTED PETITIONS BY WAGE LEVEL AND CAP TYPE—Continued

Level	Regular cap		Advanced degree exemption	
	Selected	% of total	Selected	% of total
Level IV .....	3,608	4.40	623	2.31
Total .....	82,900	100	26,930	100

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

DHS assumes that FY 2021 wage level distribution of registrations will equal the wage level distribution observed in FYs 2019 through 2020 data. DHS multiplied the percentage of selected

petitions by level from Table 11 to estimate the breakdown of registrations by wage level. For example, DHS multiplied 145,950 by 4.4 percent to estimate that a total of 6,422

registrations would have been categorized as wage level IV under the regular cap.

TABLE 12—CURRENT ESTIMATED NUMBER OF REGISTRATIONS BY WAGE LEVEL AND CAP TYPE

Level	Regular cap		Advanced degree exemption	
	Estimated registrations	% of registrations	Estimated registrations	% of registrations
Level I & Below .....	45,974	31.50	45,588	36.99
Level II .....	78,375	53.70	64,900	52.66
Level III .....	15,179	10.40	9,909	8.04
Level IV .....	6,422	4.40	2,847	2.31
Total .....	145,950	100	123,244	100

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

This final rule will change the H–1B cap selection process, but will leave in place selecting first toward the regular cap and second toward the advanced degree exemption. USCIS now will rank and select the registrations received (or petitions, as applicable) generally on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I and below. As a result of the approximated 2-year average from above, DHS displays the projected selection percentages for registrations under the regular cap and advanced degree exemption in Table 13. With the revised selection method based on

corresponding OES wage level and ranking, the approximated average indicates that all registrations with a proffered wage that corresponds to OES wage level IV or level III will be selected and 58,999, or 75 percent, of the registrations with a proffered wage that corresponds to OES wage level II will be selected toward the regular cap projections. None of the registrations with a proffered wage that corresponds to OES wage level I or below will be selected toward the regular cap projections. For the advanced degree exemption, DHS estimates all registrations with a proffered wage that corresponds to OES wage levels IV and III will be selected and 12,744, or 20 percent, of the registrations with a proffered wage that corresponds to OES

wage level II will be selected. DHS estimates that none of the registrations with a proffered wage that corresponds to OES wage level I or below will be selected.

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

TABLE 13—NEW ESTIMATED NUMBER OF SELECTED REGISTRATIONS BY WAGE LEVEL AND CAP TYPE

Level	Regular cap			Advanced degree exemption		
	Total registrations	Selected registrations	% Selected	Total registrations	Selected registrations	% Selected
Level I & Below .....	45,974	0	0	45,588	0	0
Level II .....	78,375	58,999	75	64,900	12,744	20
Level III .....	15,179	15,179	100	9,909	9,909	100
Level IV .....	6,422	6,422	100	2,847	2,847	100
Total .....	145,950	80,600	.....	123,244	25,500	.....

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



This final rule may primarily affect prospective petitioners seeking to file H-1B cap-subject petitions with a proffered wage that corresponds to OES wage level II, I, and below.<sup>196</sup> As Table 13 shows, this final rule is expected to result in a reduced likelihood that registrations for level II will be selected, as well as the likelihood that registrations for level I and below wages will not be selected. A prospective petitioner, however, could choose to increase the proffered wage, so that it corresponds to a higher wage level. Another possible effect is that employers will not fill vacant positions that would have been filled by H-1B workers. These employers may be unable to find qualified U.S. workers, or may leave those positions vacant because they cannot justify raising the wage to stand greater chances of selection in the H-1B cap selection process. That, in turn, could result in fewer registrations and H-1B cap-subject petitions with a proffered wage that corresponds to OES wage level II and below.

DHS acknowledges that this final rule might result in more registrations (or petitions, if registration is suspended) with a proffered wage that corresponds to level IV and level III OES wages for H-1B cap-subject beneficiaries. DHS believes a benefit of this final rule may be that some petitioners may choose to increase proffered wages for H-1B cap-subject beneficiaries, so that the petitioners may have greater chances of selection. This change will, in turn, benefit H-1B beneficiaries who ultimately will receive a higher rate of pay than they otherwise would have in the absence of this rule. However, DHS is not able to estimate the magnitude of such benefits. DHS acknowledges the change in the selection procedure

<sup>196</sup> DOL uses wage levels to determine the prevailing wage based on the level of education, experience (including special skills and other requirements), or supervisory duties required for a position; however, USCIS would use wage levels to rank and select registrations (or petitions, as applicable) based on the rate of pay for the wage level that the proffered wage were to equal or exceed. More information about DOL wage level determinations can be found at U.S. Department of Labor, Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Revised Nov. 2009), [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf); and at U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, <https://www.flcdcenter.com/> (last visited Dec. 15, 2020). DHS acknowledges that varying wage levels correspond to varying skill levels. In analyzing the economic effects of this final rule, DHS recognizes that prospective petitioners may offer wages exceeding the wage levels associated with the skills required for given positions to increase their chances of selection under the ranked selection process.

resulting from this final rule will create distributional effects and costs. DHS is unable to quantify the extent or determine the probability of H-1B petitioner behavioral changes. Therefore, DHS does not know the portion of overall impacts of this rule that will be benefits or costs.

As a result of this final rule, costs will be borne by prospective petitioners that would hire lower wage level H-1B cap-subject beneficiaries, but are unable to do so because of a reduced chance of selection in the H-1B selection process compared to the random lottery process. Such employers also may incur additional costs to find available replacement workers. DHS estimates costs incurred associated with loss of productivity from not being able to hire H-1B workers, or the need to search for and hire U.S. workers to replace H-1B workers. Although DHS does not have data to estimate the costs resulting from productivity loss for these employers, DHS provides an estimate of the search and hiring costs for the replacement workers. Accordingly, based on the result of the study conducted by the Society for Human Resource Management (SHRM) in 2016, DHS assumes that an entity whose H-1B petition is denied will incur an average cost of \$4,398 per worker (in 2019 dollars)<sup>197</sup> to search for and hire a U.S. worker in place of an H-1B worker during the period of this economic analysis. If petitioners cannot find suitable replacements for the labor H-1B cap-subject beneficiaries would have provided if selected and, ultimately, granted H-1B status, this final rule primarily will be a cost to these petitioners through lost productivity and profits.

DHS also acknowledges that some petitioners might be impacted in terms of the employment, productivity loss, search and hire costs, and profits resulting from labor turnover. In cases where companies cannot find reasonable substitutes for the labor H-1B beneficiaries would have provided, affected petitioners also will lose profits

<sup>197</sup> Society for Human Resource Management (SHRM), *2016 Human Capital Benchmarking Report*, at 16, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2016-Human-Capital-Report.pdf> (last visited Oct. 21, 2020). The study was based on data collected from 2,048 randomly selected human resource professionals who participated in the 2016 SHRM Human Capital Benchmarking Survey. The hiring cost is reported as \$4,129 per worker in 2016 dollars and converted to 2019 dollars in this analysis. The hiring cost includes third-party agency fees, advertising agency fees, job fairs, online job board fees, employee referrals, travel costs of applicants and staff, relocation costs, recruiter pay and benefits, and talent acquisition system costs.

from the lost productivity. In such cases, employers will incur opportunity costs by having to choose the next best alternative to fill the job prospective H-1B workers would have filled. There may be additional opportunity costs to employers such as search costs and training.

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

DHS uses the compensation to H-1B employees as a measure of the overall impact of the provisions. While DHS expects wages paid to H-1B beneficiaries to be higher in light of this final rule, DHS is unable to quantify the benefit of increased compensation because not all of the wage increases will correspond with productivity increases. This final rule may indirectly benefit prospective petitioners submitting registrations with a proffered wage that corresponds to OES wage Level I and II registrations. The indirect benefit will be present during the COVID-19 pandemic and the ensuing economic recovery if the prospective petitioners are able to find replacement workers accepting a lower wage and factoring in the replacement cost of \$4,398 per worker in the United States. Similarly, prospective petitioners that will be submitting registrations with a proffered wage that will correspond to OES wage level I and II and that substitute toward unemployed or underemployed individuals in the U.S. labor force will create an additional indirect benefit from this rule. This will benefit those in the U.S. labor force if petitioners decide to select a U.S. worker rather than a prevailing wage level I or II H-1B worker. DHS notes that, although the COVID-19 pandemic is widespread, the severity of its impacts varies by locality and industry, and there may be structural impediments to the national and local labor market. Accordingly, DHS cannot quantify with confidence, the net benefit of the redistribution of H-1B cap selections detailed in this analysis.

DHS also is changing the filing procedures to allow USCIS to deny or revoke approval of a subsequent new or amended petition filed by the petitioner,

or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner’s attempt to unfairly decrease the proffered wage to an amount that is equivalent to a lower wage level, after listing a higher wage level on the registration (or petition, if registration is suspended) to increase the odds of selection. DHS is unable to quantify the cost of these changes to petitioners.

iv. Costs of Filing Form I–129 Petitions

DHS is amending Form I–129, which must be filed by petitioners on behalf of H–1B beneficiaries, to align with the regulatory changes DHS is making in

this final rule. The changes to Form I–129 will result in an increased time burden to complete and submit the form.

Absent the changes implemented through this final rule, the current estimated time burden to complete and file Form I–129 is 2.84 hours per petition. As a result of the changes in this final rule, DHS estimates the total time burden to complete and file Form I–129 will be 3.09 hours per petition, to account for the additional time petitioners will spend reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary

documentation, and submitting the petition. DHS estimates the time burden will increase by a total of 15 minutes (0.25 hours) per petition for completing a Form I–129 petition.<sup>198</sup>

To estimate the additional cost of filing Form I–129, DHS applies the additional estimated time burden to complete and file Form I–129 (0.25 hours) to the respective total population and compensation rate of who may file, including an HR specialist, in-house lawyer, or outsourced lawyer. As shown in Table 14, DHS estimates, the total additional annual opportunity cost of time to petitioners completing and filing Form I–129 petitions will be approximately \$3,457,401.

TABLE 14—ADDITIONAL OPPORTUNITY COSTS OF TIME TO PETITIONERS FOR FILING FORM I–129 PETITIONS FROM AN INCREASE IN TIME BURDEN

Cost items	Total affected population	Additional time burden to complete Form I–129 (hours)	Compensation rate	Total cost
	A	B	C	D = A × B × C
Opportunity cost of time to complete Form I–129 for H–1B petitions by:				
HR specialist .....	21,220	0.25	\$47.57	\$252,359
In-house lawyer .....	27,586	0.25	102.00	703,443
Outsourced lawyer .....	57,294	0.25	174.65	2,501,599
<b>Total .....</b>	<b>106,100</b>			<b>3,457,401</b>

Source: USCIS analysis.

v. Costs of Submitting Registrations as Modified by This Final Rule

DHS is amending the required information on the H–1B Registration Tool. In addition to the information required on the current registration tool, a registrant will be required to provide the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended employment, if such data is available. The proffered wage is the wage that the employer intends to pay the beneficiary. The SOC code and area of intended employment would be indicated on the LCA filed with the petition. For registrants relying on a private wage survey, if the proffered wage is less than the corresponding level I OES wage, the registrant will select the “Wage Level I and below” box on the registration tool. If the registration indicates that the H–1B beneficiary will work in multiple

locations, or in multiple positions if the prospective petitioner is an agent, USCIS will rank and select the registration based on the lowest corresponding OES wage level that the proffered wage equals or exceeds. In the limited instance where there is no current OES prevailing wage information for the proffered position, the registrant will follow DOL guidance on prevailing wage determinations to select the OES wage level on the registration, and USCIS will rank and select based on the highest OES wage level. The changes to this registration requirement will impose increased opportunity costs of time to registrants, by adding additional information to their registration.

The current estimated time burden to complete and file an electronic registration is 30 minutes (0.5 hours) per registration.<sup>199</sup> DHS estimates the total time burden to complete and file a

registration in light of this final rule will be 50 minutes (0.83 hours) per registration, which amounts to an additional time burden of 20 minutes (0.33 hours) per registration. The additional time burden accounts for the additional time a registrant will spend reviewing instructions, completing the registration, and submitting the registration.

To estimate the additional cost of submitting a registration, DHS applies the additional estimated time burden to complete and submit the registration (0.33 hours) to the respective total population and total rate of compensation of who may file, including HR specialists, in-house lawyers, or outsourced lawyers. As shown in Table 15, DHS estimates the total additional annual opportunity cost of time to the prospective petitioners of completing and submitting registrations will be approximately \$11,795,997.

<sup>198</sup> 0.25 hours additional time to complete and file Form I–129 = (3.09 hours to complete and file

the new Form I–129) – (2.84 hours to complete and file the current Form I–129 and its supplements)

<sup>199</sup> Agency Information Collection Activities; Revision of a Currently Approved Collection: H–1B Registration Tool, 84 FR 54159 (Oct. 9, 2019).

TABLE 15—ADDITIONAL COST OF SUBMITTING REGISTRATIONS

Cost items	Total affected population A	Additional time burden to submit registrations (hours) B	Compensation rate C	Total cost D = A × B × C
Opportunity cost of time to complete registrations by:				
HR specialist .....	54,847	0.33	\$47.57	\$860,994
In-house lawyer .....	71,302	0.33	102.00	2,400,025
Outsourced lawyer .....	148,088	0.33	174.65	8,534,978
Total .....	274,237	.....	.....	11,795,997

Source: USCIS analysis.

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

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

seeking to file H-1B cap-subject petitions.

vi. Familiarization Cost

Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule to fully comply with the new regulation(s). To the extent that an individual or entity directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule. The entities directly regulated by this rule are the employers who file H-1B petitions. Using FY 2020 internal data on actual filings of Form I-129 H-1B petitions, DHS identified 24,111<sup>200</sup> unique entities. DHS assumes that the petitioners require approximately two hours to familiarize themselves with the rule. Using the average total rate of compensation of HR specialists, In-house lawyers, and Outsourced lawyers from Table 4, and assuming one person at each entity familiarizes themselves with the rule, DHS estimates a one-time total familiarization cost of \$6,285,527 in FY 2022.

TABLE 16—FAMILIARIZATION COSTS TO THE PETITIONERS

Cost items	Total affected population A	Additional time burden to familiarize (hours) B	Compensation rate C	Total cost D = A × B × C
Opportunity cost of time to familiarize the rule by:				
HR specialist .....	4,822	2	\$47.57	\$458,765
In-house lawyer .....	6,269	2	102.00	1,278,876
Outsourced lawyer .....	13,020	2	174.65	4,547,886
Total .....	24,111	.....	.....	6,285,527

Source: USCIS analysis.

<sup>200</sup> Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Form I-129H-1B,

Claims 3, IRFA data (Aug. 18, 2020) & USCIS Analysis.

b. Total Estimated Costs of Regulatory Changes annualized over a 10-year implementation period. Table 17 details the total annual costs of this final rule to petitioners will be \$21,538,925 in FY 2022 and \$15,253,398 in FY 2023 through 2032.

In this section, DHS presents the total annual costs of this final rule

TABLE 17—SUMMARY OF ESTIMATED ANNUAL COSTS TO PETITIONERS IN THIS FINAL RULE

Costs	Total estimated annual cost
Petitioners' additional opportunity cost of time in filing Form I-129 petitions .....	\$3,457,401
Petitioners' additional opportunity cost of time in submitting information on the registration .....	11,795,997
Familiarization Cost (Year 1 only FY 2022) .....	6,285,527
<b>Total Annual Costs (undiscounted) = FY 2022 .....</b>	<b>21,538,925</b>
<b>Total Annual Cost (undiscounted) = FY 2023–FY 2032 .....</b>	<b>15,253,398</b>

Table 18 shows costs over the 10-year implementation period of this final rule. DHS estimates the 10-year total net cost of the rule to petitioners to be approximately \$158,819,507 undiscounted, \$136,217,032 discounted at 3-percent, and \$113,007,809 discounted at 7-percent. Over the 10-year implementation period of the rule, DHS estimates the annualized costs of the rule to be \$15,968,792 annualized at 3-percent, \$16,089,770 annualized at 7-percent.

TABLE 18—TOTAL COSTS OF THIS FINAL RULE

Year	Total estimated costs	
	Discounted at 3-percent	Discounted at 7-percent
	\$21,538,925 (year 1); \$15,253,398 (year 2–10)	
1 .....	\$20,911,578	\$20,129,836
2 .....	14,377,791	13,322,909
3 .....	13,959,020	12,451,316
4 .....	13,552,447	11,636,744
5 .....	13,157,715	10,875,462
6 .....	12,774,481	10,163,983
7 .....	12,402,408	9,499,050
8 .....	12,041,173	8,877,617
9 .....	11,690,459	8,296,838
10 .....	11,349,961	7,754,054
<b>Total .....</b>	<b>136,217,032</b>	<b>113,007,809</b>
<b>Annualized .....</b>	<b>15,968,792</b>	<b>16,089,770</b>

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

c. Costs to the Federal Government

DHS is revising the process and system by which H-1B registrations or petitions, as applicable, will be selected toward the annual numerical allocations. This final rule will require updates to USCIS IT systems and additional time spent by USCIS on H-1B registrations or petitions.

The INA provides for the collection of fees at a level that will ensure recovery

of the full costs of providing adjudication and naturalization services by DHS, including administrative costs and services provided without charge to certain applicants and petitioners.<sup>201</sup> DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs such as salaries and benefits of clerical staff, officers, and managers, plus an amount to recover unassigned overhead (such as facility rent, IT equipment and systems, or other expenses) and immigration services provided without charge. Consequently, since USCIS immigration fees are based

<sup>201</sup> See INA section 286(m), 8 U.S.C. 1356(m).

on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS notes the time necessary for USCIS to review the information submitted with the forms relevant to this final rule includes the time to adjudicate the benefit request. These costs are captured in the fees collected for the benefit request from petitioners.

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. "Small entities" are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An "individual" is not considered a small entity, and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform an initial regulatory flexibility analysis (IRFA) of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered as costs for RFA purposes.

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

DHS does not believe that the changes in this final rule will have a significant economic impact on a substantial number of small entities that will file H-1B petitions. A Final Regulatory Flexibility Analysis (FRFA) follows.

#### 1. A Statement of Need for, and Objectives of, This Final Rule

DHS's objectives and legal authority for this final rule are discussed earlier in the preamble. DHS is amending its regulations governing H-1B specialty occupation workers. The purpose of this final rule is to better ensure that H-1B classification is more likely to be awarded to petitioners seeking to employ relatively higher-skilled and higher-paid beneficiaries. DHS believes these changes will incentivize use of the H-1B program to fill relatively lower-paid, lower-skilled positions.

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

*Comments:* A professional association wrote that DHS claimed that no small entities would be significantly impacted by the proposed rule, but DHS also estimated that 80.1 percent of those that filed Form I-129 were small entities. An individual commenter wrote that DHS incorrectly concluded that the proposed rule would not have a significant impact on small entities because small

businesses would be unlikely to have the legal expertise or institutional knowledge to navigate the H-1B system.

*Response:* DHS estimates the economic impact for each small entity, based on the additional cost and time associated with the changes to the form, in percentages, is the sum of the impacts of the final rule divided by the entity's sales revenue.<sup>202</sup> DHS constructed the distribution of economic impact of the final rule based on a sample of 312 small entities. Across all 312 small entities, the increase in cost to a small entity will range from 0.00000026 percent to 2.5 percent of that entity's FY 2020 revenue. Of the 312 small entities, 0 percent (0 small entities) will experience a cost increase that is greater than 5 percent of revenues.

*Comments:* Some commenters generally stated that the proposed rule would harm small businesses. Multiple commenters, including a trade association, employer, and individuals, wrote that the proposed rule would harm small and emerging businesses who, often, could not offer higher salaries compared to larger firms. Other commenters said the proposed rule would favor larger firms at the expense of small and medium sized businesses. An individual commenter wrote that the proposed rule would harm small technology companies and start-ups that are dependent on recruiting young talent, as they would be required to offer such employees level III and level IV wages when level I and level II wages would be more appropriate. Another individual commenter said companies would suffer because many small information technology or financial companies could not provide as high of salaries to their foreign workers as big companies could. An individual commenter wrote that the proposed rule would harm small businesses that often could not find the appropriate talent domestically and would have a legitimate need to hire H-1B workers, while another commenter argued the

<sup>202</sup>The economic impact, in percent, for each small entity  $i$  = (Cost of one petition for entity  $i$  × Number of petitions for entity  $j$ ) × 100. The cost of one petition for entity  $i$  (\$75.60) is estimated by adding the two cost components per petition of this final rule (\$75.60 = \$32.59 + \$43.01). The first component (\$32.59) is the weighted average additional cost of filing a petition, and is calculated by dividing total cost by the number of petitions (\$32.59 = \$3,457,401/106,100) from Table 13. The second component (\$43.01) is the weighted average cost of submitting information on the registration and is calculated by dividing total cost by the number of baseline petitions (\$43.01 = \$11,795,997/274,237) from Table 14. The number of petitions for entity  $i$  is taken from USCIS internal data on actual filings of I-129 H-1B petition. The entity's sales revenue is taken from ReferenceUSA, Manta, Cortera, and Guidestar databases.

proposed rule would shrink the hiring talent pool for small businesses. An individual commenter wrote that, under the proposed rule, small businesses would not be able to operate due to an inability to find suitable employees. Similarly, an individual commenter wrote that the proposed rule would ensure that H-1B visas would go to "the highest bidders" and would discriminate against smaller businesses with a genuine need for H-1B employees. An individual commenter wrote that the proposed rule would encourage larger employers who could afford to pay higher wages to employees to artificially inflate their job requirements and increase their chance of selection through the ranked selection process. Another commenter asserted that smaller companies in non-metropolitan areas, who might have difficulty finding domestic candidates for positions, would be negatively impacted by the proposed rule.

*Response:* DHS acknowledges that an employer offering a level I or below wage under the regular cap, and an employer offering a level II, I, or below wage under the advanced degree exemption, may have a lesser chance of selection than under the current random selection process. DHS does not believe that the changes in this final rule will have a significant economic impact on a substantial number of small businesses. As explained in the NPRM, DHS conducted an RFA and found that the changes in this rule would not have a significant economic impact on a substantial number of small entities.

Additionally, this rule does not treat people who work for small-sized entities differently than those who work for large companies. While DHS recognizes that some small businesses may operate on smaller margins than larger companies, if an employer values a beneficiary's work and the unique qualities the beneficiary possesses, the employer can offer a higher wage than required by the prevailing wage level to reflect that value. If a small company is unable to pay an employee at wage level III or IV for a greater chance of selection, they could then try to find a substitute U.S. worker.

*Comments:* An individual commenter wrote that rural areas and smaller towns depend on entry-level H-1B workers at a level I wage, but those communities would not be able to justify hiring such H-1B workers at level III and level IV wages. Another individual commenter said the rule would harm employers in rural areas where wages, often, would be lower. A professional association wrote that small and medium sized medical practices, often serving rural or

low-income areas, depend on new or inexperienced physicians at the level I or level II wage rate and would be unable to compete for H-1B cap slots for these employees under the proposed rule. An employer wrote that rural healthcare providers would not be able to meet the wage rates necessary to attract workers on H-1B visas, and, as a result, the proposed rule would decrease the supply of healthcare labor to rural communities.

*Response:* The rule takes the geographic area into account when ranking registrations or petitions, and, therefore, DHS does not agree that this rule will harm employers in rural or other areas where wages often are lower. Particularly, as stated in the proposed rule, USCIS will select H-1B registrations or petitions, as applicable, based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code and *area(s) of intended employment* (emphasis added). The prevailing wage already accounts for wage variations by location. Additionally, this rule does not treat foreign workers who work for small-sized entities differently than those who work for large companies.

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

DHS did not receive comments on this rule from the Chief Counsel for Advocacy of the Small Business Administration.

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

For this analysis, DHS conducted a sample analysis of historical Form I-129 H-1B petitions to estimate the number of small entities impacted by this final rule. DHS utilized a subscription-based online database of U.S. entities, ReferenceUSA, as well as three other open-access, free databases of public and private entities, Manta, Cortera, and Guidestar, to determine the North American Industry Classification System (NAICS) code,<sup>203</sup> revenue, and employee count for each entity in the sample. To determine whether an entity is small for purposes of the RFA, DHS

first classified the entity by its NAICS code and, then, used SBA size standards guidelines<sup>204</sup> to classify the revenue or employee count threshold for each entity. Based on the NAICS codes, some entities were classified as small based on their annual revenue, and some by their numbers of employees. Once as many entities as possible were matched, those that had relevant data were compared to the size standards provided by the SBA to determine whether they were small or not. Those that could not be matched or compared were assumed to be small under the presumption that non-small entities would have been identified by one of the databases at some point in their existence.

Using FY 2020 internal data on actual filings of Form I-129 H-1B petitions, DHS identified 24,111<sup>205</sup> unique entities. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. DHS first determined the minimum sample size necessary to achieve a 95 percent confidence level estimation for the impacted population of entities using the standard statistical formula at a 5 percent margin of error. Then, DHS created a sample size greater than the minimum necessary to increase the likelihood that our matches would meet or exceed the minimum required sample.

DHS randomly selected a sample of 473 entities from the population of 24,111 entities that filed Form I-129 for H-1B petitions in FY 2020. Of the 473 entities, 406 entities returned a successful match of a filing entity in the ReferenceUSA, Manta, Cortera, and Guidestar databases; 67 entities did not return a match. Using these databases' revenue or employee count and their assigned North American Industry Classification System (NAICS) code, DHS determined 312 of the 406 matches to be small entities, 94 to be non-small entities. Based on previous experience

<sup>204</sup> DHS utilized a subscription-based online database of U.S. entities, ReferenceUSA, as well as three other open-access, free databases of public and private entities, Manta, Cortera, and Guidestar, to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity. Guidelines suggested by the SBA Office of Advocacy indicate that the impact of a rule could be significant if the cost of the regulation exceeds 5 percent of the labor costs of the entities in the sector. Small Business Administration, Office of Advocacy, *A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act* (Aug. 2017), at 19, <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

<sup>205</sup> Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Form I-129H-1B, Claims 3, IRFA data (Aug. 18, 2020) & USCIS Analysis.

conducting RFAs, DHS assumes filing entities without database matches or missing revenue/employee count data are likely to be small entities. As a result, to prevent underestimating the number of small entities this rule will affect, DHS conservatively considers all the non-matched and missing entities as small entities for the purpose of this analysis. Therefore, DHS conservatively classifies 379 of 473 entities as small entities, including combined non-matches (67), and small entity matches (312). Thus, DHS estimates that 80.1% (379 of 473) of the entities filing Form I-129 H-1B petitions are small entities.

In this analysis DHS assumes that the distribution of firm size for our sample is the same as the entire population of Form I-129. Thus, DHS estimates the number of small entities to be 80.1% of the population of 24,111 entities that filed Form I-129 under the H-1B classification, as summarized in Table 19 below. The annual numeric estimate of the small entities impacted by this final rule is 19,319 entities.<sup>206</sup>

TABLE 19—NUMBER OF SMALL ENTITIES FOR FORM I-129 FOR H-1B, FY 2020

Population	Number of small entities	Proportion of population (percent)
24,111 .....	19,319	80.1

Following the distributional assumptions above, DHS uses the set of 312 small entities with matched revenue data to estimate the economic impact of this final rule on each small entity. The economic impact on each small entity, in percentages, is the sum of the impacts of the final rule divided by the entity's sales revenue.<sup>207</sup> DHS constructed the distribution of economic impact of the final rule based on the sample of 312 small entities. Across all 312 small

<sup>206</sup> The annual numeric estimate of the small entities (19,319) = Population (24,111) \* Percentage of small entities (80.1%).

<sup>207</sup> The economic impact, in percent, for each small entity  $i$  = (Cost of one petition for entity  $i$  × Number of petitions for entity  $j$ ) × 100. The cost of one petition for entity  $i$  (\$75.60) is estimated by adding the two cost components per petition of this final rule (\$75.60 = \$32.59 + \$43.01). The first component (\$32.59) is the weighted average additional cost of filing a petition, and is calculated by dividing total cost by the number of petitions (\$32.59 = \$3,457,401/106,100) from Table 14. The second component (\$43.01) is the weighted average cost of submitting information on the registration and is calculated by dividing total cost by the number of baseline petitions (\$43.01 = \$11,795,997/274,237) from Table 15. The number of petitions for entity  $i$  is taken from USCIS internal data on actual filings of I-129 H-1B petition. The entity's sales revenue is taken from ReferenceUSA, Manta, Cortera, and Guidestar databases.

<sup>203</sup> U.S. Census Bureau, North American Industry Classification System, <http://www.census.gov/eos/www/naics/> (last visited Oct. 21, 2020).

entities, the increase in cost to a small entity will range from 0.00000026 percent to 2.5 percent of that entity's FY 2020 revenue. Of the 312 small entities, 0 percent (0 small entities) will experience a cost increase that is greater than 5 percent of revenues.

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

Based on this analysis, DHS does not believe that this final rule will have a significant economic impact on a substantial number of small entities that file H-1B petitions.

5. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

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

6. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of the 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

DHS requested comments on, including potential alternatives to, the proposed ranking and selection of registrations based on the OES prevailing wage level that corresponds to the requirements of the proffered position in situations where there is no current OES prevailing wage information. In the RFA context, DHS sought comments on alternatives that would accomplish the objectives of the proposed rule without unduly burdening small entities. DHS also welcomed any public comments or data on the number of small entities that would be petitioning for an H-1B employee and any direct impacts on those small entities.

*Comment:* Some commenters said that DHS should consider ranking by years of experience, rather than by wage. One commenter asked DHS to give an advantage to candidates who have work experience in the United States.

*Response:* DHS declines to adopt these alternatives, as ranking and selection by years of experience would not best accomplish the goal of attracting the best and brightest workers. DHS believes that the salary, relative to others in the same occupational classification and area of intended employment, rather than years of experience, is generally more indicative of skill level and relative value/productivity of the worker to the United States. See section 3.3 *Requests for comments on alternatives* for additional suggested alternatives.

#### C. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this final rule is a major rule, as defined in 5 U.S.C. 804, also known as the "Congressional Review Act" (CRA), as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, sec. 251, 110 Stat. 868, 873, and codified at 5 U.S.C. 801 *et seq.* Therefore, the rule requires at least a 60-day delayed effective date. DHS has complied with the CRA's reporting requirements and has sent this final rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

#### 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. Based on the Consumer Price Index for All Urban Consumers (CPI-U), the value equivalent of \$100 million in 1995 adjusted for inflation to 2019 levels is approximately \$168 million.<sup>208</sup>

<sup>208</sup> See U.S. Department of Labor, Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month*, <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf> (last visited Sept. 2, 2020).

Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2019 - Average monthly CPI-U for 1995)/(Average monthly CPI-U

This rule does not contain a "Federal mandate" as defined in UMRA that may result in \$100 million or more expenditures (adjusted annually for inflation—\$168 million in 2019 dollars) in any one year by State, local and tribal governments or the private sector. This rule also does not uniquely affect small governments. Accordingly, Title II of UMRA requires no further agency action or analysis.

#### E. 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 Executive Order 13132, DHS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

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

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

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

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

#### H. National Environmental Policy Act (NEPA)

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

for 1995]] \* 100 = [(255.657 - 152.383)/152.383] \* 100 = (103.274/152.383) \* 100 = 0.6777 \* 100 = 67.77 percent = 68 percent (rounded)

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

components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500–1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) that experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS).<sup>209</sup> Categorical exclusions established by DHS are set forth in Appendix A of the Instruction Manual. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.<sup>210</sup>

As discussed in more detail throughout this final rule, DHS is amending regulations governing the selection of registrations or petitions, as applicable, toward the annual H–1B numerical allocations. This final rule establishes that, if more registrations are received during the annual initial registration period (or petition filing period, if applicable) than necessary to reach the applicable numerical allocation, USCIS will rank and select the registrations (or petitions, if the registration process is suspended) received on the basis of the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I and below. If a proffered wage falls below an OES wage level I, because the proffered wage is based on a prevailing wage from another legitimate source (other than OES) or an independent authoritative source, USCIS will rank the registration in the same category as OES wage level I.<sup>211</sup>

Generally, DHS believes NEPA does not apply to a rule intended to change a discrete aspect of a visa program because any attempt to analyze its potential impacts would be largely

speculative, if not completely so. This final rule does not propose to alter the statutory limitations on the numbers of nonimmigrants who: May be issued initial H–1B visas or granted initial H–1B nonimmigrant status, consequently will be admitted into the United States as H–1B nonimmigrants, will be allowed to change their status to H–1B, or will extend their stay in H–1B status. DHS cannot reasonably estimate whether the wage level-based ranking approach to select H–1B registrations (or petitions in any year in which the registration requirement were suspended) that DHS is implementing will affect how many petitions will be filed for workers to be employed in specialty occupations or whether the regulatory amendments herein will result in an overall change in the number of H–1B petitions that ultimately will be approved, and the number of H–1B workers who will be employed in the United States in any FY. DHS has no reason to believe that these amendments to H–1B regulations will change the environmental effect, if any, of the existing regulations. Therefore, DHS has determined that, even if NEPA applied to this action, this final rule clearly fits within categorical exclusion A3(d) in the Instruction Manual, which provides an exclusion for “promulgation of rules . . . that amend an existing regulation without changing its environmental effect.” This final rule will maintain the current human environment by proposing improvements to the H–1B program that will take effect during the economic crisis caused by COVID–19 in a way that more effectively will prevent an adverse impact from the employment of H–1B workers on the wages and working conditions of similarly employed U.S. workers. This final rule is not a part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

#### *I. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (PRA) Public Law 104–13, 44 U.S.C. 3501, *et seq.*, all Departments are required to submit to the Office of Management and Budget, for review and approval, any reporting requirements inherent in a rule. In compliance with the PRA, DHS published a notice of proposed rulemaking on November 2, 2020, in which it requested comments on the revisions to the information collections associated with this

rulemaking.<sup>212</sup> DHS responded to those comments in Section IV.E.2. of this final rule.

The following is an overview of the information collections associated with this final rule:

#### 1. USCIS H–1B Registration Tool

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

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

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

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

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H–1B Registration Tool is 275,000, and the estimated hour burden per response is 0.833 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection of information is 229,075 hours.

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

#### 2. USCIS Form I–129

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

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

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

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS uses the data collected on this form to determine 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

<sup>209</sup> See 40 CFR 1507.3(b)(2)(ii), 1508.4.

<sup>210</sup> Instruction Manual section V.B(2)(a)–(c).

<sup>211</sup> If the proffered wage is expressed as a range, USCIS would make the comparison using the lowest wage in the range.

<sup>212</sup> See 85 FR 69236, 69261–2.



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

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

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* I-129 is 294,751 and the estimated hour burden per response is 3.09 hours; the estimated total number of respondents for the information collection E-1/E-2 Classification Supplement to Form I-129 is 4,760 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I-129 is 3,057 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection H Classification Supplement to Form I-129 is 96,291 and the estimated hour burden per response is 2 hours; the estimated total number of respondents for the information collection H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement is 96,291 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I-129 is 37,831 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I-129 is 22,710 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Q-1 Classification Supplement to Form I-129 is 155 and the estimated hour burden per response is 0.34 hours; the estimated total number of respondents for the information collection R-1 Classification Supplement to Form I-

129 is 6,635 and the estimated hour burden per response is 2.34 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection of information is 1,293,873 hours.

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

#### J. Signature

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

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

Administrative practice and procedure, Aliens, Cultural exchange 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; Pub. L. 115–218.

■ 2. Section 214.2 is amended by:

- a. Revising the first sentence of paragraph (h)(8)(iii)(A)(1) introductory text;
- b. Adding paragraphs (h)(8)(iii)(A)(1)(i) and (ii);
- c. In paragraph (h)(8)(iii)(A)(5)(i), revising the last two sentences and adding a sentence at the end;
- d. In paragraph (h)(8)(iii)(A)(5)(ii), revising the last two sentences and adding a sentence at the end;
- e. In paragraph (h)(8)(iii)(A)(6)(i), revising the last two sentences and adding a sentence at the end;
- f. In paragraph (h)(8)(iii)(A)(6)(ii), revising the last two sentences and adding a sentence at the end;

- g. Revising paragraphs (h)(8)(iii)(A)(7) and (h)(8)(iii)(D)(1);
- h. In paragraph (h)(8)(iv)(B)(1), revising the last three sentences and adding three sentences at the end;
- i. Revising paragraph (h)(8)(iv)(B)(2);
- j. Removing and reserving paragraph (h)(8)(v);
- k. Revising paragraph (h)(10)(ii);
- l. Revising paragraph (h)(11)(iii)(A)(2);
- m. Redesignating paragraphs (h)(11)(iii)(A)(3) through (5) as (h)(11)(iii)(A)(4) through (6); and
- n. Adding a new paragraph (h)(11)(iii)(A)(3) and paragraph (h)(24)(i).

The revisions and additions read as follows:

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

\* \* \* \* \*

(h) \* \* \*

(8) \* \* \*

(iii) \* \* \*

(A) \* \* \*

(1) \* \* \*

Except as provided in paragraph (h)(8)(iv) of this section, before a petitioner is eligible to file an H-1B cap-subject petition for a beneficiary who may be counted under section 214(g)(1)(A) of the Act (“H-1B regular cap”) or eligible for exemption under section 214(g)(5)(C) of the Act (“H-1B advanced degree exemption”), the prospective petitioner or its attorney or accredited representative must register to file a petition on behalf of an alien beneficiary electronically through the USCIS website ([www.uscis.gov](http://www.uscis.gov)).

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

select the registration based on the OES wage level that corresponds to the requirements of the proffered position.

(ii) [Reserved]

\* \* \* \* \*

(5) \* \* \*

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

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

(6) \* \* \*

(i) \* \* \* If on the final registration date, USCIS has received more registrations than necessary to meet the H-1B advanced degree exemption limitation under Section 214(g)(5)(C) of

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

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

(7) *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 select additional registrations to receive the number of petitions projected to meet the numerical limitations, USCIS will

select from among the registrations that are on reserve a sufficient number to meet the H-1B regular cap or advanced degree exemption numerical limitation, as applicable. If all of the registrations on reserve are selected and there are still fewer registrations than needed to reach the H-1B regular cap or advanced degree exemption numerical limitation, as applicable, USCIS may reopen the applicable registration period until USCIS determines that it has received a sufficient number of registrations projected to meet the H-1B regular cap or advanced degree exemption numerical limitation. USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the new "final registration date"). The day the public is notified will not control the applicable final registration date. When selecting additional registrations under this paragraph, USCIS will rank and select properly submitted registrations in accordance with paragraphs (h)(8)(iii)(A)(1), (5), and (6) of this section. 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).

\* \* \* \* \*

(D) \* \* \* (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 petition is based on a valid registration submitted by the petitioner, or its designated representative, on behalf of the beneficiary that was selected beforehand by USCIS. The petition must be filed within the filing period indicated in the selection notice. A petitioner may not substitute the beneficiary named in the original registration or transfer the registration to another petitioner.

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

due at the time the registration is submitted.

(ii) If USCIS determines that the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct, USCIS may reject or deny the petition or, if approved, may revoke the approval of a petition that was filed based on that registration.

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

\* \* \* \* \*

(iv) \* \* \*  
(B) \* \* \*

(1) \* \* \* If the final receipt date is any of the first five business days on which petitions subject to the H-1B regular cap may be received, USCIS will select from among all the petitions properly submitted during the first five business days the number of petitions deemed necessary to meet the H-1B regular cap. If USCIS has received more petitions than necessary to meet the numerical limitation for the H-1B regular cap, USCIS will rank and select the petitions received on the basis of the highest Occupational Employment Statistics (OES) wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If the wage falls below an OES wage level I, USCIS will rank the petition in the same category as OES wage level I. USCIS will rank the petition in the same manner even if, instead of obtaining an OES prevailing wage, a petitioner elects to obtain a prevailing wage using another legitimate source (other than

OES) or an independent authoritative source. If USCIS receives and ranks more petitions at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from among all eligible petitions within that particular wage level a sufficient number of petitions needed to reach the numerical limitation.

(2) *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 selection process of petitions for the H-1B regular cap, USCIS will determine whether there is a sufficient number of remaining petitions to meet the H-1B advanced degree exemption numerical limitation. When calculating the number of petitions needed to meet the H-1B advanced degree exemption numerical limitation USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received and will announce on its website the date that it receives the number of petitions projected as needed to meet the H-1B advanced degree exemption numerical limitation (the "final receipt date"). The date the announcement is posted will not control the final receipt date. If the final receipt date is any of the first five business days on which petitions subject to the H-1B advanced degree exemption may be received (in other words, if the numerical limitation is reached on any one of the first five business days that filings can be made), USCIS will select from among all the petitions properly submitted during the first five business days the number of petitions deemed necessary to meet the H-1B advanced degree exemption numerical limitation. If USCIS has received more petitions than necessary to meet the numerical limitation for the H-1B advanced degree exemption, USCIS will rank and select the petitions received on the basis of the highest Occupational Employment Statistics (OES) wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with OES wage level IV and proceeding with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If the proffered wage

is below an OES wage level I, USCIS will rank the petition in the same category as OES wage level I. USCIS will rank the petition in the same manner even if, instead of obtaining an OES prevailing wage, a petitioner elects to obtain a prevailing wage using another legitimate source (other than OES) or an independent authoritative source. If USCIS receives and ranks more petitions at a particular wage level than necessary to meet the numerical limitation for the H-1B advanced degree exemption, USCIS will randomly select from among all eligible petitions within that particular wage level a sufficient number of petitions needed to reach the numerical limitation.

\* \* \* \* \*

(10) \* \* \*

(ii) *Notice of denial.* The petitioner shall be notified of the reasons for the denial and of the right to appeal the denial of the petition under 8 CFR part 103. The petition may be denied if it is determined that the statements on the registration or petition were inaccurate. The petition will be denied if it is determined that the statements on the registration or petition were fraudulent or misrepresented a material fact. A petition also may be denied if it is not based on a valid registration submitted by the petitioner (or its designated representative), or a successor in interest, for the beneficiary named in the petition. A valid registration must represent a legitimate job offer. USCIS also may deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the original petition. USCIS will not deny such an amended or new petition solely on the basis of a different proffered wage if that wage does not correspond to a lower OES wage level than the wage level on which the registration or petition selection, as applicable, was based. There is no appeal from a decision to deny an extension of stay to the alien.

(11) \* \* \*

(iii) \* \* \*

(A) \* \* \*

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

inaccurate, fraudulent, or misrepresented a material fact; or

(3) The petitioner, or a related entity, filed a new or amended petition on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the registration, or the original petition if the registration process was

suspended. USCIS will not revoke approval of such an amended or new petition solely on the basis of a different proffered wage if that wage does not correspond to a lower OES wage level than the wage level on which the registration or petition selection, as applicable, was based; or

\* \* \* \* \*  
 (24) \* \* \* (i) The requirement to submit a registration for an H-1B cap-subject petition and the selection process based on properly submitted registrations under paragraph (h)(8)(iii) of this section are intended to be severable from paragraph (h)(8)(iv) of

this section. In the event paragraph (h)(8)(iii) is not implemented, or in the event that paragraph (h)(8)(iv) is not implemented, DHS intends that either of those provisions be implemented as an independent rule, without prejudice to petitioners in the United States under this section, as consistent with law.

\* \* \* \* \*

**Ian J. Brekke,**

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

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