

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 214

[CIS No. 2609–17; DHS Docket No. USCIS–2008–0014]

RIN 1615–AB71

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

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (“DHS” or “the Department”) is proposing to amend its regulations governing petitions filed on behalf of H–1B beneficiaries who may be counted toward the 65,000 visa cap established under the Immigration and Nationality Act (“H–1B regular cap”) or beneficiaries with advanced degrees from U.S. institutions of higher education who are eligible for an exemption from the regular cap (“advanced degree exemption”). The proposed amendments would require petitioners seeking to file H–1B petitions subject to the regular cap, including those eligible for the advanced degree exemption, to first electronically register with U.S. Citizenship and Immigration Services (“USCIS”) during a designated registration period. USCIS would select from among the registrations timely received a sufficient number projected as needed to meet the applicable H–1B allocations. DHS also proposes to change the process by which USCIS counts H–1B registrations (or petitions, if the registration requirement is suspended), by first selecting registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption. USCIS would then select from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption. Changing the order in which USCIS counts these separate allocations would likely increase the number of beneficiaries with a master’s or higher degree from a U.S. institution of higher education to be selected for further processing under the H–1B allocations.

**DATES:** Written comments must be received on or before January 2, 2019.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the website instructions for submitting comments.

- *Mail:* You may submit written comments directly to USCIS by mail by sending correspondence to Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS–2008–0014 on your correspondence.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Buten, Adjudications (Policy) Officer, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Suite 1100, Washington, DC 20529–2140; Telephone (202) 631–3555.

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#### I. Public Participation

All interested parties are invited to participate in this rulemaking by submitting written data, views,

comments and/or arguments on all aspects of this proposed rule. DHS and USCIS also invite comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to USCIS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

*Instructions:* All submissions must include the agency name and DHS Docket No. USCIS–2008–0014 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, including any personal information provided. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information providing comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

#### II. Executive Summary

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

The H–1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations, defined by statute as occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor’s or higher degree in the specific specialty, or its equivalent. See INA sections 101(a)(15)(H)(i)(b) and 214(i); 8 U.S.C 1101(a)(15)(H)(i)(b) and 1184(i). A key goal of the program is to help U.S. employers obtain the employees they need to meet their business needs and thus remain competitive in the global marketplace.<sup>1</sup>

<sup>1</sup> See 144 Cong. Rec. S12741, S12748 (daily ed. Oct. 21, 1998) (statement of Sen. Spencer Abraham) (explaining, in discussing the goals of the H–1B provisions in the American Competitiveness and Workforce Improvement Act that the continued competitiveness of the U.S. high-technology sector is “crucial for [U.S.] economic well-being as a

Congress intended for the program to, among other things, supplement the U.S. workforce that lacked certain types of skilled workers, and placed a limit on the number of workers that generally may be issued an initial H-1B visa or otherwise provided H-1B status each year. Congressional deliberations ahead of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) describe the H-1B program's purpose as intended to both fill shortages and create opportunities for innovation and expansion.<sup>2</sup> Congress set the current annual cap for the H-1B visa category at 65,000 ("regular cap").<sup>3</sup> Congress has also set up several cap exemptions. For example, workers who will be employed at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965, as amended) or a related or affiliated nonprofit entity and workers who will be employed at a nonprofit or governmental research organization are exempt from the cap. These exemptions are unlimited. *See* INA sec. 214(g)(5)(A)–(B), 8 U.S.C. 1184(g)(5)(A)–(B). Congress also provides an exemption for 20,000 new H-1B visas each fiscal year for foreign nationals who hold U.S. master's or higher degrees ("advanced degree exemption").<sup>4</sup>

On April 18, 2017, the President issued Executive Order 13788, *Buy American and Hire American*, instructing DHS to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system." Executive Order 13788, *Buy American and Hire American*, 82 FR 18837, sec. 5 (Apr. 18, 2017) ("E.O. 13788"). E.O. 13788 specifically mentioned the H-1B program and directed DHS and other agencies to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." *See id.* at sec. 5(b).

nation, and for increased economic opportunity for American workers").

<sup>2</sup> *See id.* at S12749 (statement of Sen. Abraham) ("[T]his issue [of increasing H-1B visas is not only about shortages, it is about opportunities for innovation and expansion."]

<sup>3</sup> Up to 6,800 visas are set aside from the 65,000 each fiscal year for the H-1B1 visa program under terms of the legislation implementing the U.S.-Chile and U.S.-Singapore free trade agreements. *See* INA secs. 101(a)(15)(H)(i)(b1), 214(g)(8), 8 U.S.C. 1101(a)(15)(H)(i)(b1), 1184(g)(8).

<sup>4</sup> *See* INA section 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C). In this rule, the 20,000 exemptions under section 214(g)(5)(C) from the H-1B regular cap also may be referred to as the "advanced degree exemption allocation" or "advanced degree exemption numerical limitation."

In addition, as part of ongoing review of regulations under Executive Orders 13563 *Improving Regulation and Regulatory Review*, 76 FR 3821 (Jan. 21, 2011) and 13771 *Reducing Regulation and Controlling Regulatory Costs*, 82 FR 9339 (Feb. 3, 2017) and the review of agency's compliance with the Paperwork Reduction Act, USCIS determined that it could introduce a cost-saving, innovative solution to facilitate the filing of H-1B cap-subject petitions and selection of beneficiaries, by creating a streamlined process for the identification and selection of H-1B beneficiaries for whom H-1B cap subject petitions would be filed. This H-1B registration process would reduce the cost, paperwork burden, and complexity of participation in the H-1B program because it would alleviate the burden of preparing and filing H-1B cap-subject petitions, unless the petitioner's registration for a specific beneficiary has been selected under the regular cap or advanced degree exemption.

DHS is proposing to require petitioners seeking to file H-1B cap-subject petitions, which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to first electronically register with USCIS. Under the proposal, DHS would establish a designated registration period prior to the date that petitions could be filed. At the end of the initial registration period, if USCIS determines that it has received more registrations than needed to reach the H-1B regular cap during the initial registration period for the new fiscal year, USCIS would close the registration period for the H-1B regular cap and would randomly select a sufficient number of electronic registrations projected as needed to meet the cap. H-1B cap-subject petitions could only be filed on behalf of a beneficiary whose registration was selected by USCIS.

Under this proposed rule, if USCIS determines that it has received fewer registrations than needed to meet the projected number of petitions to reach the H-1B regular cap during the initial registration period for the new fiscal year, USCIS would notify all registered petitioners that all registrations have been selected and they are eligible to file H-1B cap-subject petitions on behalf of those beneficiaries named in the registration during the applicable filing period. USCIS would notify the registered petitioner of the applicable filing period and where to file the H-1B cap-subject petition. In this scenario, USCIS would continue to accept and select registrations until a sufficient

number of registrations have been received to meet the H-1B regular cap. These registrations would be selected on a rolling basis until a sufficient number of registrations have been received (e.g., at the end of each day, USCIS would review the number of registrations received during that day and determine if sufficient numbers remain available to select all of the registrations filed during that day). Once USCIS has received more registrations than needed to meet the projected number of petitions to reach the H-1B regular cap, USCIS would close the registration period for the H-1B regular cap and may randomly select a sufficient number of electronic registrations from the final registration date to meet the regular H-1B cap.

Unselected registrations would remain on reserve in the system for the applicable fiscal year. If USCIS determines that it needs to increase the number of registrations projected to meet the regular cap or advanced degree exemption, and select additional registrations, USCIS would select from among the registrations that are on reserve a sufficient number to meet the cap or advanced degree exemption or re-open the registration period if additional registrations are needed to meet the new projected amount. If the registration period will be re-opened, USCIS would announce the start of the re-opened registration period on its website before the start of the re-opened registration period. Once a sufficient number of registrations have been received to meet the new projected amount to meet the regular cap or advanced degree exemption, as applicable, USCIS would close the re-opened registration period, identify the new final registration date, and, if needed, may randomly select from among registrations received on the new final registration date a sufficient number of registrations projected to meet the regular cap or advanced degree exemption, as applicable.

DHS proposes this new process to reduce costs for petitioners who currently spend significant time and resources preparing petitions and supporting documentation for each intended beneficiary without knowing whether such petitions will be accepted for processing by USCIS due to the statutory allocations. The proposed mandatory registration process also would help to alleviate administrative burdens on USCIS service centers that process H-1B petitions since USCIS would no longer need to physically receive and handle hundreds of thousands of H-1B petitions (and the accompanying supporting documentation) before conducting the

random selection process. The requirement to register electronically is in line with the OMB consolidated plan reforming the Executive Branch, which favorably references the USCIS e-processing initiative.<sup>5</sup> Finally, H-1B petitioners are accustomed to filing electronically given that the Department of Labor (DOL) generally has required the electronic filing of Labor Condition Applications (LCAs) in support of H-1B petitions since 2005.<sup>6</sup> USCIS is not proposing a fee for registration at this time.

Consistent with E.O. 13788's direction to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries," DHS is also proposing to amend its regulations establishing the sequence for considering petitions filed on behalf of H-1B beneficiaries who may be counted under the H-1B regular cap or under the H-1B advanced degree exemption. Specifically, DHS proposes to amend the process by which USCIS selects H-1B petitions toward the projected number of petitions needed to reach the regular cap and advanced degree exemption. The proposed amendment would change the order in which petitions are selected.

Currently, in years when a sufficient number of petitions needed to reach the

regular cap or advanced degree exemption are received during the first five business days that H-1B cap-subject petitions may be filed, USCIS selects qualifying petitions towards the H-1B advanced degree exemption first. H-1B cap-subject petitions eligible for the advanced degree exemption, but not selected for the advanced degree exemption, are then included in the H-1B regular cap random selection process. Under the proposed amendments, USCIS would select all registrations toward the projected number of petitions needed to meet the regular cap first until the regular cap is reached. Once the projected number of registrations needed to meet the regular cap is reached, USCIS would then select registrations that are eligible for the advanced degree exemption until the projected number of registrations needed to meet the advanced degree exemption is reached. USCIS is proposing to count all registrations toward the H-1B regular cap projections first, even in years when a random selection process at the end of the initial registration period may not be necessary. In such years, USCIS would continue to count all registrations toward the H-1B regular cap projections until such time as the projected number of registrations needed to reach the H-1B regular cap is met.

Changing the order in which USCIS selects beneficiaries under these separate allocations will likely increase the total number of petitions selected under the regular cap for H-1B beneficiaries who possess a master's or higher degree from a U.S. institution of higher education each fiscal year, particularly in years of high demand for new H-1B visas when USCIS is likely to receive a greater number of petitions for beneficiaries who qualify for the advanced degree exemption. Conversely, this process will likely decrease the total number of petitions selected for H-1B beneficiaries with less than a master's degree from a U.S. institution of higher education and those with master's or higher degrees from foreign institutions of higher education. DHS believes that amending its regulations in this manner would increase the chances that beneficiaries with a master's degree or higher from a U.S. institution of higher education would be selected under the H-1B regular cap, which is generally consistent with congressional intent in enacting section 214(g)(5)(C) to prioritize these workers and the administration's goal to improve policies such that H-1B visas are more

likely to be awarded to the most-skilled and highest paid beneficiaries.

### B. Legal Authority

The Secretary of Homeland Security's authority for these proposed 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 the proposed rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, as well as section 102 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations. Further authority for the regulatory amendments in the proposed rule is found in:

- Section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the terms and conditions of the admission of nonimmigrants;
- Section 214(c) of the INA, 8 U.S.C. 1184(c), which, *inter alia*, authorizes the Secretary to prescribe how an importing employer may petition for an H nonimmigrant worker, and the information that an importing employer must provide in the petition; and
- Section 214(g) of the INA, 8 U.S.C. 1184(g), which, *inter alia*, prescribes the H-1B and H-2B numerical limitations, various exceptions to those limitations, and criteria concerning the order of processing H-1B and H-2B petitions.

### C. Summary of Costs and Benefits

DHS is proposing to amend its regulations governing the process for petitions filed on behalf of cap-subject H-1B workers. Specifically, DHS is proposing to add a registration requirement for petitioners seeking to file H-1B cap-subject petitions on behalf of foreign workers. Additionally, DHS is proposing to change the order in which H-1B cap-subject registrations would be selected towards the applicable projections needed to meet the annual H-1B regular cap and advanced degree exemption in order to increase the odds for selection for H-1B beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education.

All petitioners seeking to file an H-1B cap-subject petition would have to submit a registration. However, under the proposed process, only those whose registrations are selected (termed

<sup>5</sup> On March 13, 2017, President Trump signed Executive Order 13781, entitled Comprehensive Plan for Reorganizing the Executive Branch, 82 FR 13959 (Mar 16, 2017). The order instructs the Director of the Office of Management and Budget (OMB) to propose a plan to improve the efficiency, effectiveness, and accountability of the Executive Branch. The resulting June 2018 OMB Report, "Delivering Government Solutions in the 21st Century" recognizes that an overarching source of government inefficiency is the outdated reliance on paper-based processes and proposes that Federal agencies transition to a fully electronic environment. Office of Management and Budget, Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations, available at: <https://www.whitehouse.gov/wp-content/uploads/2018/06/Government-Reform-and-Reorg-Plan.pdf>; see *id.* at 101-02 (citing USCIS' e-processing initiative as an example of agency efforts that conform to the President's directive). The report notes that Federal agencies collectively spend billions of dollars on paper management, including the processing, moving, and maintaining of large volumes of paper records. The report proposes transitioning from paper-based processes to a fully electronic environment across the government.

<sup>6</sup> DOL established elective use of electronic filing of LCAs in 2001. See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas; Implementation of Electronic Filing, 66 FR 63298 (Dec. 5, 2001) (final rule) made electronic filing of LCAs mandatory in 2005. See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, and Labor Attestation Requirements for Employers Using Nonimmigrants on H-1B1 Visas in Specialty Occupations; Filing Procedures, 70 FR 72556, (Dec. 5, 2005) ( ) (final rule).

“selected registrant”<sup>7</sup> for purposes of this analysis) would be eligible to file an H-1B cap-subject petition for those selected registrations and during the associated filing period. Therefore, as selected registrants under the proposed registration requirement, selected petitioners would incur additional opportunity costs of time to complete the electronic registration relative to the costs of completing and filing the associated H-1B petition, the latter costs being unchanged from the current H-1B petitioning process. Conversely, those who complete registrations that are unselected because of excess demand currently (termed “unselected registrant” for purposes of this analysis) would experience cost savings relative to the current process, as they would no longer have to complete an entire H-1B cap-subject petition that ultimately does not get selected for USCIS processing and adjudication as done by current unselected petitioners.

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

Under the proposed requirement, the opportunity cost of time associated with required registration would be a cost to all petitioners (selected and unselected), but those whose registrations are not selected would be relieved from the opportunity cost associated with completing and mailing an entire H-1B cap-subject petition. Therefore, DHS estimates proposed costs of this rule to selected petitioners for completing an H-1B cap-subject petition as the sum of new registration costs and current costs. DHS estimates that the costs of this

proposed rule to unselected petitioners would only result from the estimated opportunity costs associated with the registration requirement. Overall, unselected petitioners would experience a cost savings relative to the current H-1B cap-subject petitioning process; DHS estimates these cost savings by subtracting new registration costs from current costs of preparing an H-1B cap-subject petition. These estimated quantitative cost savings would be a benefit that would accrue to only those with registrations that were not selected.

Currently, for selected petitioners the total costs to complete an entire H-1B cap-subject petition ranges from \$128.4 million to \$161.1 million, depending on who petitioners use to prepare a petition. These current costs to complete and file an H-1B cap-subject petition are based on a 5 year petition volume average and may differ across sets of fiscal years. Current costs are not changing for selected petitioners as a result of this proposed registration requirement. Rather, this proposed registration requirement would add a new opportunity cost of time to selected petitioners who will continue to face current H-1B cap-subject petition costs. DHS estimates the added opportunity cost of time to selected petitioners under this proposed registration requirement would range from \$6.2 million to \$10.3 million, again depending on who petitioners use to submit a registration and prepare a petition. Therefore, under the proposed registration requirement, DHS estimates an adjusted total cost to complete an entire H-1B cap-subject petition would range from \$134.7 million to \$171.4 million. Since these petitioners already file Form I-129, only the registration costs of \$6.2 million to \$10.3 million are considered as new costs.

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

submit a registration. Therefore, the difference between current costs and proposed costs for unselected petitioners would represent a cost savings ranging from \$47.3 million to \$75.5 million, again depending on who petitioners use to submit the registration.

The government would also benefit from the proposed registration provision by no longer having to receive, handle and return large numbers of petitions that are currently rejected because of excess demand (unselected petitions). These activities would save DHS an estimated \$1.6 million annually. USCIS would, however, have to expend a total of \$279,149 in the development of the registration website in the first year after this proposed rule would become effective. In subsequent years, DHS would incur labor and maintenance costs of \$200,000 per year. Over ten years, USCIS would incur maintenance costs of \$2,079,149, resulting in an annualized amount of \$225,269 discounted at 7 percent and \$215,279 discounted at 3 percent, for that timeframe. Discounted over 10 years, this provision would result in costs to USCIS totaling \$1.8 million based on a discount rate of 3 percent and \$1.6 million based on a discount rate of 7 percent.

The net quantitative impact of this proposed registration requirement is an aggregate cost savings to petitioners and to government ranging from \$42.4 million to \$66.5 million annually. Using lower bound figures, the net quantitative impact of this proposed registration requirement is cost savings of \$424.8 million over ten years. Discounted over 10 years, these cost savings would be \$373.2 million based on a discount rate of 3 percent and \$319.2 million based on a discount rate of 7 percent. Using upper bound figures, the net quantitative impact of this proposed registration requirement is cost savings of \$666.4 million over ten years. Discounted over ten years, these cost savings would be \$585.5 million based on a discount rate of 3 percent and \$500.8 million based on a discount rate of 7 percent.

DHS notes that these overall cost savings result only in years when the demand for registrations and the subsequently filed petitions exceeds the number of available visas needed to meet the regular cap and the advanced degree exemption. For years where DHS has demand that is less than the number of available visas, this proposed registration requirement would result in increased costs. For this proposed rule to result in net quantitative cost savings, at least 110,182 petitions (registrations

<sup>7</sup> DHS notes that one entity may submit multiple registrations which could result in a mix of selected and unselected outcomes. For the purpose of this analysis, the terms “selected registrant” and “unselected registrant” refer to the originator of a submission based on its outcome and should not be deemed a unilateral label for a single entity. Using this terminology it is possible for a single entity to experience impacts simultaneously as a selected registrant and as an unselected registrant.

and subsequently filed petitions under the proposed rule) would need to be received by USCIS based on lower bound cost estimates. For upper bound cost estimates, USCIS would need to receive at least 111,137 registrations and subsequently filed petitions for this

proposed rule to result in net quantitative cost savings.

The proposed provision to change the petition selection process would result in an estimated increase in the number of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education selected by 16 percent (or 5,340 workers). This

increase could result in greater numbers of highly educated workers with degrees from U.S. institutions of higher education entering the U.S. workforce under the H-1B program.

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

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS

| Current and proposed provisions  | Expected cost of the proposed provision   | Expected benefit of the proposed provision  |
|--|---|---|
| <p>Currently, all petitioners who file on behalf of an H-1B worker must complete and file Form I-129 along with a certified DOL Labor Condition Application (LCA). For selected petitioners, the total current cost to file and complete an entire H-1B cap-subject petition ranges from \$128.4 million to \$161.1 million. For unselected petitioners, the total current cost is \$53.5 million to \$85.6 million.</p> <p>DHS is proposing to require all petitioners who seek to hire a cap-subject H-1B worker to register for each prospective H-1B worker for whom they seek to file a cap-subject H-1B petition. Only those petitioners whose registrations are selected may proceed to complete and file an H-1B cap-subject petition.</p> <p>Under the current H-1B selection process, if the regular cap and advanced degree exemption are reached in the first five business days that cap-subject petitions can be filed, USCIS randomly selects sufficient H-1B petitions to reach the H-1B 20,000 advanced degree exemption first. Then, USCIS randomly selects sufficient H-1B petitions from the remaining pool of beneficiaries, including those not selected in the advanced degree exemption to reach the H-1B 65,000 regular cap limit. USCIS rejects all remaining unselected H-1B cap-subject petitions.</p> <p>The proposed process would reverse the selection process so that USCIS would randomly select registrations for the H-1B regular cap first, including registrations for petitions eligible for the H-1B advanced degree exemption. Then USCIS would randomly select registrations for the H-1B advanced degree exemption.</p> | <p>Petitioners—</p> <ul style="list-style-type: none"> <li>For current selected petitioners, the proposed rule would add an additional annual opportunity cost of time ranging from \$6.2 million to \$10.3 million, depending on who the petitioner uses to submit the registration. Therefore, the total costs of registering and completing and filing H-1B cap-subject petitions would range from \$134.7 million to \$171.4 million to this population annually, depending on the type of petition preparer.</li> <li>For current unselected petitioners they would experience an overall cost savings, though the proposed rule would add an opportunity cost of time ranging from \$6.2 million to \$10.1 million to this population annually, depending on who the petitioner uses to submit the registration.</li> </ul> <p>Government—</p> <ul style="list-style-type: none"> <li>The proposed rule would cost the government \$279,149 in the first year to develop the registration Web site. In subsequent years, USCIS would incur annual labor and maintenance costs of \$200,000.</li> </ul> <p>Petitioners—</p> <ul style="list-style-type: none"> <li>The proposed selection process could decrease the number of cap-subject H-1B petitions for beneficiaries with bachelor's degrees, advanced degrees from U.S. for-profit universities, or foreign advanced degrees by up to 5,340 workers. This potential decrease could result in some higher labor costs to petitioners assuming that beneficiaries with bachelor's degrees, advanced degrees from U.S. for-profit universities or foreign advanced degrees are paid less than and replaced by beneficiaries with master's degrees from U.S. institutions of higher education.</li> <li>DHS does not anticipate, as a result of the new selection process, petitioning employers would suffer economic harm from the decreased probability of selecting H-1B petitions eligible only under regular cap.</li> </ul> | <p>Petitioners—</p> <ul style="list-style-type: none"> <li>Petitioners whose registrations are not selected would have cost savings that would range from \$47.3 million to \$75.5 million from no longer having to complete and file H-1B cap-subject petitions along with mailing costs despite new opportunity cost of time to submit registration</li> </ul> <p>Government—</p> <ul style="list-style-type: none"> <li>USCIS would save \$1.6 million annually in processing and return shipping costs, as fewer petitions will be filed with USCIS based on registrations that are not selected.</li> </ul> <p>Petitioners and Government—</p> <ul style="list-style-type: none"> <li>The proposed selection process could increase the number of cap-subject H-1B petitions that are selected for beneficiaries with master's degrees or higher from U.S. institutions of higher education by an estimated 16 percent (or 5,340 workers) annually. DHS believes the increase in the number of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education would likely result in more highly educated workers entering the U.S. workforce.</li> </ul> |

This proposed rule would also allow for the H-1B cap and advanced degree exemption selections to take place in the event that the registration system is inoperable for any reason and needs to be suspended. If temporary suspension of the registration system is necessary, then the costs and benefits described in this analysis resulting from registration for the petitioners and government would not apply during any period of temporary suspension. However, the

proposed selection reversal process would still take place and is anticipated to yield a higher proportion of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education being selected.

### III. Background

#### A. The 2011 Proposed Registration Rule

On March 3, 2011, DHS published a Notice of Proposed Rulemaking (NPRM)

titled, "Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations" (the "2011 NPRM"). 76 FR 11686 (Mar. 3, 2011). Similar to this proposed rule, in the 2011 NPRM DHS proposed to require employers seeking to petition for H-1B workers subject to the cap to first electronically register with USCIS during a designated registration period. DHS sought public comments for a 60-

day period after the 2011 NPRM published, and received a total of 60 comments but never finalized the rule. Due to the passage of time, DHS, through this proposed rule, is superseding and withdrawing the 2011 NPRM. DHS invites those who commented on the 2011 NPRM to comment on this NPRM.

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

A U.S. employer seeking to temporarily employ a foreign national in the United States as an H-1B nonimmigrant may file a petition to obtain H-1B nonimmigrant classification on behalf of the individual. Before filing an H-1B petition, the petitioner (U.S. employer or agent) must first file a Labor Condition Application (LCA) with the U.S. Department of Labor (DOL) that covers the proposed dates of H-1B employment.<sup>8</sup> See INA sections 101(a)(15)(H)(i)(b) and 212(n), 8 U.S.C. 1101(a)(15)(H)(i)(b) and 1182(n); 8 CFR 214.2(h)(1)(ii)(B) and (h)(4)(i)(B)(1). After DOL certifies the LCA, the petitioner may then file an H-1B petition with USCIS on Form I-129, Petition for a Nonimmigrant Worker, seeking approval of H-1B classification for the worker (or "beneficiary"). Once USCIS accepts a properly filed H-1B petition, it adjudicates the petition to determine eligibility for the benefit sought. USCIS may issue a written request for additional information or evidence, if the evidence in the record is insufficient to establish eligibility, before rendering a written decision to

approve or deny the petition. See 8 CFR 103.2(b)(8) and 214.2(h)(9) and (10). If the H-1B petition is approved, H-1B classification may be authorized for a period of up to three years but may not exceed the validity period of the LCA.<sup>9</sup> See 8 CFR 214.2(h)(9)(iii)(A)(1). Subsequently, the original petitioner or a different petitioner may petition USCIS to authorize continued or new employment of the worker as an H-1B nonimmigrant. Such a renewal petition may include a request to extend the worker's stay in H-1B status, and if the worker is in the United States and (with limited exceptions) maintaining H-1B status at the time the petition is filed, the petition and extension of stay request may be approved. See 8 CFR 214.1(c)(1) and (4) and 214.2(h)(2)(i)(D) and (h)(14) and (15).

An extension of stay generally may only be granted for a period of up to three years, and the total period of the H-1B worker's admission generally cannot exceed six years. See INA 214(g)(4), 8 U.S.C. 1184(g)(4); 8 CFR 214.2(h)(15)(ii)(B)(1). As with initial H-1B petitions, the petitioner must first obtain a certified LCA from DOL that covers the location and proposed dates of H-1B employment before filing the petition extension. At the end of the six-year period, with limited exceptions,<sup>10</sup> the H-1B worker must change to another nonimmigrant status, seek permanent resident status, or depart the United States. The worker may be eligible for a new six-year maximum period of stay in H-1B nonimmigrant status if he or she resides and is physically present outside the United States for the immediate prior year. See 8 CFR 214.2(h)(13)(iii)(A).

#### C. H-1B Numerical Cap and Exemptions

As noted, Congress has established limits on the number of workers who may be granted initial H-1B nonimmigrant visas or status each fiscal year (commonly known as the "cap"). See INA section 214(g), 8 U.S.C. 1184(g). The total number of workers who may be granted initial H-1B nonimmigrant status during any fiscal year currently may not exceed 65,000. See INA section 214(g), 8 U.S.C. 1184(g). However, some petitions do not count towards the 65,000 cap, including petitions filed on

behalf of workers who: (1) Are employed or offered employment at an U.S. institution of higher education, or a related or affiliated nonprofit entity; (2) are employed or offered employment at a nonprofit research organization or a governmental research organization; or (3) have earned a master's or higher degree from a U.S. institution of higher education.<sup>11</sup> See INA section 214(g)(5), 8 U.S.C. 1184(g)(5). The annual exemption from the 65,000 cap for H-1B workers for those who have earned a qualifying U.S. master's or higher degree may not exceed 20,000 workers. See INA section 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C). The exemption under INA section 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C), is sometimes referred to as the "H-1B master's cap" because it is limited to 20,000 workers per year. Additionally, H-1B workers who have been previously counted against the cap or advanced degree exemption, and who are not eligible for the full six-year maximum period of stay, are generally considered to be exempt from the cap. See INA 214(g)(7), 8 U.S.C. 1184(g)(7). As such, H-1B petitions filed on behalf of such workers—including petitions seeking extensions of stay, new employer petitions, amended petitions, petitions for concurrent employment with a second employer, or those seeking to recapture time from a prior admission period—are generally exempt from the cap. See 8 CFR 214.2(h)(8)(ii)(A). The spouses and minor children of H-1B nonimmigrants, who hold H-4 nonimmigrant status, also do not count towards the cap. See INA 214(g)(2), 8 U.S.C. 1184(g)(2); 8 CFR 214.2(h)(8)(ii)(A).

#### D. Current Selection Process

Under the current H-1B cap filing and selection process, USCIS monitors the number of H-1B petitions it receives at each service center in order to manage the H-1B allocations. The first day on which petitioners may file H-1B petitions can be as early as six months ahead of the actual date of need (commonly referred to as the employment start date). See 8 CFR 214.2(h)(9)(i)(B). For example, a U.S. employer seeking an H-1B worker for a job beginning October 1 (the first day of the next fiscal year) can file an H-1B petition no earlier than April 1 of the current fiscal year. Thus, an H-1B employer requesting a worker for the

<sup>8</sup> Petitions for H-1B visas relating to Department of Defense cooperative research, development, and coproduction projects do not require petitioners to file a Labor Condition Application. See 8 CFR 214.2(h)(4)(vi).

<sup>9</sup> H-1B classification relating to Department of Defense cooperative research, development, and coproduction projects may be authorized for up to 5 years, and they may be renewed for a maximum cumulative period of 10 years. See Public Law 101-649, section 222(a)(2), 104 Stat. 4978 (Nov. 29, 1990); 8 CFR 214.2(h)(9)(iii)(A)(2).

<sup>10</sup> See 8 CFR 214.2(h)(13)(iii)(D) and (E), (h)(13)(v).

<sup>11</sup> For purposes of this H-1B numerical cap exemption, the term "institution of higher education" is given the same meaning as that set forth in section 101(a) of the Higher Education Act of 1965, Public Law 89-329, 79 Stat. 1224 (1965), as amended (codified at 20 U.S.C. 1001(a) ("Higher Education Act")).

first day of fiscal year (FY) 2020, October 1, 2019, would be allowed to file an H-1B petition as early as April 1, 2019. Because of this, USCIS routinely receives hundreds of thousands of H-1B petitions in early April each year and this period is informally recognized as an H-1B “cap season.” Currently, USCIS monitors the number of H-1B cap-subject petitions received and notifies the public of the date that USCIS received a sufficient number of petitions needed to reach the numerical limit (the “final receipt date”). See 8 CFR 214.2(h)(8)(ii)(B). USCIS then may randomly select from the cap-subject petitions received on the final receipt date the projected number of petitions needed to reach the limit. If the final receipt date falls on any of the first five business days on which cap-subject petitions may be filed, USCIS randomly selects the projected number of petitions from among all petitions received on any of those five business days. *Id.*

USCIS makes projections on the number of petitions it needs to select to meet the statutory H-1B allocations by taking into account historical data related to approvals, denials, revocations, and other relevant factors. See 8 CFR 214.2(h)(8)(ii)(B). Based on these projections, USCIS typically selects a quantity of petitions exceeding by approximately 10 to 15 percent the regular cap number<sup>12</sup> and approximately 5 to 10 percent more than the 20,000 for the advanced degree exemption, although the exact percentage and number of petitions may vary depending on the applicable projections for a particular fiscal year.

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

USCIS rejects all remaining H-1B cap-subject petitions not selected during one of the random selections. USCIS also rejects all H-1B cap-subject petitions for that fiscal year that are received after the final receipt date. See 8 CFR 214.2(h)(8)(ii)(D).

If a sufficient number of petitions needed to reach the H-1B allocations are not received during the first five days that cap-subject petitions may be filed, USCIS currently counts the regular cap and the advanced degree exemption separately. Those petitions filed for beneficiaries with a master's or higher degree from a U.S. institution of higher education and eligible for the advanced degree exemption are counted toward the projections needed to reach the advanced degree exemption allocation, and all other cap-subject H-1B petitions are counted toward the regular cap. Consistent with 8 CFR 214.2(h)(8)(ii)(B), once USCIS receives a sufficient number of petitions to reach the regular cap or advanced degree exemption, USCIS will identify the final receipt date and may randomly select a number of petitions needed to reach the projected number from among the petitions received on the applicable final receipt date. If the final receipt date for the advanced degree exemption is reached before the final receipt date for the regular cap, then unselected petitions eligible for the advanced degree exemption would be counted toward the regular cap projections until the regular cap is met. If the final receipt date for the regular cap is reached before the advanced degree exemption numerical limitation, then USCIS would continue to receive cap-subject petitions eligible for the advanced degree exemption until such time as USCIS receives a sufficient number of petitions to reach the advanced degree exemption projections.

#### *E. Challenges With the Current Random Selection Process*

USCIS has found that when it receives a significant number of H-1B petitions (such as 100,000 or more) within the first few days of the H-1B filing period, it is difficult to handle the volume of petitions received. USCIS has received well over 100,000 cap-subject petitions within the first few days of the H-1B filing period for the past five fiscal years (FYs). Table 2 shows the number of H-1B cap-subject petitions USCIS received during the first five business days of the H-1B filing period in the FY in which the beneficiary was selected.

TABLE 2—TOTAL NUMBER OF H-1B CAP-SUBJECT PETITIONS

| Fiscal year in which beneficiary was selected | Number of H-1B cap-subject petitions received |
|---|---|
| 2017 .....                                    | 198,460                                       |
| 2016 .....                                    | 236,444                                       |
| 2015 .....                                    | 232,973                                       |
| 2014 .....                                    | 172,581                                       |
| 2013 .....                                    | 124,130                                       |

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

Further, after expending significant USCIS resources to ensure proper intake of these petitions, USCIS must reject and return those cap-subject petitions (and associated fees) that are not randomly selected. H-1B petitioners may also incur significant expenses preparing and filing petitions that are ultimately not selected and are rejected by USCIS under the current filing and selection process for cap-subject petitions.

This proposed rule is designed to alleviate many of the difficulties and inefficiencies stemming from the current H-1B cap-subject selection process and to create a more streamlined filing and selection process for cap-subject petitions. Requiring petitioners to electronically register before filing H-1B cap-subject petitions, and randomly selecting these registrations to determine which petitioners may file an H-1B cap-subject petition in years of excess demand for H-1B cap numbers, would allow USCIS to more efficiently administer the regular cap and advanced degree exemption numerical limitation. Implementing an internet-based electronic H-1B cap registration process would reduce the burden on USCIS since it would no longer need to physically receive, store, and process hundreds of thousands of cap-subject H-1B petitions, which in some cases contain hundreds of pages of supporting evidence, prior to conducting the random selection process. DHS also believes that requiring cap-subject petitioners to electronically register for selection would help to avoid repeating many of the same issues created by the current paper-based petition selection process, namely the physical receipt, processing, and storage of possibly hundreds of thousands of paper-based registration requests.

Some of the front-end processing activities associated with handling this exceptionally high volume of petitions include, but are not limited to, opening and sorting mail, manually assigning

<sup>12</sup> Congress set the current annual cap for the H-1B category at 65,000. Up to 6,800 visas are set aside from the 65,000 each fiscal year for the H-1B1 program under the terms of the legislation implementing the U.S.-Chile and U.S.-Singapore free trade agreements. Unused visas in this group become available for H-1B use for the next fiscal year. INA section 214(g)(8), 8 U.S.C. 1184(g)(8).



unique identifier numbers to each petition for random selection, and returning the unselected and improperly filed petitions along with associated fees. USCIS also must store the voluminous petition filings while front-end processing is completed. USCIS has a fixed amount of storage at each service center and the current process causes a massive strain on USCIS operations during the filing period due to the processing and storage of hundreds of thousands of full petition filings.

Furthermore, preparing and mailing H-1B cap-subject petitions, with the required filing fees, can be burdensome and costly for petitioners, particularly if the petition must ultimately be returned because the numerical limit was reached and the petition was not selected in the random selection process. Requiring petitioners to file complete H-1B petitions before the random selection process is not the most efficient way to administer the random selection process. The current process could also have the unintended effect of deterring petitions by employers with a bona fide need, but who are reluctant to file given the high-cost involved in filing the petition versus the low likelihood of selection.

During years of high demand for H-1B workers, including in recent years, the H-1B regular cap and advanced degree exemption allocation have been reached within the first few days of the opening of the H-1B cap filing period. For example, for FY 2017, USCIS received 198,460 H-1B petitions during the first five business days that cap-subject petitions could be filed, which began April 3, and ended on April 7, 2017, and a sufficient number of petitions were received to meet the projections for both the H-1B regular cap and the advanced degree exemption allocations. Although fewer petitions were received for FY 2017 than FY 2016 during the first five business days that cap-subject petitions could be filed, the number of petitions received in FY 2017 was still much greater than the total projected amount needed to fill the regular cap and advanced degree exemption (85,000+x percent).

DHS proposes to alleviate administrative burdens and the current uncertainty faced by petitioners who must prepare and submit complete H-1B petitions for all intended beneficiaries. Petitioners often expend significant time, money, and resources to prepare the H-1B petition for submission. Under the current process, these resources and costs are expended for every H-1B worker the employer intends to hire, regardless of whether the petition will ultimately be selected

toward the H-1B regular cap or advanced degree exemption allocation and adjudicated by USCIS, or rejected because the H-1B allocations were reached and the petition was not randomly selected.

As discussed in further detail in the Executive Orders 12866 and 13653 sections of this rule, the proposed rule would reduce the costs for employers whose registrations were not selected since they would no longer be required to file a complete H-1B cap-subject petition in order to be selected in the random selection process. These employers would only have to electronically register, which requires fewer resources and less time. However, the proposed rule would add some cost to those employers whose registrations are selected by imposing costs in resources and time to complete the electronic registration, as well as the H-1B cap-subject petition. The costs and cost-savings are fully discussed in the Executive Orders 12866 and 13653 sections of this rule.

#### **IV. Proposed Changes to 8 CFR 214.2(h)(8)**

##### *A. Proposed H-1B Registration Program*

DHS proposes to establish a mandatory internet-based electronic registration process for petitioners seeking to file H-1B petitions for beneficiaries that may be counted under the regular cap or advanced degree exemption. See proposed 8 CFR 214.2(h)(8)(iii). The electronic registration process would start before April 1, in advance of the period during which H-1B petitions can be filed for a new fiscal year. A registrant therefore could wait until they have been notified of selection before submitting the LCA to DOL for approval and preparing the corresponding H-1B petition on behalf of the beneficiary named in the selected registration.<sup>13</sup> DHS is not proposing a fee for registration at this time.

The registration process would be mandatory, and an H-1B cap-subject petition would not be considered properly filed unless it is based on a valid registration selection for that fiscal year. H-1B cap-subject petitions that are not properly filed would be rejected.

##### **1. Announcement of the Registration Period**

Under the proposed registration process, each petitioner would be required to electronically register

through the USCIS website ([www.uscis.gov](http://www.uscis.gov)) according to the instructions provided on the website. See proposed 8 CFR 214.2(h)(8)(iii)(A)(1). DHS proposes to establish a registration period that would begin at least fourteen calendar days before the first day of filing in each fiscal year. The registration period would last for a minimum period of fourteen calendar days. See proposed 8 CFR 214.2(h)(8)(iii)(A)(3). USCIS would give the public at least 30 days advance notice of the opening of the initial registration period for the upcoming fiscal year via the USCIS website ([www.uscis.gov](http://www.uscis.gov)). USCIS will also separately announce the final registration date in any fiscal year on the USCIS website. If USCIS determines that it is necessary to re-open the registration period, it would announce the start of the re-opened registration period on its website before the start of the re-opened registration period. See proposed 8 CFR 214.2(h)(8)(iii)(A)(7).

Because the public regularly uses the USCIS website, USCIS believes posting the information on the USCIS website would provide a timelier and more efficient method of communication with the public than publishing the information in the **Federal Register**. The public frequently turns to the USCIS website for information and routinely uses the USCIS website for general information on immigration benefits, rules, and processes; applicable statutes and regulations; downloadable immigration forms; specific case status information; and processing times at the various service centers and district offices. USCIS currently notifies the public when it will begin accepting petitions subject to the cap for a given fiscal year and when numerical limits have been reached through its website; maintaining this practice therefore would be consistent with settled expectations. With respect to the initial registration period, DHS is also considering announcing the opening date of the first registration period in the final rule resulting from this proposed rule to allow for maximum visibility for the regulated public.

DHS is proposing that a petitioner could submit a registration during the initial registration period only if the requested start date for the beneficiary is the first business day for the applicable fiscal year. If USCIS keeps the registration period open beyond the initial registration period, or determines that it is necessary to re-open the registration period, a petitioner could submit a registration with a requested start date after the first business day for the applicable fiscal year, as long as the

<sup>13</sup> Although the LCA is not required for registration, it is the petitioner's obligation to obtain a DOL-certified LCA before the deadline to file the Form I-129, which is explained below in greater detail.



date of registration is no more than 6 months before the requested start date. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(4). USCIS proposes to limit submission of any additional registrations to within six months of the date of need in order to be consistent with existing rules at 8 CFR 214.2(h)(9)(i)(B) and allow us the ability to provide a filing window for registrations that would permit immediate filing of petitions upon selection. This window also would allow USCIS to effectively administer the registration process and intake of petitions across service centers by providing staggered petition filing windows during which a petitioner would be eligible to file the petition, but without USCIS having to review requested petition start dates to determine that the filing window to be provided to each petitioner would not conflict with the 6-month limitation at 8 CFR 214.2(h)(9)(i)(B).

USCIS would not accept any registrations either before the opening or after the close of the relevant registration period. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(5) and (6). DHS invites the public to comment on whether the proposed duration and timing of the registration period would provide enough time for prospective petitioners to submit their registrations. Petitioners would be asked to provide basic information regarding the petitioner and beneficiary when registering. This information may include, but is not limited to: (1) The employer's name, employer identification number (EIN), and employer's mailing address; (2) the employer's authorized representative's name, job title, and contact information (telephone number and email address); (3) the beneficiary's full name, date of birth, country of birth, country of citizenship, gender, and passport number; (4) if the beneficiary has obtained a master's or higher degree from a U.S. institution of higher education; (5) the employer's attorney or accredited representative, if applicable (a Form G-28 should be also submitted electronically if this is applicable); and (6) any additional basic information requested by the registration system or USCIS. DHS is not proposing a separate fee for registration at this time.

The petitioner would also be required to attest, within the registration system, that the contents of each registration are true and accurate and that the petitioner intends to employ the beneficiary consistent with the registration. DHS recognizes that with the lowering of the burden and cost for participating in the H-1B cap selection process, there is a

possibility that employers will utilize the registration system in a way to maximize their likelihood of being able to hire the best job candidates. To address potential issues of "flooding the system" with non-meritorious registrations, DHS is prohibiting petitioners from submitting more than one registration for the same beneficiary during the same fiscal year, and is requiring petitioners to make an attestation in the system indicating their intent to file an H-1B petition for the beneficiary in the position for which the registration is filed. This attestation is intended to ensure that each registration is connected with a bona fide job offer and, to the extent selected, will result in the filing of an H-1B petition.

DHS is particularly interested in preventing circumstances where petitioners submit large numbers of registrations but never follow up with the filing of H-1B petitions for the selected beneficiaries, thus in the short term impacting USCIS' H-1B cap projections, as well as increasing uncertainty for petitioners whose registrations were not selected. Such a scenario would necessarily lead to USCIS having to select additional registrations, including, if necessary, by reopening the registration period, which could lengthen the period of time between the submission of a registration and the adjudication of an H-1B petition for petitioners whose registrations were not selected during the initial lottery. USCIS intends to closely monitor whether selected registrations are resulting in the filing of H-1B petitions. If USCIS finds that petitioners are registering numerous beneficiaries but are not filing petitions for selected beneficiaries at a rate indicative of a pattern and practice of abuse of the registration system, USCIS would investigate those practices and could hold petitioners accountable for not complying with the attestations, consistent with its existing authority to prevent and deter fraud and abuse. *See DHS Delegation 0150.1(II)(I)*. For example, USCIS may refer the matter to a law enforcement agency for further review and possible action. *See Id.*; However, given that the registration system is not intended to replace the petition system, DHS will not have a means for up-front determining whether a registration is meritorious until after it is selected and a petition resulting from such registration is properly filed. While DHS will be data mining the registration system and monitoring the filing rates of H-1B cap petitioners after the system is implemented, as well as employing its authority to investigate and sanction

instances of fraud and abuse, DHS does not currently have a solution for the registration process, or any of its filing processes, that guarantees prevention of all non-meritorious registrations or filings prior to adjudication. DHS invites comments from stakeholders on other ways to enhance the integrity of the registration system and reduce the potential for abuse, such as enhancements to the accounts system for registration, increased vetting of registrants, and any other fraud and abuse prevention measures.

USCIS believes that the content noted above is the minimum amount of information that USCIS would need to identify the prospective H-1B petitioner and the named beneficiary, to eliminate duplicate registrations, and to match selected registrations with subsequently filed H-1B petitions. At least thirty calendar days before opening the initial registration period, USCIS would provide specific details on what information is required via the USCIS website. USCIS seeks public comments on the type and scope of information that should be submitted with each registration.

Note that each annual registration period would be treated as separate from any registration period for a prior fiscal year. Therefore, registrations from a prior fiscal year would not be automatically entered into a new registration period.

## 2. Registration Requirements

DHS proposes to require petitioners who participate in the registration process to electronically submit a single registration relating to each prospective H-1B beneficiary they intend to hire. Multiple prospective beneficiaries could not be listed on a single registration and a petitioner would be permitted to submit a registration relating to a particular H-1B beneficiary only once in any given fiscal year. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(2). DHS believes that prohibiting petitioners from submitting more than one registration relating to the same beneficiary for the same fiscal year would prevent petitioners from abusing the system. Otherwise, a petitioner would be able to gain an unfair advantage by filing multiple registrations relating to the same beneficiary but listing different job offers when the positions are in fact the same or only very slightly different. This rationale is similar to those underpinning the limitations in 8 CFR 214.2(h)(2)(i)(G), which generally prevents petitioners from filing more than one H-1B cap-subject petition on

behalf of the same beneficiary in the same fiscal year.<sup>14</sup>

If a petitioner violates the limitation with regard to registrations relating to H-1B beneficiaries, all of the registrations filed by the petitioner relating to that beneficiary for that fiscal year would be considered invalid.

Each petitioner who submits a properly completed H-1B cap registration request online would receive an automatic electronic notification that the registration request has been received by USCIS (*Note:* Receipt is not the same as selection). See proposed 8 CFR 214.2(h)(8)(iii)(B). Petitioners would not be able to edit a registration request once it has been received by USCIS. USCIS intends to assign a unique identifying number for each registration. The automatic electronic registration receipt notification would be in a printable format and contain a unique identifying number for USCIS tracking and recordkeeping purposes.

### 3. Selection of Registrations

#### a. If the Number of Registrations Received Is Fewer Than the Projected Number of Petitions Needed To Reach the Regular Cap During the Initial Registration Period

If the number of registrations received during the initial registration period is fewer than the number of petitions USCIS projects are needed to meet the regular cap, USCIS would announce on its website that the registration period would remain open and all registrations received during that initial period would be selected. See proposed 8 CFR 214.2(h)(8)(iii)(A)(5)(i). When USCIS determines it has enough registrations to reach the regular cap, it would announce that USCIS will no longer accept registrations under section 214(g)(1)(A) (the “final registration date”) on the USCIS website. If USCIS determines it is necessary, it may conduct a random selection from among all of the registrations received on the final registration date. Petitioners whose registrations are subject to that random selection and who receive notification that their registrations have been selected would be eligible to file an H-1B cap-subject petition on behalf of the

prospective H-1B beneficiary named in the selected registration during the applicable filing period. See proposed 8 CFR 214.2(h)(8)(iii)(C) and (D). USCIS would hold in reserve registrations that are not selected. See proposed 8 CFR 214.2(h)(8)(iii)(A)(5)(i).

#### b. If the Number of Registrations Received Is Sufficient To Reach the Projected Number of Petitions for the Regular Cap During the Initial Registration Period

At the end of the initial registration period, if USCIS determines that it has received enough registrations in the initial registration period to reach the projected number of petitions to meet the regular cap, USCIS would conduct a random selection of all of the registrations received during the initial registration period. See proposed 8 CFR 214.2(h)(8)(iii)(A)(5)(ii). Under such process, USCIS would randomly select a number of registrations in the regular cap that USCIS projects would be sufficient to meet the cap. The number needed to meet the cap would be determined by USCIS in advance of each fiscal year’s cap selection, and would be determined by projections taking into account historical approval, denial, revocation, rejection rates, and other relevant factors such as the percentage of registrants that ultimately decide not to file an H-1B petition. See proposed 8 CFR 214.2(h)(8)(iii)(E). USCIS would hold in reserve registrations which are not selected. See proposed 8 CFR 214.2(h)(8)(iii)(A)(7).

#### c. Advanced Degree Exemption Selection

After USCIS has completed selecting registrations for the H-1B regular cap, USCIS would determine whether there is a sufficient number of remaining eligible registrations to meet the projected number of petitions to reach the H-1B advanced degree exemption numerical limitation. See proposed 8 CFR 214.2(h)(8)(iii)(A)(6). USCIS is proposing to count all registrations toward the H-1B regular cap projections first, even in years when a random selection process at the end of the initial registration period is unnecessary.

#### i. Fewer Registrations Than Needed To Reach the Projected Number of Petitions To Meet the H-1B Advanced Degree Exemption Numerical Limitation

After USCIS has completed selecting registrations for the H-1B regular cap, if USCIS determines that it has received fewer registrations than needed to reach the projected number of petitions to meet the H-1B advanced degree exemption numerical limitation, USCIS

will notify all petitioners that have properly registered that each registration has been selected. See proposed 8 CFR 214.2(h)(8)(iii)(A)(6)(i). USCIS will continue to accept registrations that may be counted under section 214(g)(5)(C) of the INA until USCIS determines that it has received enough registrations as projected to meet the H-1B advanced degree exemption numerical limitation. USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the “final registration date”). The day the news is published will not control the applicable final registration date. When necessary to ensure the fair and orderly allocation of numbers under 214(g)(5)(C) of the INA, USCIS may randomly select the remaining number of registrations projected as necessary to meet the H-1B advanced degree exemption numerical limitation from among the registrations properly submitted on the final registration date. This random selection would be made by computer-generated selection. USCIS would hold in reserve registrations which are not selected.

#### ii. Sufficient Registrations To Reach the Projected Number of Petitions To Meet the H-1B Advanced Degree Exemption Numerical Limitation

After USCIS has completed selecting registrations for the H-1B regular cap, if USCIS determines that it has received enough eligible registrations to reach the projected number of petitions to meet the H-1B advanced degree exemption numerical limitation, USCIS would no longer accept registrations that may be counted under section 214(g)(5)(C) of the INA and would notify the public of the final registration date. See proposed 8 CFR 214.2(h)(8)(iii)(A)(6)(ii). USCIS would randomly select the number of registrations projected as needed to meet the H-1B advanced degree exemption numerical limitation from among the remaining registrations that may be counted against the advanced degree exemption numerical limitation. This random selection would be made by computer-generated selection. USCIS would hold in reserve registrations which are not selected.

#### d. Availability of Cap Numbers

Once actual petition filings commence on the first day that H-1B cap-subject petitions may be filed (that is, April 1 or the next business day if April 1 falls on Saturday or Sunday) of each fiscal year, USCIS monitors petition receipts closely to ensure adherence to the H-1B allocations. By over-selecting registrations, there is a

<sup>14</sup> See *Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation; Interim Rule*; 73 FR 15389, 15392 (Mar. 24, 2008) (explaining that USCIS wanted to ensure the fair and equitable distribution of cap numbers, and that allowing multiple H-1B petitions on behalf of the same alien would undermine the purpose of the H-1B numerical cap because multiple filings can result in the misallocation of the total available cap numbers.)

risk of exceeding the H-1B allocations; the challenge is to approve a sufficient number of petitions that would support issuance of H-1B visas or otherwise providing initial H-1B status to up to 85,000 aliens each year without exceeding the H-1B allocations. In order to stay within the numerical limits of the H-1B allocations, one option would be to select only 85,000 registrations (65,000 plus 20,000) in the lottery. However, by selecting only 85,000 registrations, USCIS would likely permit filing of too few petitions to meet the H-1B allocations because some petitions would be rejected, denied, or not filed following registration selection. Even if a petition is approved, the beneficiary might not apply for or be issued an H-1B visa or otherwise obtain H-1B status. Therefore, similar to the way USCIS determines the number of petitions it accepts for filing under the current process, under this proposed rule USCIS would use historical data to project a number above 85,000, and would use yearly projections to determine the number of registrations to select for the H-1B regular cap and advanced degree exemption allocation. USCIS recognizes that because the costs of registration are low relative to the costs of filing a complete petition, all of the selected registrants may not ultimately file petitions, but USCIS does not have reliable data aside from the historical data from past filings to project the number of registrations in the first year of implementation. In order to account for the changes, USCIS would create a reserve of registrations to pull from in the scenario that a sufficient number of selected registrants do not file petitions, and more registrations need to be added to the selected pool. USCIS is also proposing that it could re-open the registration period in the event the reserve of unselected registrations is insufficient to fill the H-1B cap projections for a given fiscal year.

Unselected registrations would remain on reserve for the applicable fiscal year. If USCIS determines that it needs to increase the number of registrations projected to meet the H-1B regular cap or advanced degree exemption allocation, and select additional registrations, USCIS would select from among the registrations that are on reserve a sufficient number to meet it or re-open the registration period if additional registrations are needed to meet the new projected amount. If the registration period will be re-opened, USCIS would announce the start of the re-opened registration period on its website before the start of the re-opened registration period. Once a sufficient

number of registrations have been received to meet the new projected amount to meet the H-1B regular cap, or the advanced degree exemption numerical limitation, USCIS would close the re-opened registration period, identify the new final registration date, and, if necessary to ensure the fair and orderly allocation of numbers, may randomly select from among registrations received on the new final registration date a sufficient number of registrations projected to meet the applicable H-1B allocations. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(7). If USCIS determines that the projections for both H-1B allocations fell short of the number of petition approvals needed to reach the regular cap and advanced degree exemption numerical limitation, such that additional registrations towards both are needed, USCIS would first re-open the registration for the regular cap, until a sufficient number of registrations have been received (counting all registrations) to meet the regular cap projections. After a new final registration date for the regular cap has been identified, USCIS would re-open the registration period for the advanced degree exemption numerical limitation.

#### e. Notification

USCIS would notify all petitioners with selected registrations that the petitioner is eligible to file an H-1B cap-subject petition on behalf of the named beneficiary within the designated filing period. *See* proposed 8 CFR 214.2(h)(8)(iii)(C). If the petitioner's registration was selected, the notice would indicate a filing location and the designated filing period during which the H-1B petition must be filed, and provide instructions on how to file. *See id.*

#### 4. Filing the H-1B Petition Following Selection

##### a. Eligibility To File

DHS proposes to accept as properly filed only those H-1B cap-subject petitions that are based on selected registrations for the applicable fiscal year, and only for the specific H-1B beneficiary named in the original registration; others would be rejected (if caught at intake) or denied (if caught by an officer during an adjudicative review of the petition). *See* proposed 8 CFR 214.2(h)(8)(iii)(D). Employers would not be permitted to substitute beneficiaries. DHS recognizes that employer needs often change and intended workers may become unavailable for a variety of reasons. However, DHS is proposing to limit the filing of H-1B cap-subject

petitions to the beneficiary named on the original registration request in an effort to guard against the possibility of abuse by unscrupulous petitioners who might otherwise attempt to monopolize petition filing "slots" or create an illegitimate market related to the sale of selected registrations if substitution were permissible.<sup>15</sup> In addition, allowing substitution of beneficiaries could undermine the prohibition on submitting multiple registrations for a single beneficiary. If substitutions are permissible, a petitioner could submit registrations for multiple individuals even though it does not actually intend to file a petition for each of the named individuals, but is doing so simply to improve its chances for having a sufficient number of selected registrations for those beneficiaries it seeks to employ as H-1B nonimmigrants. Thus, DHS believes that prohibiting substitution of beneficiaries complements the justification for prohibiting multiple registrations for one beneficiary, discussed in Section IV.A.2. above, as both would result in the potential gaming of the registration system. This restriction also is in line with current policy, which does not allow substitution of beneficiaries. USCIS may also require that petitioners submit copies of the registration information with the Form I-129 so that USCIS may verify the registration.

Furthermore, a petitioner is prohibited from filing more than one H-1B petition in the same fiscal year on behalf of the same beneficiary if the beneficiary is subject to either the regular cap or advanced degree exemption, *see* 8 CFR 214.2(h)(2)(i)(G), and likewise would be prohibited from filing more than one registration for the same beneficiary in the same fiscal year under this proposed rule. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(2). Under the proposed process, USCIS would continue to apply the prohibition on the filing of multiple H-1B cap petitions for the same beneficiary. If the petitioner (including related entities, such as a parent, company, subsidiary or affiliate) files more than one H-1B cap petition for the same beneficiary in the same fiscal year, all of the H-1B cap petitions filed for that beneficiary by the related entities would be denied or revoked, unless the petitioner is able to

<sup>15</sup> For example, a petitioner could hoard selected registrations for itself and substitute beneficiaries, or hoard numbers in an attempt to sell selected registration "slots" to other petitioners for a fee, or to foreign nationals looking to come to the U.S. as H-1B nonimmigrants, thereby creating an illicit market where selected registrations could be bought and sold as a commodity.

demonstrate a legitimate business need for filing multiple petitions.

#### b. Filing Time Period

DHS proposes that petitioners would have a period of at least 60 days to properly file a completed H-1B cap-subject petition for the named beneficiary. USCIS would notify all petitioners with selected registrations that the petitioner is eligible to file an H-1B cap-subject petition on behalf of the named beneficiary within the designated filing period. *See* proposed 8 CFR 214.2(h)(8)(iii)(C) and (D). Allowing USCIS to specify the filing period in the selection notice would give USCIS the flexibility to stagger filings, as described below, and provide filing periods of longer than 60 days if necessary to accommodate processing backlogs or other operational needs.

If an H-1B cap-subject petition is filed before or after the applicable filing period noted on the selection notice, USCIS would reject the H-1B cap-subject petition (if caught at intake) or deny the petition (if caught by an officer during an adjudicative review of the petition). *See* proposed 8 CFR 214.2(h)(8)(iii)(D)(2). A selected registrant who does not file a petition on behalf of the named beneficiary within the timeframe stated on the selection notice would forego eligibility to file and any consideration for an available H-1B cap or advanced degree exemption number based on that selection notice.

DHS is proposing to set a filing period of at least 60 days to ensure that the petitioner has adequate time to prepare and file the H-1B petition. If, for example, a petitioner's selection notice dated March 22, contains a 60-day filing period beginning on April 1 and ending on May 31, the petition may not be filed before April 1 and must be filed no later than May 31, or USCIS would reject the petition. If the last day of the 60-day filing period is a Saturday, Sunday, or legal holiday, the petitioner would have until the following day that is not a Saturday, Sunday, or legal holiday to file the petition. *See* 8 CFR 1.2.

DHS anticipates that there would be several filing periods for each fiscal year. For example some selected registrations may be provided a filing window between April 1 and May 31, while other selected registrations may be provided a filing window between May 1 and June 30. Separate filing windows would help USCIS manage the surge of cap-subject petitions received after it conducts the lottery. Separate filing windows would allow USCIS to more efficiently use its resources (*e.g.*, personnel) to complete the intake

process and allow for the most efficient processing and adjudication of cap-subject petitions. DHS believes that a 60-day filing window would allow a petitioner sufficient time to obtain an LCA, if they have not already, and prepare the full H-1B package for filing.

The proposed filing period in which a selected registrant may file a petition on behalf of the named beneficiary is not entirely consistent with the existing regulation that provides a petitioner the ability to file a petition up to six months before the date of actual need for the beneficiary's services or training, because the first day of the proposed filing period may be less than six months before the date of actual need. *See* current 8 CFR 214.2(h)(9)(i)(B); *see also* 20 CFR 655.730(b). For that reason, DHS clarifies that current 8 CFR 214.2(h)(9)(i)(B) establishes the outer limit of when an H petition may be filed, but that other regulatory provisions, such as proposed paragraph (h)(8)(iii)(D)(2), may shorten that filing period. DHS is also proposing to redesignate this paragraph as new paragraph (h)(2)(i)(I) so that it is grouped under petition filing procedures. DHS is also making a technical amendment to current 8 CFR 214.2(h)(9)(i) to combine 8 CFR 214.2(h)(9)(i) introductory text and (h)(9)(i)(A), but is making no other changes to this section.

#### B. Proposed Advanced Degree Exemption Allocation Amendment

DHS proposes to amend the regulations currently at 8 CFR 214.2(h)(8)(ii)(B) to change the process by which USCIS would select H-1B petitions that may be counted under section 214(g)(1)(A) or section 214(g)(5)(C) of the INA. *See* proposed 8 CFR 214.2(h)(8)(iii)(A)(5) and (6) and (h)(8)(iv). The proposed amendment would change the order in which registrations are counted towards the projected number needed to reach the H-1B allocations. Currently, USCIS counts petitions filed for beneficiaries with a master's degree or higher from a U.S. institution of higher education under the H-1B advanced degree exemption first until the projected number of petitions needed to meet the advanced degree exemption allocation is reached. Under the proposed amendments, USCIS would include registrations for petitions that are eligible for the H-1B advanced degree exemption under the regular cap first until the projected number needed to meet the regular cap is reached. Once the regular cap projected number is reached, USCIS would then count those registrations for petitions eligible for the

advanced degree exemption and not selected under the regular cap toward the projected number needed to reach the advanced degree exemption allocation. Changing the order in which USCIS counts these prospective beneficiaries toward the applicable projections would likely increase the number of petitions filed for beneficiaries each fiscal year with a master's or higher degree from a U.S. institution of higher education, and in turn, increase the number of individuals with a master's or higher degree from a U.S. institution of higher education who are issued H-1B visas or otherwise provided H-1B status.<sup>16</sup>

Under Executive Orders 12866 and 13653 of this regulation, USCIS analyzed the current selection process and the proposed selection process to determine which process would increase the likelihood that H-1B petitions are granted for beneficiaries with a master's degree or higher from a U.S. institution of higher education. The proposed change would prioritize petitions filed on behalf of beneficiaries who have attained a master's or higher degree from a U.S. institution of higher education. DHS believes the advanced degree exemption statutory provision at section 214(g)(5)(C) is best read as intending to increase the number of individuals with advanced degrees from U.S. institutions issued H-1B visas or otherwise provided H-1B status by 20,000. As described, the current lottery system does not provide an optimal mechanism for achieving that aim because it dilutes the candidate pool in a manner that greatly diminishes the possibility of adding 20,000 such H-1B nonimmigrants beyond those that would be admitted without the advanced degree exemption allocation.

#### C. Cap Allocation Alternative: Temporary Suspension of the H-1B Registration Process

As an alternative to the proposal to implement a registration process for cap-subject H-1B petitions, as well as to address circumstances in which it may be necessary to suspend the registration process for H-1B cap-subject petitions, DHS proposes amending its regulations to allow for a change in how it counts a sufficient number of petitions needed to reach the regular cap or advanced degree exemption under the existing petition-based process (*i.e.*, reversing

<sup>16</sup> For clarification, as proposed in this rule, the selection of a number of registrations that USCIS projects would be sufficient to meet the regular cap and advanced degree exemption is distinct from the fulfillment of the cap or exemption through "issu[ance] of visas or otherwise provid[ing] H-1B] nonimmigrant status." *See* INA 214(g)(1)(A).

the selection order separate and apart from implementing a registration process). This approach primarily is intended to address rare circumstances in which USCIS may experience technical challenges with the H-1B registration process and/or the new electronic system that would be used to submit H-1B registrations, or where the system otherwise is inoperable for any reason. The approach would also allow USCIS to up-front delay the implementation of the H-1B registration process past the FY 2020 cap season, if necessary to complete all requisite user testing and vetting of the new H-1B registration system and process and to otherwise ensure the system and process are operable. Under this alternative, if USCIS suspends the registration process, USCIS would make an announcement on its website (<http://www.uscis.gov>) to inform the public that the registration requirement for that fiscal year is being suspended, and provide the opening date of the applicable petition-filing period. So while petitioners would not be required to register and be selected in order to properly file an H-1B cap-subject petition, USCIS would still reverse the order of counting the petitions toward the H-1B allocations such that it would first count all cap-subject H-1B petitions, including those that may be eligible for the advanced degree exemption, towards the regular cap until the projected number of petitions needed to meet the regular cap is reached. Once the regular cap projected number is reached, USCIS would then count those petitions eligible for the advanced degree exemption and not selected under the regular cap toward the projected number needed to reach the advanced degree exemption allocation. *See* proposed 8 CFR 214.2(h)(8)(iv)(B). This alternative would further the same goal of increasing the likelihood that more beneficiaries with advanced degrees from U.S. institutions of higher education would be selected and ultimately issued an H-1B visa or otherwise provided H-1B status. DHS may elect to finalize and implement changes to the selection process independently from the new H-1B registration process, or before such registration process is implemented. DHS seeks public comments on this alternative. DHS views the H-1B registration process and the new H-1B regular cap and advanced degree exemption allocation process as separate, and founded on different policy objectives, as set forth above, and has only included both proposals into a

single rule in service of expediency. Therefore, DHS may opt to finalize and implement each proposal separately, and on a schedule most likely to ensure orderly and appropriate administration of the H-1B allocations.

#### *D. Severability*

In addition to the provisions that permit USCIS to implement changes to the H-1B regular cap and advanced degree exemption selection process independently from the registration process for H-1B cap-subject petitions, DHS is proposing to include in the regulation a severability clause. This clause would provide that DHS would continue to implement either the new H-1B regular cap and advanced degree exemption allocation process or the registration process independently in the event it cannot implement the both together (e.g., if one of the processes is enjoined or invalidated by a court of a competent jurisdiction). *See* proposed 8 CFR 214.2(h)(8)(v).

#### *E. Conforming Change to the H-2B Filing Period*

DHS is proposing to remove a reference to the now outdated 120-day filing period for H-2B petitions currently contained in 8 CFR 214.2(h)(9)(i)(B), which is being redesignated in the proposed rule as 8 CFR 214.2(h)(2)(i)(I). Per 8 CFR 214.2(h)(6)(iv) and (v), an H-2B petition may not be filed with USCIS unless it is accompanied, in all cases, by an approved Temporary Labor Certification from DOL. Therefore, this proposed revision does not change existing filing procedures for H-2B petitions, but merely removes a timeframe in the regulatory provision that is no longer applicable because it intended to match a DOL regulation that has since been amended. Further, DHS clarifies that proposed 8 CFR 214.2(h)(2)(i)(I), as amended, would establish the outer limit for when a petition for H classification may be filed, but that other regulatory provisions, such as 8 CFR 214.2(h)(1)(ii)(D) and (h)(6)(iii)(C) (requiring that a TLC must be issued by the DOL or Governor of Guam before an H-2B petition may be filed with USCIS) or 8 CFR 214.2(h)(5)(i)(A) (requiring that an H-2A petition must be filed with a single, valid temporary agricultural labor certification) may shorten that filing period in a specified context.

#### *F. Other Technical Amendments*

DHS is proposing various technical amendments to 8 CFR 214.2(h)(8)(ii) to reflect the proposed changes. First, DHS would make a technical change by removing the discussion of H numerical

limitation calculations in current 8 CFR 214.2(h)(8)(ii)(B) and adding new paragraphs discussing numerical limitations: Proposed paragraphs (h)(8)(iii) and (iv) discuss H-1B numerical limitations and paragraph (h)(8)(vii) discusses H-2B numerical limit calculations. DHS would also redesignate 8 CFR 214.2(h)(8)(ii)(C) and (D) as 8 CFR 214.2(h)(8)(ii)(B) and (C), respectively. In addition, DHS would redesignate 8 CFR 214.2(h)(8)(ii)(E) as 8 CFR 214.2(h)(8)(vi), as well as redesignate 8 CFR 214.2(h)(8)(ii)(F) as 8 CFR 214.2(h)(8)(iii)(F). DHS would also move the text of paragraph (h)(9)(i)(B) into paragraph (h)(2)(i)(I). These proposed redesignated paragraphs remain as currently codified; however, DHS would update cross reference citations in current 8 CFR 214.2(h)(8)(ii) to reflect these technical changes.

### **V. Statutory and Regulatory Requirements**

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

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs and benefits of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule constitutes an “economically significant” regulatory action under section 3(f) of E.O. 12866. Accordingly, the rule has been reviewed by the Office of Information and Regulatory Affairs.

#### *1. Summary*

DHS is proposing to amend its regulations governing the process for petitions filed on behalf of cap-subject H-1B workers. Specifically, DHS is proposing to add a registration requirement for petitioners seeking to file H-1B cap-subject petitions on behalf of foreign workers. Additionally, DHS is proposing to change the order in which H-1B cap-subject petitions would be selected towards the applicable projections needed to meet the annual H-1B allocations in order to increase the odds for selection for H-1B beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education.

All petitioners seeking to file an H-1B cap-subject petition would have to submit a registration. However, under

the proposed process, only those whose registrations are selected (termed “selected registrant”<sup>17</sup> for purposes of this analysis) would be eligible to file an H-1B cap-subject petition for those selected registrations and during the associated filing period. Therefore as selected registrants under the proposed registration requirement, selected petitioners would incur additional opportunity costs of time to complete the electronic registration relative to the costs of completing and filing the associated H-1B petition, the latter costs being unchanged from the current H-1B petitioning process. Conversely, those who complete registrations that are unselected because of excess demand (termed “unselected registrant” for purposes of this analysis) would experience cost savings relative to the current process, as they would no longer have to complete an entire H-1B cap-subject petition that ultimately does not get selected for USCIS processing and adjudication as done by current unselected petitioners.

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

Under the proposed requirement, the opportunity cost of time associated with required registration would be a cost to all petitioners (selected and unselected), but those whose registrations are not selected would be relieved from the opportunity cost associated with completing and mailing an entire H-1B cap-subject petition. Therefore, DHS estimates proposed costs of this rule to selected petitioners for completing an H-1B cap-subject petition as the sum of

new registration costs and current costs. DHS estimates that the costs of this proposed rule to unselected petitioners would only result from the estimated opportunity costs associated with the registration requirement. Overall, unselected petitioners would experience a cost savings relative to the current H-1B cap-subject petitioning process; DHS estimates these cost savings by subtracting new registration costs from current costs of preparing an H-1B cap-subject petition. These estimated quantitative cost savings would be a benefit that would accrue to only those with registrations that were not selected.

Currently, for selected petitioners the aggregated total costs to complete an entire H-1B cap-subject petition ranges from \$128.4 million to \$161.1 million, depending on who petitioners use to prepare a petition. These current costs to complete and file an H-1B cap-subject petition are based on a 5 year petition volume average and may differ across sets of fiscal years. Current costs are not changing for selected petitioners as a result of this proposed registration requirement. Rather, this proposed registration requirement would add a new opportunity cost of time to selected petitioners who will continue to face current H-1B cap-subject petition costs. DHS estimates the added opportunity cost of time to selected petitioners under this proposed registration requirement would range from \$6.2 million to \$10.3 million, again depending on who petitioners use to submit a registration and prepare a petition. Therefore, under the proposed registration requirement, DHS estimates an adjusted total cost to complete an entire H-1B cap-subject petition would range from \$134.7 million to \$171.4 million. Since these petitioners already file Form I-129, only the registration costs of \$6.2 million to \$10.3 million are considered as new costs.

Unselected petitioners would experience an overall cost savings, despite new opportunity costs of time associated with the proposed registration requirement. Currently for unselected petitioners, the total cost associated with the H-1B process is \$53.5 million to \$85.6 million, depending on who petitioners use to prepare the petition. The difference between total current costs for selected and unselected petitioners in an annual filing period consists of fees returned to unselected petitioners. DHS estimates the total costs to unselected petitioners from the registration requirement would range from \$6.2 million to \$10.1 million. DHS estimates a cost savings occurs because under the proposed requirement unselected petitioners

would avoid having to file an entire H-1B cap-subject petition and only have to submit a registration. Therefore, the difference between current costs and proposed costs for unselected petitioners would represent a cost savings ranging from \$47.3 million to \$75.5 million, again depending on who petitioners use to submit the registration.

The government would also benefit from the proposed registration provision by no longer having to receive, handle and return large numbers of petitions that are currently rejected because of excess demand (unselected petitions). These activities would save DHS an estimated \$1.6 million annually.<sup>18</sup> USCIS would, however, have to expend a total of \$279,149 in the development of the registration website in the first year after this proposed rule would become effective. In subsequent years, DHS would incur labor and maintenance costs of \$200,000 per year. Over ten years, USCIS would incur maintenance costs of \$2,079,149, resulting in an annualized amount of \$225,269 discounted at 7 percent and \$215,279 discounted at 3 percent, for that timeframe. Discounted over 10 years, this provision would result in costs to USCIS totaling \$1.8 million based on a discount rate of 3 percent and \$1.6 million based on a discount rate of 7 percent.

The net quantitative impact of this proposed registration requirement is an aggregate cost savings to petitioners and to government ranging from \$42.4 million to \$66.5 million annually. Using lower bound figures, the net quantitative impact of this proposed registration requirement is cost savings of \$424.8 million over ten years. Discounted over 10 years, these cost savings would be \$373.2 million based on a discount rate of 3 percent and \$319.2 million based on a discount rate of 7 percent. Using upper bound figures, the net quantitative impact of this proposed registration requirement is cost savings of \$666.4 million over ten years. Discounted over ten years, these cost savings would be \$585.5 million based on a discount rate of 3 percent and \$500.8 million based on a discount rate of 7 percent.

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

<sup>17</sup> DHS notes that entities may submit multiple registrations which could result in a mix of selected and unselected outcomes. For the purpose of this analysis, the terms “selected registrant” and “unselected registrant” refer to the originator of a submission based on its outcome and should not be deemed a unilateral label for a single entity. Using this terminology it is possible for a single entity to experience impacts simultaneously as a selected registrant and as an unselected registrant.

<sup>18</sup> Although DHS does not estimate the impact of the proposed registration provision to DOL processes, DHS recognizes DOL may have some cost savings due to fewer LCA adjudications.

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

The proposed change to the petition selection process would result in an estimated increase in the number of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education selected by 16 percent (or 5,340 workers). This increase could result in greater numbers of highly educated workers with degrees from U.S. institutions of higher education entering the U.S. workforce under the H-1B program. DHS recognizes there could be a wage differential across industries, but due to the variance in the composition of the beneficiaries subject to the cap and their associated differences in educational level,

whether any advanced degrees are from U.S. or foreign institutions of higher education, and the location of the ultimate job opportunity, DHS cannot reliably estimate the impact on wages under this proposed rule. Under an assumption that the change to the petition selection process resulted in 5,000 workers with an average fully loaded wage of at least \$20,000 transferring from one market or industry to the other, then the rule would meet the \$100 million threshold for economic significance.

Table 3 provides a detailed summary of the proposed changes and their impacts.

TABLE 3—SUMMARY OF PROVISIONS AND IMPACTS

| Current and proposed provisions   | Expected cost of the proposed provision  | Expected benefit of the proposed provision   |
|---|--|--|
| <p>Currently, all petitioners who file on behalf of an H-1B worker must complete and file H-1B cap-subject petitions along with a certified DOL Labor Condition Application (LCA). For selected petitioners, the total current cost to file and complete an entire H-1B cap-subject petition ranges from \$128.4 million to \$161.1 million. For unselected petitioners, the total current cost is \$53.5 million to \$85.6 million.</p> <p>DHS is proposing to require all petitioners who seek to hire a cap-subject H-1B worker to register for each prospective H-1B worker for whom they seek to file a cap-subject H-1B petition. Only those petitioners whose registrations are selected may proceed to complete and file an H-1B cap-subject petition.</p>  | <p>Petitioners—</p> <ul style="list-style-type: none"> <li>For current selected petitioners, the proposed rule would add an additional annual opportunity cost of time ranging from \$6.2 million to \$10.3 million, depending on who the petitioner uses to submit the registration. Therefore, the total costs of registering and completing and filing H-1B cap-subject petitions would range from \$134.7 million to \$171.4 million to this population annually, depending on the type of petition preparer.</li> <li>For current unselected petitioners, the proposed rule would add an opportunity cost of time ranging from \$6.2 million to \$10.1 million to this population annually, depending on who the petitioner uses to submit the registration.</li> </ul> <p>Government—</p> <ul style="list-style-type: none"> <li>The proposed rule would cost the government \$279,149 in the first year to develop the registration Website. In subsequent years, USCIS would incur annual labor and maintenance costs of \$200,000.</li> </ul> | <p>Petitioners—</p> <ul style="list-style-type: none"> <li>Petitioners whose registrations are not selected would have cost savings that would range from \$47.3 million to \$75.5 million from no longer having to complete and file H-1B cap-subject petitions along with mailing costs despite new opportunity cost of time to submit registration.</li> </ul> <p>Government—</p> <ul style="list-style-type: none"> <li>USCIS would save \$1.6 million annually in processing and return shipping costs, as fewer petitions will be filed with USCIS based on registrations that were not selected.</li> </ul> |
| <p>Under the current H-1B selection process, if the regular cap and advanced degree exemption are reached during the first five business days that cap-subject petitions can be filed, USCIS randomly selects sufficient H-1B petitions to reach the H-1B 20,000 advanced degree exemption first. Then, USCIS randomly selects sufficient H-1B petitions from the remaining pool of beneficiaries, including those not selected in the advanced degree exemption to reach the H-1B 65,000 regular cap limit. USCIS rejects all remaining unselected H-1B cap-subject petitions.</p> <p>The proposed process would reverse the selection process so that USCIS would randomly select registrations for the H-1B regular cap first, including registrations for petitions eligible for the H-1B advanced degree exemption. Then USCIS would randomly select registrations for the H-1B advanced degree exemption.</p> | <p>Petitioners—</p> <ul style="list-style-type: none"> <li>The proposed selection process could decrease the number of cap-subject H-1B petitions for beneficiaries with bachelor's degrees, advanced degrees from U.S. for-profit universities, or foreign advanced degrees by up to 5,340 workers. This potential decrease could result in some higher labor costs to petitioners assuming that beneficiaries with bachelor's degrees, advanced degrees from U.S. for-profit universities or foreign advanced degrees are paid less than and replaced by beneficiaries with master's degrees from U.S. institutions of higher education.</li> <li>DHS does not anticipate, as a result of the new selection process, petitioning employers would suffer economic harm from the decreased probability of selecting H-1B petitions eligible only under regular cap.</li> </ul>   | <p>Petitioners and Government—</p> <ul style="list-style-type: none"> <li>The proposed selection process could increase the number of cap-subject H-1B petitions that are selected for beneficiaries with master's degrees or higher from U.S. institutions of higher education by an estimated 16 percent (or 5,340 workers) annually. DHS believes the increase in the number of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education would likely result in more highly educated workers entering the U.S. workforce.</li> </ul>                                     |

As discussed previously in the preamble, this proposed rule would also allow for the H-1B regular cap and advanced degree exemption selections

to take place in the event that the registration system is inoperable for any reason and needs to be suspended. If temporary suspension of the registration

system is necessary, then the cost and benefits described in this analysis resulting from registration for the petitioners and government would not



apply during any period of temporary suspension. However, the proposed selection reversal process would still take place and are anticipated to yield a higher proportion of H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education being selected.

## 2. Background and Purpose of the Proposed Rule

The H-1B program allows U.S. employers to temporarily employ foreign workers in occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor's degree or higher in the specific specialty or its equivalent.

As the preamble explains, Congress limits the number of H-1B visas to 65,000 new visas annually ("regular cap"), with certain exemptions including a limited exemption for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education.<sup>19</sup> The annual exemption from the 65,000 cap for H-1B beneficiaries who have earned a qualifying U.S. master's or higher degree is limited to 20,000 beneficiaries ("advanced degree exemption").<sup>20</sup>

Currently, when an employer wants to hire an H-1B worker who is subject to the regular cap or advanced degree exemption, the petitioner must first obtain a certified Labor Condition Application (LCA) from the U.S. Department of Labor (DOL) and then complete and file a Petition for a Nonimmigrant Worker (Form I-129) with USCIS during the H-1B cap filing period. The first day on which petitioners may file H-1B petitions can be as early as 6 months ahead of the projected employment start date.<sup>21</sup> For example, a U.S. employer seeking an H-1B beneficiary for a job beginning October 1 (the first day of the next fiscal year) can file an H-1B petition no earlier than April 1 of the current fiscal year. Thus, an H-1B employer requesting a beneficiary for the first day of Fiscal Year (FY) 2020, October 1, 2019, would be allowed to file an H-1B petition as early as April 1, 2019. Therefore, the cap filing period begins on or shortly after April 1 each year and generally ends when USCIS has received enough petitions projected as needed to fill the H-1B numerical limitations.

Each year USCIS monitors the number of H-1B cap-subject petitions it receives

at its service centers. When USCIS determines that it has received a sufficient number of petitions projected as needed to reach the H-1B allocations, it announces on its website the final receipt date on which petitioners may file an H-1B cap-subject petition for that fiscal year.<sup>22</sup> USCIS then may randomly select from the cap-subject petitions received on the final receipt date the number of petitions projected as needed to reach the H-1B allocations. If the final receipt date falls on any of the first five business days on which cap petitions may be filed, USCIS randomly selects the requisite number of petitions from among all petitions received on any of those five business days.<sup>23</sup> USCIS rejects all H-1B cap-subject petitions received after the final receipt date.<sup>24</sup>

Each year, to administer the H-1B cap and advanced degree exemption, USCIS expends resources towards opening and sorting mail, identifying properly filed petitions, and removing duplicate petitions before proceeding with the petition selection process. In years of high petition volume, these duties present operational challenges for USCIS, including greater labor needs and limited space at Service Centers where petitions are stored, sorted, and selected.

Once the petitions have been sorted and assigned a case identification number, if USCIS determines that a lottery should be conducted, USCIS randomly selects a certain number of H-1B cap-subject petitions projected as needed to meet the numerical limitation. USCIS makes projections on the number of H-1B cap-subject petitions necessary to meet the numerical limit, taking into account historical data related to approvals, denials, revocations, and other relevant factors.<sup>25</sup> USCIS uses these projections to determine the number of petitions to select to meet, but not exceed, the 65,000 regular cap and 20,000 advanced degree exemption, although the exact percentage and number of petitions may vary depending on the applicable projections for a particular fiscal year. USCIS begins the H-1B cap and advanced degree selection process by first randomly selecting petitions that will apply to the projections needed to reach the 20,000 advanced degree exemption.<sup>26</sup> Once the selection process for the 20,000 advanced degree exemption is complete, USCIS then randomly selects petitions that apply to

the projections needed to reach the 65,000 regular cap limit. USCIS then rejects all remaining H-1B petitions and returns the petition and associated fees to the petitioners. For petitions selected during the selection process, USCIS enters petition information into its database and notifies the petitioner of their selection, which includes receipting and depositing associated petition fees.

## 3. Proposed Changes

DHS proposes to establish a mandatory electronic registration requirement that would address some of the current operational challenges associated with the H-1B cap-subject petition process. The electronic registration would commence before the H-1B cap filing season, which currently begins on April 1 each year (or the next business day if April 1 falls on Saturday, Sunday or a legal holiday). The proposed rule would require petitioners to create an account and electronically register through the USCIS website each prospective H-1B worker on whose behalf the petitioner seeks to file an H-1B cap-subject petition. DHS estimates that each unique account creation by a petitioner would take 0.17 hours and each electronic registration for a unique beneficiary would take 0.5 hours to complete.<sup>27</sup> DHS describes in further detail how the proposed electronic registration process would work in the preamble.

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

<sup>27</sup> DHS assumes petitioners would not need to expend additional funds to procure computer equipment or acquire internet connections since DOL already requires employers to electronically file Labor Condition Applications (LCAs), and an approved LCA is a requisite for requesting an H-1B employee. This assumption was made in the 2011 proposed rule, "Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations" and USCIS received no comments regarding this assumption.

<sup>19</sup> See INA section 214(g)(1) and (g)(5), 8 U.S.C. 1184(g)(1) and (g)(5).

<sup>20</sup> *Id.*

<sup>21</sup> See 8 CFR 214.2(h)(9)(i)(B).

<sup>22</sup> See 8 CFR 214.2(h)(8)(ii)(B).

<sup>23</sup> *Id.*

<sup>24</sup> See 8 CFR 214.2(h)(8)(ii)(D).

<sup>25</sup> See 8 CFR 214.2(h)(8)(ii)(B).

<sup>26</sup> *Id.*

Additionally, DHS is proposing to change the H-1B random selection process to provide more H-1B visas to beneficiaries with master's degrees or higher from U.S. institutions of higher education. DHS is proposing to change the H-1B selection process by first selecting H-1B registrations towards the projected number of petitions needed to meet the 65,000 regular cap limit, which would include all cap-subject beneficiaries, including those with a master's degree or higher from a U.S. institution of higher education. Then USCIS would select registrations that are eligible for the 20,000 advanced degree exemption, which are those with master's degrees or higher from U.S. institutions of higher education, towards the projected number needed to reach the advanced degree exemption. This proposed process would allow

those petitions with beneficiaries who have a master's degree or higher from U.S. institutions of higher education a greater chance to be selected.

#### 4. Population

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

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

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

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

Table 4 shows historical filings of Form I-129 for H-1B cap-subject petitions.

TABLE 4—H-1B CAP-SUBJECT PETITIONS RECEIVED BY USCIS, FY 2013–2017

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

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

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

In FY 2017, USCIS received 198,460 H-1B petitions in the first five days that cap-subject petitions could be filed, a 16 percent<sup>28</sup> decline in H-1B cap-subject petitions from FY 2016. Though the receipt of H-1B cap-subject petitions fell in FY 2017, the petitions received still far exceeded the numerical limitations, continuing a trend of excess demand since FY 2010.<sup>29</sup> DHS uses the five-year average of H-1B cap-subject petitions received from FY 2013 to FY 2017 (192,918) as the estimate of H-1B cap-subject petitions that would be received annually. DHS uses the

historical five-year average of 192,918 as seen in Table 4 as a reasonable proxy for the number of registrations that would be submitted in an annual filing period. DHS recognizes that the use of this historical average does not include the possibility that the registration's lower barrier to entry will result in an increase in the number of registrations. Currently, DHS does not have data to estimate the likelihood of that occurrence. However, as discussed previously, this proposed rule incorporates measures to minimize the number of petitioners who might try to flood the registration in order to increase the chances of their petition being selected. Nevertheless, if these mitigation measures are not fully successful, the estimates based on historical averages may underestimate

the actual numbers of registrations, and thus underestimate the costs of the rule.

Table 4 also shows historical filings for Form I-907 and Form G-28 that accompanied selected H-1B cap-subject petitions. DHS uses this data to obtain the numbers of H-1B cap-subject petitions that are filed with a Form I-907 and/or Form G-28. DHS notes that these forms are not mutually exclusive. Based on the five-year average, DHS estimates 25 percent<sup>30</sup> of selected petitions would include Form I-907 and 75 percent<sup>31</sup> of selected petitions would include Form G-28. Based on operational resource considerations, USCIS has announced temporary suspensions of the premium processing

<sup>28</sup> Calculation: (236,444 FY16 H-1B cap-subject petitions – 198,460 FY17 H-1B cap-subject petitions) / 236,444 Form I-129 petitions = 16 percent (rounded).

<sup>29</sup> For H-1B filing petitions data prior to FY 2013, see USCIS Reports and Studies, retrieved at <https://www.uscis.gov/tools/reports-studies/reports-and-studies>. Visited March 3, 2018.

<sup>30</sup> Calculation: 24,008 Form I-907 / 97,198 Form I-129 petitions = 25 percent (rounded).

<sup>31</sup> Calculation: 73,272 Forms G-28 / 97,198 Form I-129 petitions = 75 percent (rounded).

service in the past.<sup>32</sup> For the purposes of this analysis, DHS assumes that Form I-907 would not be suspended and includes eligibility for petitioners to voluntarily incur such costs in both the baseline and proposed costs analysis.

Table 5 summarizes the population under the current filing process for selected petitions versus unselected petitions because the impact of the proposed registration requirement is not the same for selected and unselected petitioners. DHS estimates 95,720 unselected petitions by subtracting selected petitions from the total

petitions filed.<sup>33</sup> DHS also distinguishes the number of petitions with premium processing fees (Form I-907) and the number of petitions filed by a lawyer or other accredited representative (Form G-28). Historical filings for Form I-907 and Form G-28 that accompanied selected petitions were estimated to be 25 percent and 75 percent respectively. DHS reasonably applies those percentages to the number of total petitions and estimates 47,651<sup>34</sup> Form I-907 and 145,431<sup>35</sup> Form G-28 were submitted with total petitions

filed. Since DHS uses the five-year average of total petitions received (192,918) as the estimate of petitions that would be received annually, DHS also assumes the five-year average of Form I-907 (24,008) and Form G-28 (73,272) that accompany selected petitions is a reasonable annual estimate for each form. For unselected petitions, DHS estimates 23,643<sup>36</sup> Form I-907 and 72,158<sup>37</sup> Form G-28 by subtracting the estimated selected petitions from estimated total petitions.

TABLE 5—ANNUAL POPULATION OF THE H-1B FILING PROCESS

[Based on 5 year average]

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

Source: USCIS analysis.

TABLE 6—ESTIMATED ANNUAL POPULATION UNDER THE PROPOSED REGISTRATION REQUIREMENT

|                      | Total registrations filed | Selected registrations    | Unselected registrations    |
|----------------------|---------------------------|---------------------------|-----------------------------|
| <b>Registrations</b> |                           |                           |                             |
| .....                | 192,918                   | 97,198                    | 95,720                      |
| <b>Petitions</b>     | <b>Total forms filed</b>  | <b>Selected petitions</b> | <b>Unselected petitions</b> |
| Form I-129 .....     | 97,198                    | 97,198                    | 0                           |
| Form I-907 .....     | 24,008                    | 24,008                    | 0                           |
| Form G-28 * .....    | 73,272                    | 73,272                    | 0                           |

Source: USCIS analysis.

\*Refers specifically to Form G-28 submitted with a Form I-129 petition. DHS notes that under the proposed registration requirement, accredited representatives would be required to upload Form G-28 during registration and provides more detail later on in this analysis.

Table 6 presents populations DHS anticipates for the proposed registration process based on comparable historical data from Table 5. DHS assumes the historical five-year average of 192,918 as seen in Table 5 as a reasonable estimate for the number of total registrations that would be submitted in an annual filing period.<sup>38</sup> DHS also assumes that the historical five-year averages of selected and unselected petitions would be a

reasonable estimate for the total number of registrations that are selected and not selected.

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

beneficiary named in the selected registration for that fiscal year. Therefore, DHS assumes under the proposed registration process, 97,198 petitions would result from the 97,198 selected registrants. Of the petitions resulting from selected registrations, DHS anticipates 24,008 (25 percent) petitions would include premium processing (Form I-907) and 73,272 (75 percent) petitions would include

<sup>32</sup> DHS notes USCIS temporarily suspended premium processing of all H-1B petitions on March 20, 2018. USCIS News Releases. "USCIS Will Temporarily Suspend Premium Processing for Fiscal Year 2019 H-1B Cap Petitions." March 3, 2017. <https://www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-fiscal-year-2019-h-1b-cap-petitions>. Visited April 13, 2018.

<sup>33</sup> Calculation: 192,918 total petitions filed – 97,198 selected petitions = 95,720 unselected petitions.

<sup>34</sup> Calculation: 192,918 \* 25 percent = 47,651 Form I-907.

<sup>35</sup> Calculation: 192,918 \* 75 percent = 145,431 Form G-28.

<sup>36</sup> Calculation: 47,651 Forms I-907 – 24,008 Forms I-907 = 23,643 Forms I-907 received with unselected petitions.

<sup>37</sup> Calculation: 145,431 Forms G-28 – 73,272 Forms G-28 = 72,158 Forms G-28 received with unselected petitions.

<sup>38</sup> DHS acknowledges the possibility that certain employers who currently decide against filing an H-1B petition may choose to file a registration under the proposal since the cost is much less. However, at this time DHS is not able to forecast this scenario with statistical validity. Therefore, for this purpose of this analysis DHS has estimated the registration population that would parallel the current petitioner population.

representation by a lawyer or accredited representative (Form G–28).<sup>39</sup> Those registrants who are not selected would not be eligible to file an H–1B cap-subject petition and therefore DHS does not estimate any petition volume for unselected registrations under the proposed registration requirement. DHS welcomes any public comments on the estimates provided for the registration or the methodology used to derive these estimates.

b. Estimated Population Impacted by the Proposed Selection Process

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

As discussed in section 4, DHS uses historical filing data of H–1B cap-subject petitions to estimate future registration populations. Table 7 shows historical filing data for H–1B cap-subject petitions categorized by regular cap and advanced degree exemption

receipts. USCIS received an annual average of 192,918 H–1B cap-subject petitions. DHS calculates 71 percent<sup>40</sup> of petitions (137,017) were filed under the regular cap and 29 percent<sup>41</sup> of petitions (55,900) were filed under the advanced degree exemption. Therefore, DHS estimates that USCIS would receive a total of 192,918 registrations annually consisting of 137,017 registrations under the regular cap and 55,900 registrations under the advanced degree exemption.

TABLE 7—H–1B PETITIONS RECEIVED BY REGULAR CAP AND ADVANCED DEGREE EXEMPTION  
[FY 2013–2017]

| Fiscal year          | Number of all petitions filed | Number of petitions received (regular cap) | Number of petitions received (advanced degree exemption) |
|----------------------|-------------------------------|--|--|
| 2013 .....           | 124,130                       | 93,489                                     | 30,641   |
| 2014 .....           | 172,581                       | 132,063                                    | 40,518   |
| 2015 .....           | 232,973                       | 182,249                                    | 50,724   |
| 2016 .....           | 236,444                       | 166,206                                    | 70,238   |
| 2017 .....           | 198,460                       | 111,080                                    | 87,380   |
| 5-year average ..... | 192,918                       | 137,017                                    | 55,900   |

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

Additionally, DHS uses 55,900 petitions in this analysis as a volume estimate of beneficiaries who have a master's degree or higher from a U.S. institution of higher education. Anecdotal evidence suggests that very few petitions do not align with the education requirements of the H–1B regular cap or advanced degree exemption under which the petition was submitted.

Under the current process, when the number of cap-subject petitions filed with USCIS during the first five days that such petitions may be filed exceeds the numerical limits, a certain number of petitions projected as needed to meet the 20,000 advanced degree exemption are randomly selected first from the 55,900 advanced degree petitions eligible for the advanced degree exemption.<sup>42</sup> Of the remaining 172,918 petitions, 35,900 (21 percent) of H–1B beneficiaries with a master's degree or higher from a U.S. institution of higher education remain in the pool to be selected in the 65,000 regular cap

limit.<sup>43</sup> Then, USCIS randomly selects a certain number of petitions projected as needed to meet the 65,000 regular cap limit from the remaining pool, which includes H–1B beneficiaries with bachelor's degrees and beneficiaries with a master's or higher degree from a U.S. institution of higher education not selected under the advanced degree exemption. DHS estimates that an additional 13,495 petitions otherwise eligible for the advanced degree exemption but not selected under the advanced degree exemption would be randomly selected in the regular cap.<sup>44</sup> Therefore, USCIS currently selects an estimated total of 33,495 petitions filed for beneficiaries with a master's or higher degree from a U.S. institution of higher education, which accounts for 17 percent of the 192,918 Form I–129 petitions.<sup>45</sup>

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

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

<sup>39</sup> Based on the five-year averages from Table 4, DHS estimates 24 percent of selected petitions would include Form I–907 and 76 percent of selected petitions would include Form G–28.

<sup>40</sup> Calculation: 137,017 regular/192,918 Form I–129 petitions \* 100 = 71 percent (rounded).

<sup>41</sup> Calculation: 55,900 advanced degree/192,918 Form I–129 petitions \* 100 = 29 percent (rounded).

<sup>42</sup> DHS uses the mandated numerical limitations (65,000 for regular cap and 20,000 for advanced degree exemption) to demonstrate the statistical validity in the descriptions of selected advanced degree petitions in the current and proposed selection process.

<sup>43</sup> Calculation: 192,918 Form I–129 H–1B cap-subject petitions – 20,000 advanced degree = 172,918 advanced degree and regular; Calculation:

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

<sup>44</sup> Calculation: 65,000 regular cap limit \* 21 percent = 13,495 advanced degree petitions.

<sup>45</sup> Calculation: 33,495 advanced degree/192,918 Form I–129 H–1B cap-subject petitions \* 100 = 17 percent (rounded).

registrations could be selected during the selection for the regular cap.<sup>46</sup>

Next, USCIS would select a certain number of registrations projected to meet the 20,000 advanced degree exemption from the remaining pool of 37,065 advanced degree registrations.<sup>47</sup> In total, USCIS would select an estimated 38,835 registrations for petitioners seeking to file H-1B petitions under the advanced degree exemption.<sup>48</sup> These registrations would account for 20 percent of the 192,918 registrations.<sup>49</sup> Therefore, DHS estimates USCIS could accept up to 5,340 (or 16 percent)<sup>50</sup> more H-1B cap-subject petitions annually for beneficiaries with a master's or higher degree from a U.S. institution of higher education.<sup>51</sup>

DHS welcomes any public comments on the estimates provided for the numbers of randomly selected registrations for petitioners seeking to file petitions that may be counted under the regular cap and the advanced degree exemption under this proposed rule.

## 5. Costs

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

<sup>46</sup> Calculation: 65,000 regular cap limit \* 29 percent = 18,835 advanced degree petitions.

<sup>47</sup> Calculation: 55,900 advanced degree – 18,835 advanced degree = 37,065 advanced degree.

<sup>48</sup> Calculation: 18,835 selected advanced degree petitions + 20,000 advanced degree petitions = 38,835 total advanced degree petitions selected.

<sup>49</sup> Calculation: 38,835 advanced degree petitions / 192,918 registrations = 20 percent (rounded).

<sup>50</sup> Calculation: (38,835 (proposed advanced degree petitions) – 33,495 (current advanced degree petitions)) / 33,495 (current advanced degree petitions) \* 100 = 16 percent.

<sup>51</sup> Calculation: 38,835 proposed advanced degree petitions – 33,495 current advanced degree petitions = 5,340 additional petitions.

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

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

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

Currently, an employer seeking to file a petition on behalf of an H-1B worker must complete and file Form I-129. Form I-129 is estimated to take 2.26 hours to complete per petition and includes a filing fee of \$460.<sup>52</sup> Filing the Form I-129 petition includes the H Classification supplement and the H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement, which are estimated to take 2 hours and 1 hour per supplement to complete, respectively. Therefore, it is estimated to take a total of 5.26 hours to complete and file Form I-129. Petitioners may also choose or be

<sup>52</sup> DHS recognizes there are other fees associated with an H-1B petition, such as the ACWIA Fee, the Fraud Fee and Public Law 114–113 fee. These fees generally vary depending on the size of the petitioning entity. Therefore, DHS has not specifically included these fees in the calculations of H-1B cap-subject petitions though DHS acknowledges these fees are statutorily required.

required to complete the following forms:

- Form I-907 is estimated to take 0.5 hours to complete with a filing fee of \$1,225, and/or
- Form G-28 is estimated to take 0.88 hours to complete and does not have a fee.

In order to estimate the opportunity costs of time in completing and filing Form I-129, and if necessary, Form I-907 or Form G-28, DHS assumes that a petitioner will use a human resources (HR) specialist, an in-house lawyer, or an outsourced lawyer to prepare Form I-129 petitions.<sup>53</sup> DHS uses the historical filings of Forms I-907 and Forms G-28 submitted with H-1B petitions to estimate the distribution of form submissions amongst type of petition preparer.

In section 4 of this analysis, DHS estimates that 75 percent of H-1B petitions were completed and filed by lawyers or other accredited representatives based on the submissions of Forms G-28. Table 5 presents the total number of Form G-28 accompanying total petitions, selected petitions and unselected petitions. DHS reasonably assumes the total number of Form G-28 represents the number of H-1B petitions that were completed and filed by lawyers or other accredited representatives and presents this in Table 8. DHS estimates the remaining petitions are completed and filed by HR specialists or other equivalent occupation. DHS estimates of total petitions filed, 47,487<sup>54</sup> petitions were filed by HR specialists or other equivalent occupation. Of selected petitions, DHS estimates 23,926<sup>55</sup> petitions were filed by HR specialists or other equivalent occupation. Of unselected petitions, DHS estimates 23,562<sup>56</sup> petitions were filed by HR specialists or other equivalent occupation. Table 8 summarizes the estimated population of H-1B petition submissions based on the type of petition preparer.

<sup>53</sup> USCIS limited its analysis to HR specialists, in-house lawyers, and outsourced lawyers to present estimated costs. However, USCIS understands that not all entities employ individuals with these occupations and, therefore, recognizes equivalent occupations may also prepare and file these petitions.

<sup>54</sup> Calculation: 192,918 – 145,431 = 47,487 petitions prepared by HR specialists.

<sup>55</sup> Calculation: 97,198 – 73,272 = 23,926 selected petitions prepared by HR specialists.

<sup>56</sup> Calculation: 95,720 – 72,158 = 23,562 unselected petitions prepared by HR specialists.

TABLE 8—SUMMARY OF THE POPULATION OF H-1B PETITION SUBMISSIONS BASED ON PREPARER TYPE

| Type of preparer  | Total filed | Selected petitions | Unselected petitions |
|---|-------------|--------------------|----------------------|
| All H-1B petitions .....  | 192,918     | 97,198             | 95,720               |
| H-1B petitions filed by lawyers or accredited representatives .....         | 145,431     | 73,272             | 72,158               |
| H-1B petitions filed by HR specialists or other equivalent occupation ..... | 47,487      | 23,926             | 23,562               |

Source: USCIS analysis.

The relevant wage is currently \$31.84<sup>57</sup> per hour for an HR specialist and \$68.22<sup>58</sup> per hour for an in-house lawyer. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the Department of Labor, BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.46 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement.<sup>59</sup> DHS multiplied the average hourly U.S. wage rate for HR specialists and lawyers by 1.46 to account for the full cost of employee benefits, for a total of \$46.49<sup>60</sup> per hour for an HR specialist and \$99.60<sup>61</sup> per hour for an in-house lawyer. DHS recognizes that a firm may choose, but is not required, to outsource the preparation of these petitions and, therefore, has presented two wage rates for lawyers. To determine the full opportunity costs if a firm hired an outsourced lawyer, DHS multiplied the average hourly U.S. wage rate for lawyers by 2.5 for a total of \$170.55<sup>62</sup> to approximate an hourly billing rate for

an outsourced lawyer.<sup>63</sup> DHS requests comment on the estimated hourly billing rate for an outsourced lawyer and any supporting data that can be provided for the estimate.

Based on the time burden and relevant wages, the total opportunity costs of time to complete Form I-129 is \$244.52 per petition<sup>64</sup> and for Form I-907 is \$23.24<sup>65</sup> per petition if an HR specialist files. Although USCIS only requires petitioners to file Form I-129 and supplemental forms on behalf of an H-1B worker, DHS includes the opportunity cost of time for Form I-907 since some petitioners may file for premium processing. The opportunity cost of time for an in-house lawyer to complete Form I-129 is \$523.90,<sup>66</sup> Form I-907 is \$49.80,<sup>67</sup> and Form G-28 is \$87.65.<sup>68</sup> The opportunity cost of time for an outsourced lawyer to complete Form I-129 is \$897.09,<sup>69</sup> Form I-907 is \$85.28,<sup>70</sup> and Form G-28 is \$150.08.<sup>71</sup> DHS assumes that only Form I-129 petitions completed by in-house lawyers and outsourced lawyers would also complete Form G-28.

Based on the calculated opportunity costs of time, the total cost to complete

and file Form I-129 is \$704.52<sup>72</sup> and Form I-907 is \$1,248.24<sup>73</sup> if an HR specialist files. The total cost to complete and file Form I-129 is \$983.90,<sup>74</sup> Form I-907 is \$1,274.80,<sup>75</sup> and Form G-28 is \$87.65 if an in-house lawyer files. The total cost to complete and file Form I-129 is \$1,357.09,<sup>76</sup> Form I-907 is \$1,310.28,<sup>77</sup> and Form G-28 is \$150.08 if an outsourced lawyer files.

As seen in Table 8, DHS estimates that 75 percent of selected petitions (73,272) were completed and filed by lawyers or other accredited representatives from the submitted Forms G-28. DHS assumes the remaining petitions (23,926 or 25 percent) are completed and filed by HR specialists. In order to determine the distribution of Forms I-907 among types of petition preparer, DHS uses historical filing data of Form I-907 submitted with H-1B petitions to estimate the number of Forms I-907 that are completed by HR specialists or lawyers.

Table 9 shows the number of Forms I-907 received with selected H-1B cap-subject petitions from fiscal years 2013 to 2017 categorized by accompaniment of a Form G-28. As previously stated, DHS assumes that only in-house lawyers and outsourced lawyers would complete Form G-28. Therefore, Form I-907 petitions received with a Form G-28 are assumed to be completed by a lawyer. Table 9 shows that among selected petitions over the last 5 years, 21,401 Forms I-907 (89 percent)<sup>78</sup> have been completed and filed by lawyers

<sup>57</sup> Bureau of Labor Statistics, U.S. Department of Labor, "Occupational Employment Statistics, May 2017, Human Resources Specialist": <https://www.bls.gov/oes/2017/may/oes131071.htm>. Visited April 13, 2018.

<sup>58</sup> Bureau of Labor Statistics, U.S. Department of Labor, "Occupational Employment Statistics, May 2017, Lawyers": <https://www.bls.gov/oes/2017/may/oes231011.htm>. Visited April 13, 2018.

<sup>59</sup> The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour). See Economic News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (December 2017), available at [https://www.bls.gov/news.release/archives/ecec\\_03202018.pdf](https://www.bls.gov/news.release/archives/ecec_03202018.pdf) (viewed April 2018). The ECEC measures the average cost to employers for wages and salaries and benefits per employee hour worked.

<sup>60</sup> Calculation: \$31.84 \* 1.46 = \$46.49 total wage rate for HR specialist.

<sup>61</sup> Calculation: \$68.22 \* 1.46 = \$99.60 total wage rate for in-house lawyer.

<sup>62</sup> Calculation: \$68.22 \* 2.5 = \$170.55 total wage rate for an outsourced lawyer.

<sup>63</sup> The DHS analysis in, "Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program" (May 31, 2018), available at <https://www.federalregister.gov/documents/2018/05/31/2018-11732/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2018-numerical-limitation-for-the>, used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages. DHS believes the methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule.

<sup>64</sup> Calculation: \$46.49 (HR wage) \* 5.26 hours (time to complete Form I-129) = \$244.52.

<sup>65</sup> Calculation: \$46.49 (HR wage) \* 0.5 hour (time to complete Form I-907) = \$23.24.

<sup>66</sup> Calculation: \$99.60 (in-house lawyer wage) \* 5.26 hours (time to complete Form I-129) = \$523.90.

<sup>67</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.5 hour (time to complete Form I-907) = \$49.80.

<sup>68</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.88 hour (time to complete Form G-28) = \$87.65.

<sup>69</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 5.26 hours (time to complete Form I-129) = \$897.09.

<sup>70</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.5 hour (time to complete Form I-907) = \$85.28.

<sup>71</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.88 hour (time to complete Form G-28) = \$150.08.

<sup>72</sup> Calculation: \$244.52 opportunity cost + \$460 Form I-129 filing fee = \$704.52 total cost per Form I-129 if filed by an HR specialist.

<sup>73</sup> Calculation: \$23.24 opportunity cost + \$1,225 Form I-907 filing fee = \$1,248.24 total cost per Form I-907 if filed by an HR specialist.

<sup>74</sup> Calculation: \$523.90 opportunity cost + \$460 filing fee = \$983.90 total cost per Form I-129 if filed by an in-house lawyer.

<sup>75</sup> Calculation: \$49.80 opportunity cost + \$1,225 filing fee = \$1,274.80 total cost per Form I-907 if filed by an in-house lawyer.

<sup>76</sup> Calculation: \$897.09 opportunity cost + \$460 = \$1,357.09 total cost per Form I-129 if filed by an outsourced lawyer.

<sup>77</sup> Calculation: \$85.28 opportunity cost + \$1,225 = \$1,310.28 total cost per Form I-907 if filed by an outsourced lawyer.

<sup>78</sup> Calculation: 21,401 petitions received with a Form I-907 and a Form G-28/24,008 Total Forms I-907 = 89 percent (rounded).

and 2,606 Forms I-907 (11 percent)<sup>79</sup> have not. Therefore, DHS estimates that

89 percent of Forms I-907 would be completed by lawyers and 11 percent

would be completed by HR specialists for this analysis.

**TABLE 9—NUMBER OF H-1B PETITIONS RECEIVED FOR PREMIUM PROCESSING (FORM I-907) FILED BY A LAWYER OR ACCREDITED REPRESENTATIVE (FORM G-28)**  
[FY 2013–2017]

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

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

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

and outsourced lawyers as an upper bound.

#### i. Current Costs to Selected Petitioners

Table 10 shows the current total cost of filed petitions that were selected during the H-1B cap-subject selection process by type of petition preparer. To calculate mailing costs, DHS uses the shipping prices of United States Postal Service (USPS) Domestic Priority Mail Express Flat Rate Envelopes, which is currently priced at \$25.80 per envelope.<sup>80</sup>

Under current procedures for H-1B cap-subject petitions, DHS estimates cost to complete and file selected Form I-129 H-1B cap-subject petitions

prepared by HR specialists is \$16.9 million,<sup>81</sup> Form I-907 is \$3.3 million,<sup>82</sup> and mailing cost is \$617,280<sup>83</sup> (an aggregate \$20.7 million). Similarly, DHS estimates the cost to complete and file selected Form I-129 H-1B cap-subject petitions prepared by in-house lawyers is \$72.1 million,<sup>84</sup> Form I-907 is \$27.2 million,<sup>85</sup> Form G-28 is \$6.4 million,<sup>86</sup> and mailing cost is \$1.9 million<sup>87</sup> (an aggregate \$107.6 million). If prepared by an outsourced lawyer, DHS estimates the cost to complete and file selected Form I-129 H-1B cap-subject petitions is \$99.4 million,<sup>88</sup> Form I-907 is \$28.0 million,<sup>89</sup> Form G-28 is \$11.0 million,<sup>90</sup> and mailing cost is \$1.9 million<sup>91</sup> (an aggregate \$140.3 million).

**TABLE 10—ESTIMATED ANNUAL COSTS TO SELECTED PETITIONERS UNDER CURRENT H-1B CAP-SUBJECT PROCEDURE BY PREPARER TYPE**

[Includes opportunity cost of time and filing fees]

|                    | HR specialist | In-house lawyer | Outsourced lawyer |
|--------------------|---------------|-----------------|-------------------|
| Form I-129 .....   | \$16,856,064  | \$72,092,714    | \$99,437,241      |
| Form I-907 .....   | 3,252,913     | 27,281,995      | 28,041,302        |
| Form G-28 .....    | .....         | 6,422,326       | 10,996,722        |
| Mailing Cost ..... | 617,280       | 1,890,428       | 1,890,428         |

<sup>79</sup> Calculation: 2,606 petitions received with a Form I-907 and without a Form G-28/24,008 Total Forms I-907 = 11 percent (rounded).

<sup>80</sup> For the purposes of this analysis, we assume that petitioners would use the USPS "Domestic Priority Mail Express Flat Rate Envelope" shipping at the retail price to ensure delivery of Form I-129 petitions to USCIS. USCIS also assumes that the petition weighs five pounds and ships locally or in zone 1 or 2. However, USCIS acknowledges that a petitioner may choose other means of shipping. U.S. Postal Service, Price List: [https://pe.usps.com/text/dmm300/Notice123.htm#\\_c011](https://pe.usps.com/text/dmm300/Notice123.htm#_c011). Visited February 23, 2018.

<sup>81</sup> Calculation: 23,926 Forms I-129 filed by HR specialists \* \$704.52 total cost per petition = \$16,856,064 (rounded).

<sup>82</sup> Calculation: 2,606 Forms I-907 (11 percent of 24,008 Forms I-907) \* \$1,248.24 total cost per Form I-907 = \$3,252,913 (rounded).

<sup>83</sup> Calculation: 23,926 Forms I-129 filed by HR specialists \* \$25.80 mailing cost = \$617,280 (rounded).

<sup>84</sup> Calculation: 73,272 Forms I-129 filed by lawyers \* \$983.90 total cost if filed by an in-house lawyer = \$72,092,714 (rounded).

<sup>85</sup> Calculation: 21,401 Forms I-907 (89 percent of 24,008 Forms I-907) \* \$1,274.80 total cost if filed by an in-house lawyer = \$27,281,995 (rounded).

<sup>86</sup> Calculation: 73,272 Forms G-28 filed by lawyers \* \$87.65 cost if filed by an in-house lawyer = \$6,422,326 (rounded).

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

<sup>88</sup> Calculation: 73,272 Forms I-129 filed by lawyers \* \$1,357.09 total cost if filed by an outsourced lawyer = \$99,437,241 (rounded).

<sup>89</sup> Calculation: 21,401 Forms I-907 (89 percent of 24,008 Forms I-907) \* \$1,310.28 total cost if filed by an outsourced lawyer = \$28,041,302 (rounded).

<sup>90</sup> Calculation: 73,272 Forms G-28 filed by lawyers \* \$150.08 cost if filed by an outsourced lawyer = \$10,996,722 (rounded).

<sup>91</sup> Calculation: 73,272 Forms I-129 filed by lawyers \* \$25.80 mailing cost = \$1,890,428 (rounded).



TABLE 10—ESTIMATED ANNUAL COSTS TO SELECTED PETITIONERS UNDER CURRENT H-1B CAP-SUBJECT PROCEDURE BY PREPARER TYPE—Continued

[Includes opportunity cost of time and filing fees]

|            | HR specialist | In-house lawyer | Outsourced lawyer |
|------------|---------------|-----------------|-------------------|
| Cost ..... | 20,726,257    | 107,687,463     | 140,365,693       |

Source: USCIS analysis.

## ii. Current Costs to Unselected Petitioners

Table 11 shows the estimated costs for the H-1B petitioners whose cap-subject petitions are not selected for adjudication under current procedures for H-1B cap-subject petitions. The fees for these unselected petitions are returned to petitioners and, therefore, petitioners with unselected petitions incur costs only in the opportunity costs of time for completing the appropriate forms and mailing costs for those cap-subject petitions that were not selected. From Table 8 of this analysis, DHS estimates that 72,158 unselected Form I-129 H-1B cap-subject petitions were

completed and filed by lawyers or other accredited representatives from the submitted Forms G-28. As seen in Table 8, DHS assumes the remaining H-1B cap-subject petitions (23,562) are completed and filed by HR specialists. DHS also estimates in Table 5 that 23,643 Forms I-907 were filed with H-1B cap-subject petitions that were not selected. USCIS continues to assume of Forms I-907 that were filed with H-1B cap-subject petitions that were not selected 89 percent are completed by lawyers and 11 percent are completed by HR specialists.

DHS estimates the annual cost to complete unselected Form I-129 H-1B cap-subject petitions prepared by HR

specialists is \$5.8 million,<sup>92</sup> Forms I-907 is \$60,447,<sup>93</sup> and mailing costs is \$607,900<sup>94</sup> (an aggregate \$6.4 million). DHS estimates the annual cost to complete unselected Form I-129 H-1B cap-subject petitions prepared by in-house lawyers is \$37.8 million,<sup>95</sup> Form I-907 is \$1 million,<sup>96</sup> Form G-28 is \$6.3 million,<sup>97</sup> and mailing costs is \$1.9 million<sup>98</sup> (an aggregate \$47.0 million). If prepared by an outsourced lawyer, DHS estimates the annual cost to complete unselected Form I-129 H-1B cap-subject petitions is \$64.7 million,<sup>99</sup> Form I-907 is \$1.8 million,<sup>100</sup> Form G-28 is \$10.8 million,<sup>101</sup> and mailing costs is \$1.9 million<sup>102</sup> (an aggregate \$79 million).

TABLE 11—ESTIMATED ANNUAL COSTS TO UNSELECTED PETITIONERS UNDER CURRENT H-1B CAP-SUBJECT PROCEDURE BY PREPARER TYPE

[Includes opportunity cost of time and excludes filing fees]

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

Source: USCIS analysis.

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

As discussed in Table 8 of this analysis, DHS estimates the distribution of HR specialists and lawyers based on historical filings. DHS estimates that 75 percent of H-1B petitions are prepared by lawyers or other accredited representatives, and 25 percent are completed and prepared by HR

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

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

Table 12 summarizes the estimated lower bound and upper bound for selected petitioners and unselected petitioners in an annual filing period.

<sup>92</sup> Calculation: 23,562 Forms I-129 filed by HR specialists \* \$244.52 opportunity cost = \$5,761,380 (rounded).

<sup>93</sup> Calculation: 2,601 Forms I-907 (11 percent of 23,643 Forms I-907) \* \$23.24 opportunity cost = \$60,447 (rounded).

<sup>94</sup> Calculation: 23,562 Forms I-129 filed by HR specialists \* \$25.80 mailing cost = \$607,900 (rounded).

<sup>95</sup> Calculation: 72,158 Forms I-129 filed by lawyers \* \$523.90 opportunity cost if filed by an in-house lawyer = \$37,803,576 (rounded).

<sup>96</sup> Calculation: 21,042 Forms I-907 (89 percent of 23,643 Forms I-907) \* \$49.80 opportunity cost if filed by an in-house lawyer = \$1,047,892 (rounded).

<sup>97</sup> Calculation: 72,158 Forms G-28 filed by lawyers \* \$87.65 opportunity cost if filed by an in-house lawyer = \$6,324,649 (rounded).

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

<sup>99</sup> Calculation: 72,158 Forms I-129 filed by lawyers \* \$897.09 opportunity cost if filed by an outsourced lawyer = \$64,732,220 (rounded).

<sup>100</sup> Calculation: 21,042 Forms I-907 (89 percent of 23,643 Forms I-907) \* \$85.28 opportunity cost if filed by an outsourced lawyer = \$1,794,462 (rounded).

<sup>101</sup> Calculation: 72,158 Forms G-28 filed by lawyers \* \$150.08 opportunity cost if filed by an outsourced lawyer = \$10,829,473 (rounded).

<sup>102</sup> Calculation: 72,158 Forms I-129 filed by lawyers \* \$25.80 mailing cost = \$1,861,676 (rounded).

TABLE 12—ESTIMATED COSTS FOR ALL (SELECTED AND UNSELECTED) PETITIONERS IN AN ANNUAL FILING PERIOD

| Petitioner type              | Lower bound <sup>a</sup> | Upper bound <sup>b</sup> |
|------------------------------|--------------------------|--------------------------|
| Selected Petitioners .....   | \$128,413,720            | \$161,091,950            |
| Unselected Petitioners ..... | 53,467,520               | 85,647,558               |
| All Petitioners .....        | 181,881,240              | 246,739,508              |

Source: USCIS analysis.

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

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

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

As seen in Table 12, the total current costs for selected petitioners in an annual filing period ranges from \$128.4 <sup>103</sup> million to \$161.1 million, <sup>104</sup> depending on who petitioners use to prepare the petition. The total current costs for unselected petitioners in an annual filing period ranges from \$53.5 <sup>105</sup> million to \$85.6 million, <sup>106</sup> again depending on who petitioners use to prepare the petition. Fees returned to unselected petitioners make up the difference between total current costs for selected and unselected petitioners in an annual filing period.

For all petitioners, DHS estimates the total current cost to complete and file an H-1B petition for an annual filing period ranges from \$181.9 million to \$246.7 million, using lower bound and upper bound calculations. DHS welcomes public comments on the methodology used to calculate the current costs to petitioners in filing an H-1B cap-subject petition.

#### b. Costs From the Proposed Registration Requirement

In order to accurately describe the proposed requirements, and distinguish between the petitioner under the current H-1B process, DHS will use the term registrants when describing impacts to employers intending to petition for H-1B cap-subject beneficiaries under the proposed rule. The proposed registration requirement results in selected and unselected registrants. As seen in comparing Table 5 and Table 6, DHS estimates that the selected registrant population is equal to the selected petitioner population. Similarly, DHS estimates that the

unselected registrant population is equal to the unselected petitioner population.

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

The proposed registration requirement would impose costs to registrants in terms of the opportunity costs of time to create an initial account per user and complete a registration for each prospective cap-subject H-1B worker. Additionally, under this proposed registration requirement, registrations that are completed by lawyers would require completion annually of Form G-28 once per lawyer-petitioner relationship. The proposed rule would require that all who seek to file an H-1B cap-subject petition (an estimated 192,918 petitions annually) would now be required to register. Only those whose registrations are selected would then be eligible to complete and file an H-1B cap-subject petition on behalf of a prospective H-1B worker for that fiscal year. DHS estimates a range of the total cost of the proposed

registration requirement <sup>107</sup> by using the time burden estimated for each account creation (0.17 hours) and registration (0.5 hours) by the wages previously discussed for each type of petition preparer, in addition to the time burden to complete a Form G-28 for in-house and outsourced lawyers. <sup>108</sup>

Unlike the standard for current H-1B cap-subject petitions, lawyers and accredited representatives would not be required to file a separate Form G-28 for each electronic registration when submitting multiple registrations for the same employer. Instead, in the electronic registration environment, a lawyer or accredited representative that submits multiple electronic registrations for an employer would only be required to file Form G-28 once annually for that employer for purpose of filing H-1B cap registrations after which multiple registrations could be filed at various times. This creates efficiency for those lawyers that file multiple registrations for the same employer since the uploaded Form G-28 information can be provided once annually and linked automatically with all registrations filed by that lawyer or accredited representative for that employer. Lawyers and accredited representatives would still be required to complete one electronic registration per beneficiary, and a separate Form G-28 would still be required for each H-1B cap-subject petition subsequently filed based on a selected registration. <sup>109</sup>

<sup>107</sup> As previously stated, DHS does not assume petitioners would need to expend additional funds to procure computer equipment or acquire internet connections because DOL already requires employers to use electronic filing of Labor Condition Applications (LCAs), and an approved LCA is a requisite for requesting an H-1B employee.

<sup>108</sup> Lawyers and accredited representatives who complete electronic registration would need to complete a paper Form G-28 and upload the paper form as a portable document format (PDF) file. One Form G-28 would need to be uploaded for each employer, and can be tied automatically to multiple registrations of beneficiaries under the same employer.

<sup>109</sup> The Form G-28 submission to authorize a lawyer or accredited representative to file

Continued

<sup>103</sup> Calculation: \$20,726,257 HR specialist cost + \$107,687,463 in-house lawyer cost = \$128,413,720 total annual cost (rounded).

<sup>104</sup> Calculation: \$20,726,257 HR specialist cost + \$140,365,693 outsourced lawyer cost = \$161,091,950 total annual cost (rounded).

<sup>105</sup> Calculation: \$6,429,727 HR specialist cost + \$47,037,793 in-house lawyer cost = \$53,467,520 total annual cost (rounded).

<sup>106</sup> Calculation: \$6,429,727 HR specialist cost + \$79,217,831 in-house lawyer cost = \$85,647,558 total annual cost (rounded).

The total opportunity cost of time for an HR specialist to create an account would be \$7.90<sup>110</sup> and to register a single beneficiary would be \$23.24.<sup>111</sup> The opportunity cost of time for an in-house lawyer to create an account would be \$16.93,<sup>112</sup> to register a single beneficiary would be \$49.80,<sup>113</sup> and to complete Form G–28 would be \$87.65.<sup>114</sup> The opportunity cost of time for an outsourced lawyer to create an account would be \$28.99,<sup>115</sup> to register a single beneficiary would be \$85.28,<sup>116</sup>

and to complete Form G–28 would be \$150.08.<sup>117</sup> Therefore, based on the calculated opportunity costs of time, the total cost to submit a registration for a single beneficiary would be \$31.14<sup>118</sup> if submitted by an HR specialist, \$154.38<sup>119</sup> if submitted by an in-house lawyer, and \$264.35<sup>120</sup> if submitted by an outsourced lawyer.

In order to estimate how many accounts would be created for registration of beneficiaries, DHS used historical filings to identify the number

of unique entities filing H–1B cap-subject petitions by employer identification number (EIN). DHS distinguishes the number of filings which included a Form G–28. DHS assumes petitions without a Form G–28 were filed by HR specialists and petitions with a Form G–28 were filed by lawyers.

Table 13 summarizes the filing history for the number of unique entities filing H–1B cap-subject petitions with and without associated Forms G–28.

TABLE 13—NUMBER OF UNIQUE ENTITIES FILING H–1B PETITIONS WITH OR WITHOUT FORM G–28, SELECTED H–1B CAP-SUBJECT PETITIONS FY 2013–2017

| FY                   | Number of unique petitioners filing with Form G–28 | Number of unique petitioners filing without Form G–28 |
|----------------------|--|---|
| 2013 .....           | 18,795   | 1,605   |
| 2014 .....           | 19,639   | 1,892   |
| 2015 .....           | 18,729   | 2,171   |
| 2016 .....           | 18,573   | 2,231   |
| 2017 .....           | 21,039   | 2,180   |
| 5-year average ..... | 19,355   | 2,016   |

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

For selected petitioners, DHS estimates 19,355 unique accounts would be created by lawyers and 2,016 unique accounts would be created by HR specialists for electronic registration based on the five-year historical averages in Table 13 (overall 21,371 unique entities).<sup>121</sup>

To estimate the number of unique accounts created by lawyers and HR specialists for unselected petitioners, DHS applies the proportion of 21,371 unique entities among selected petitions to unselected petitions (populations which are estimated in Table 5) and estimates 21,046 total unique entities.<sup>122</sup> Furthermore, DHS reasonably estimates that 91 percent<sup>123</sup> of unique accounts would be created by lawyers and 9 percent<sup>124</sup> of unique accounts would be created by HR specialists. DHS applies these percentages to 21,046 total unique

entities among unselected petitioners and estimates 19,152<sup>125</sup> unique accounts would be created by lawyers and 1,894<sup>126</sup> unique accounts would be created by HR specialists.

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

#### i. Proposed Cost to Selected Registrants

The proposed registration requirement would add an additional cost to those whose registrations are

selected to complete and file H–1B cap-subject petitions. As stated in Table 6, DHS estimates 97,198 registrations would be selected annually. Of the 97,198 selected registrations, USCIS estimates 73,272 registrations would be submitted by lawyers with the remaining registrations (23,926) submitted by HR specialists.

As stated previously in the calculated opportunity costs of time presented in section 5(a) of this analysis, the total cost to complete and file Form I–129 would be \$704.52 and Form I–907 would be \$1,248.24 for an HR specialist who files. The total cost to complete and file Form I–129 would be \$983.90, Form I–907 would be \$1,274.80, and Form G–28 would be \$87.65 for lawyers if an in-house lawyer files. The total cost to complete and file Form I–129 would be \$1,357.09, Form I–907 would be

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

<sup>110</sup> Calculation: \$46.49 (HR wage) \* 0.17 hours (time to create an account) = \$7.90.

<sup>111</sup> Calculation: \$46.49 (HR wage) \* 0.5 hour (time to register one beneficiary) = \$23.24.

<sup>112</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.17 hours (time to create an account) = \$16.93.

<sup>113</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.5 hour (time to register one beneficiary) = \$49.80.

<sup>114</sup> Calculation: \$99.60 (in-house lawyer wage) \* 0.88 hour (time to complete Form G–28) = \$87.65.

<sup>115</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.17 hours (time to create an account) = \$28.99.

<sup>116</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.5 hour (time to register one beneficiary) = \$85.28.

<sup>117</sup> Calculation: \$170.55 (outsourced lawyer wage) \* 0.88 hour (time to complete Form G–28) = \$150.08.

<sup>118</sup> Calculation: \$7.90 (HR specialist account creation cost) + \$23.24 (HR specialist registration cost) = \$31.14.

<sup>119</sup> Calculation: \$16.93 (in-house lawyer account creation cost) + \$49.80 (in-house lawyer registration

cost) + \$87.65 (in-house lawyer Form G–28 cost) = \$154.38.

<sup>120</sup> Calculation: \$28.99 (outsourced lawyer account creation cost) + \$85.28 (outsourced lawyer registration cost) + \$150.08 (outsourced lawyer Form G–28 cost) = \$264.35.

<sup>121</sup> Calculation: 19,355 unique entities + 2,016 unique entities = 21,371 total unique entities.

<sup>122</sup> Calculation: 21,371 total unique entities among selected petitions/97,198 selected petitions = 22 percent; 22 percent \* 95,720 unselected petitions = 21,046 unique entities among unselected petitions.

<sup>123</sup> Calculation: 19,355/21,371 = 91 percent.

<sup>124</sup> Calculation: 2,016/21,371 = 9 percent.

<sup>125</sup> Calculation: 21,046 unique entities \* 91 percent = 19,152 unique entities.

<sup>126</sup> Calculation: 21,046 unique entities \* 9 percent = 1,894 unique entities.

\$1,310.28, and Form G–28 would be \$150.08 for lawyers if an outsourced lawyer files.

Table 14 shows the estimated annual costs to complete and file H–1B petitions for selected registrants who are eligible to proceed as a petitioner under the proposed requirement. DHS estimates the proposed cost to complete electronic registration account creation is \$15,926,<sup>127</sup> registration is \$556,031,<sup>128</sup> Form I–129 is \$16.9 million, Form I–907 is \$3.3 million, and mailing cost is \$617,280 based on

selected registrations anticipated to be prepared by an HR specialist. If completed by an in-house lawyer, DHS estimates the proposed cost to complete electronic registration account creation is \$327,680,<sup>129</sup> submitting a Form G–28 with the registration is \$1.7 million,<sup>130</sup> registration is \$3.6 million,<sup>131</sup> Form I–129 is \$72.1 million, Form I–907 is \$27.2 million, Form G–28 again with each petition is \$6.4 million, and mailing cost is \$1.9 million based on selected anticipated to be prepared by

in-house lawyers. Finally, if completed by an outsourced lawyer, DHS estimates the proposed cost to complete electronic registration account creation is \$561,101,<sup>132</sup> submitting a Form G–28 with the registration is \$2.9 million,<sup>133</sup> registration is \$6.2 million,<sup>134</sup> Form I–129 is \$99.4 million, Form I–907 is \$28.0 million, and Form G–28 again with each petition is \$11.0 million, and mailing cost is \$1.9 million based on selected registrations anticipated to be prepared by lawyers.

**TABLE 14—ESTIMATED COSTS FOR SELECTED REGISTRANTS UNDER THE PROPOSED REGISTRATION REQUIREMENT BY PREPARER TYPE**

[Includes opportunity cost of time for registration, opportunity cost of time to complete petition, and filing fees]

|  | HR specialist     | In-house lawyer    | Outsourced lawyer  |
|--|-------------------|--------------------|--------------------|
| Registration Account Creation .....          | \$15,926          | \$327,680          | \$561,101          |
| Form G–28 Submission with Registration ..... |                   | 1,696,466          | 2,904,798          |
| Registration .....                           | 556,031           | 3,648,966          | 6,248,670          |
| Form I–129 .....                             | 16,856,064        | 72,092,714         | 99,437,241         |
| Form I–907 .....                             | 3,252,913         | 27,281,995         | 28,041,302         |
| Form G–28 Submission with Form I–129 .....   |                   | 6,422,326          | 10,996,722         |
| Mailing Cost .....                           | 617,280           | 1,890,428          | 1,890,428          |
| <b>Total Cost .....</b>                      | <b>21,298,214</b> | <b>113,360,574</b> | <b>150,080,263</b> |

Source: USCIS analysis.

Compared to current costs, DHS estimates the proposed registration process would add a new cost of \$571,957,<sup>135</sup> \$5.7 million,<sup>136</sup> or \$9.7 million<sup>137</sup> in costs to selected petitioners depending on the type of preparer. Per petition, as previously stated, DHS estimates the total cost to submit a registration for a single beneficiary would be \$31.14 if submitted by an HR specialist, \$154.38 if submitted by an in-house lawyer, and \$264.35 if submitted by an outsourced lawyer.

#### ii. Proposed Costs to Unselected Registrants

Those whose registrations are not selected would incur new costs as a

result from this proposed registration requirement as well. DHS estimates annually 95,720 registrations would be not selected as presented in Table 5. Of the 95,720 unselected registrations DHS estimates 72,158 registrations would be submitted by lawyers with the remaining registrations (23,562) submitted by HR specialists.

Table 15 shows the estimated costs to unselected registrants from this proposed registration requirement. DHS estimates the proposed annual cost to complete electronic registration account creation is \$14,963,<sup>138</sup> and cost to complete registrations is \$547,581<sup>139</sup> for HR specialists who submit unselected registrations. DHS estimates the

proposed annual cost to complete electronic registration account creation is \$324,243,<sup>140</sup> registrations is \$3.6 million,<sup>141</sup> and cost to complete and upload Form G–28 is \$1.7 million<sup>142</sup> for in-house lawyers who submit unselected registrations. Finally, DHS estimates the proposed annual cost to complete electronic registration account creation is \$552,216,<sup>143</sup> registrations is \$6.2 million,<sup>144</sup> and cost to complete and upload Form G–28 is \$2.9 million<sup>145</sup> for outsourced lawyers who submit unselected registrations.

<sup>127</sup> Calculation: 2,016 unique HR specialists among selected registrations \* \$7.90 cost per account creation for HR specialist = \$15,926 (rounded).

<sup>128</sup> Calculation: 23,926 selected registrations filed by HR specialists \* \$23.24 cost per registration = \$556,031 (rounded).

<sup>129</sup> Calculation: 19,355 unique lawyers \* \$16.93 cost per account creation for in-house lawyer = \$327,723 (rounded).

<sup>130</sup> Calculation: 19,355 unique lawyers \* \$87.65 cost per Form G–28 upload for in-house lawyer = \$1,696,447 (rounded).

<sup>131</sup> Calculation: 73,272 selected petitions filed by lawyers \* \$49.80 cost per registration for in-house lawyer = \$3,649,009 (rounded).

<sup>132</sup> Calculation: 19,355 unique lawyers \* \$28.99 cost per account creation for outsourced lawyer = \$561,169 (rounded).

<sup>133</sup> Calculation: 19,355 unique lawyers \* \$150.08 cost per Form G–28 upload for outsourced lawyer = \$2,904,876 (rounded).

<sup>134</sup> Calculation: 73,272 selected petitions filed by lawyers \* \$85.28 cost per registration for outsourced lawyer = \$6,248,304 (rounded).

<sup>135</sup> Calculation: \$15,926 + \$556,031 = \$571,957 (rounded).

<sup>136</sup> Calculation: \$327,680 + \$1,696,466 + \$3,648,966 = \$5,673,111 (rounded).

<sup>137</sup> Calculation: \$561,101 + \$2,904,798 + \$6,248,670 = \$9,714,570 (rounded).

<sup>138</sup> Calculation: 1,894 unique HR specialists among unselected registrations \* \$7.90 opportunity cost = \$14,963 (rounded).

<sup>139</sup> Calculation: 23,562 unselected registrations filed by HR specialists \* \$23.24 opportunity cost = \$547,581 (rounded).

<sup>140</sup> Calculation: 19,152 unique lawyers among unselected registrations \* \$16.93 cost per account creation for in-house lawyer = \$324,243 (rounded).

<sup>141</sup> Calculation: 72,158 unselected registrations filed by lawyers \* \$49.80 opportunity cost = \$3,593,468 (rounded).

<sup>142</sup> Calculation: 19,152 Form G–28 petitions \* \$87.65 opportunity cost in-house lawyer = \$1,678,673 (rounded).

<sup>143</sup> Calculation: 19,152 unique lawyers among unselected registrations \* \$28.99 cost per account creation for outsourced lawyer = \$552,216 (rounded).

<sup>144</sup> Calculation: 72,158 unselected registrations filed by lawyers \* \$85.28 opportunity cost = \$6,153,634 (rounded).

<sup>145</sup> Calculation: 19,152 Form G–28 petitions \* \$150.08 opportunity cost outsourced lawyer = \$2,874,332 (rounded).

TABLE 15—ESTIMATED COSTS FOR UNSELECTED REGISTRANTS UNDER THE PROPOSED REGISTRATION REQUIREMENT BY PREPARER TYPE

[Includes opportunity cost of time for registration]

|  | HR specialist | In-house lawyer | Outsourced lawyer |
|--|---------------|-----------------|-------------------|
| Electronic Registration Account Creation ..... | \$14,963      | \$324,243       | \$552,216         |
| Form G–28 Submission with Registration .....   | .....         | 1,678,673       | 2,874,332         |
| Registration .....                             | 547,581       | 3,593,468       | 6,153,634         |
| Total Cost .....                               | 562,544       | 5,596,384       | 9,583,182         |

Source: USCIS analysis of H–1B cap-subject petition cost.

Table 15 demonstrates the proposed registration process would add a new cost of \$562,544, \$5.6 million, or \$9.6 million in costs to unselected registrants depending on the type of preparer.

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

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

an annual filing period by adding HR specialist costs and lawyer costs. Table 16 summarizes the lower bound and upper bound for selected petitioners and unselected registrants in an annual filing period.

TABLE 16—SUMMARY OF REGISTRATION COSTS AND PETITION COSTS FOR ALL (SELECTED AND UNSELECTED) REGISTRANTS IN AN ANNUAL FILING PERIOD UNDER THE PROPOSED REGISTRATION REQUIREMENT

| Registrant type   | Lower bound   | Upper bound   |
|---|---------------|---------------|
| <b>Estimated Proposed Registration Costs<br/>(new costs as a result of this proposed registration requirement)</b>  |               |               |
| Selected Registrants .....  | \$6,245,069   | \$10,286,527  |
| Unselected Registrants .....  | 6,158,928     | 10,145,726    |
| All Registrants .....   | 12,403,997    | 20,432,254    |
| <b>Estimated Proposed Petition Costs associated with H–1B Cap-Subject Petition Process<br/>(estimated costs as a result of the proposed registration requirement)</b> |               |               |
| Selected Registrants .....  | \$134,658,789 | \$171,378,477 |
| Unselected Registrants .....  | 6,158,928     | 10,145,726    |
| All Registrants .....   | 140,817,717   | 181,524,203   |

Source: USCIS analysis.

**Note:** DHS estimates that 75 percent of H–1B petitions are prepared by lawyers or other accredited representatives and 24 percent are completed and prepared by HR specialists or other equivalent occupation in an annual filing period. Therefore in order to present total costs for an annual filing period, DHS aggregates HR specialist costs and lawyer (or accredited representative) costs.

In Table 16, the estimated registration costs for selected registrants in an annual filing period would range from \$6.2 million<sup>146</sup> to \$10.3 million,<sup>147</sup> depending on who registrants use to submit the registration. The estimated registration costs for unselected registrants in an annual filing period would range from \$6.2 million<sup>148</sup> to \$10.1 million<sup>149</sup>, again depending on who registrants use to submit the registration. Therefore, DHS estimates

under the proposed registration requirement the total proposed registration cost to all petitioners for an annual filing period would range from \$12.4 million to \$20.4 million, using lower bound and upper bound calculations.

DHS anticipates selected registrants would complete and file H–1B cap-subject petitions. Therefore, for selected registrants, entire costs to complete the H–1B cap-subject petition under the proposed registration requirement would range from \$134.7 million<sup>150</sup> to \$171.4 million<sup>151</sup>, depending on who selected registrants use to complete the process. Under the proposed registration

requirement, DHS anticipates unselected registrants would only experience registration costs in pursuing H–1B cap-subject petitions. Therefore, DHS estimates the total proposed registration costs and proposed costs associated with the H–1B cap-subject petition process are equal for unselected registrants, as seen in Table 16. For all registrants, DHS estimates the total cost to complete and file an H–1B petition for an annual filing period would range from \$140.8 million to \$181.5 million. DHS welcomes any public comments on the estimated costs from the proposed electronic registration process.

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

The government would incur costs to develop and maintain the proposed electronic registration requirement. USCIS would need to develop the

<sup>146</sup> Calculation: \$571,957 HR specialist cost + \$5,673,111 in-house lawyer cost = \$6,245,069 annual costs (rounded).

<sup>147</sup> Calculation: \$571,957 HR specialist cost + \$9,714,570 outsourced lawyer cost = \$10,286,527 annual costs (rounded).

<sup>148</sup> Calculation: \$562,544 HR specialist cost + \$5,596,384 in-house lawyer cost = \$6,158,928 annual costs (rounded).

<sup>149</sup> Calculation: \$562,544 HR specialist cost + \$9,583,182 outsourced lawyer cost = \$10,145,726 annual costs (rounded).

<sup>150</sup> Calculation: \$21,341,632 HR specialist cost + \$113,317,338 in-house lawyer cost = \$134,658,970 annual costs (rounded).

<sup>151</sup> Calculation: \$21,341,632 HR specialist cost + \$150,035,823 outsourced lawyer cost = \$171,377,455 annual costs (rounded).

proposed registration website. To complete the proposed registration system development, USCIS anticipates paying four workers each an annual salary of \$134,789,<sup>152</sup> or an hourly rate of \$64.59.<sup>153</sup> Similar to wage calculations in prior sections, DHS multiplies the per hourly wage rate (\$64.59) by 1.46 to account for total employee costs. The total per hour wage would be \$94.30.<sup>154</sup> DHS anticipates the four workers would each dedicate varied amounts of work time over the span of 27 weeks to complete the registration system development. Of the four workers during this time period, two workers would dedicate 75 percent of working hours (1,620 hours) to this project,<sup>155</sup> one worker would dedicate 50 percent of working hours (540 hours) to this project,<sup>156</sup> and the last worker would dedicate 25 percent of working hours (270 hours) to this project.<sup>157</sup> The registration development team would work an estimated 2,430 total hours on this project.<sup>158</sup> Therefore, at an hourly rate of \$94.30, USCIS estimates that the labor costs associated with the development of the registration system would be \$229,149.<sup>159</sup> DHS welcomes any comments from the public on government costs.

The electronic registration system would use current USCIS infrastructure. Therefore, USCIS would not need to invest in new hardware or other equipment during the development phase. Once the registration system is in use, DHS anticipates annual costs associated with running existing servers and the opportunity cost of time for the workers who continue to maintain the registration system. Based on prior experience and current assumptions about the system's usage, DHS estimates that it would not exceed \$50,000 annually to run servers once this rule

becomes effective.<sup>160</sup> Additionally, DHS estimates that labor costs associated with maintaining the registration system would not exceed \$150,000 annually beginning in the second year.<sup>161</sup>

USCIS would develop the electronic registration system and incur costs associated with labor and maintenance, totaling \$279,149 in the first year of the effectiveness of this proposed rule.<sup>162</sup> In subsequent years, USCIS would incur maintenance costs associated with labor and running servers, which would total \$200,000 per year. Over ten years, USCIS would incur maintenance costs of \$2,079,149, resulting in an annualized amount of \$225,269 discounted at 7 percent, and \$215,279 discounted at 3 percent for that timeframe. Discounted over 10 years, this provision would result in costs to USCIS totaling \$1.8 million based on a discount rate of 3 percent and \$1.6 million based on a discount rate of 7 percent.

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

As discussed in the population section of this analysis, under the current process, if more petitions are received during the first five business days that petitions may be filed than USCIS has projected are needed to meet both the regular cap and the advanced degree exemption, USCIS would randomly select an estimated 33,495 beneficiaries with master's degrees or higher from U.S. institutions of higher education in total between the regular cap and advanced degree exemption, which accounts for 17 percent of the total H-1B cap-subject petitions received.<sup>163</sup> Under the proposed selection process, USCIS would randomly select an estimated 38,835 registrations relating to beneficiaries with an advanced degree from a U.S. institution of higher education, which would account for 20 percent of the total registrations received by USCIS.<sup>164</sup> Conversely, beneficiaries qualifying under the regular cap currently account for 83 percent of selected H-1B cap-

subject petitions,<sup>165</sup> and under the proposed selection process, such beneficiaries would account for 80 percent of selected registrations.<sup>166</sup> Therefore, USCIS anticipates the probability of randomly selecting a petition filed for a beneficiary without a master's or higher degree from a U.S. institution of higher education during the H-1B cap registration selection process under the proposed rule to fall by 3 percent.<sup>167</sup> This could result in fewer selections of petitioners with H-1B cap-subject beneficiaries holding a bachelor's degree, an advanced degree from a U.S. for-profit institution of higher education, or a foreign advanced degree. This potential decrease could result in some higher labor costs to petitioners assuming that beneficiaries with bachelor's degrees, advanced degrees from U.S. for-profit universities or foreign advanced degrees are paid less than and replaced by beneficiaries with master's or higher degrees from U.S. institutions of higher education.<sup>168</sup> However, more highly educated workers tend to have a higher marginal product of labor, which would benefit employers and could be expected to offset the additional wages costs. Thus, any potential wage differential may be more appropriately thought of as a benefit because it takes account of the higher value of the labor resources being brought to the economy. DHS encourages any public comments on these anticipated costs, benefits, and transfers.

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

<sup>152</sup> USCIS anticipates paying employees at Grade 15 from the General Schedule from the U.S. Office of Personnel Management's 2018 schedule for the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA locality pay. DHS does not know these employees' step level, but assumes that team members are Step 1 for the purposes of this analysis. See <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/DCB.pdf>.

<sup>153</sup> For Grade 15 Step 1 hourly wages see [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/DCB\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/DCB_h.pdf).

<sup>154</sup> Calculation: \$64.59 \* 1.46 = \$94.30.

<sup>155</sup> Calculation: 27 weeks \* 40 hours = 1,080 hours; (1,080 hours \* 0.75) \* 2 workers = 1,620 hours.

<sup>156</sup> Calculation: 1,080 hours \* 0.5 = 540 hours.

<sup>157</sup> Calculation: 1,080 hours \* 0.25 = 270 hours.

<sup>158</sup> Calculation: 1,620 hours + 540 hours + 270 hours = 2,430 total hours.

<sup>159</sup> Calculation: 2,430 hours \* \$94.30 per hour = \$229,149.

<sup>160</sup> Information verified by U.S. Digital Services (USDS) on November 9, 2017. While USDS is not developing the electronic registration system for this proposed rule, DHS assumes the information provided is a reasonable estimate of development costs.

<sup>161</sup> *Id.*

<sup>162</sup> Calculation: \$229,149 (labor costs) + \$50,000 (server costs) = \$279,149. These estimates are based on the information provided by USCIS OIT.

<sup>163</sup> Calculation: 33,495 advanced degree Forms I-129 selected/192,918 total H-1B cap-subject petitions \* 100 = 17 percent (rounded).

<sup>164</sup> Calculation: 38,835 advanced degree registrations selected/192,918 total registrations \* 100 = 20 percent (rounded).

<sup>165</sup> Calculation: 100 percent - 17 percent advanced degree beneficiaries = 83 percent regular cap beneficiaries (rounded).

<sup>166</sup> Calculation: 100 percent - 20 percent advanced degree beneficiaries = 80 percent regular cap beneficiaries (rounded).

<sup>167</sup> Calculation: 80 percent - 83 percent = - 3 percent.

<sup>168</sup> While DHS recognizes that wages paid to workers with a master's degrees may be higher than wages paid to workers with a bachelor's degree, it is unclear whether wages paid to workers with a master's or higher degree from a U.S. institution of higher education are higher than those paid to workers with a comparable advanced degree from a foreign educational institution.

and above from U.S. institutions of higher education and how this may impact particular types of workers. DHS welcomes input from commenters on the industries and types of workers most likely to be affected by the proposed rule and the likely sizes of these effects.

#### 6. Benefits

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

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

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

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

Presented in Table 12, the current total costs to unselected petitioners in

an annual filing period ranges from \$53.5 million to \$85.6 million, depending on who petitioners use to prepare the petition. These costs represent the opportunity costs of time to complete and file H-1B cap-subject petitions without the filing fees since those are returned to petitioners as well as the costs of mailing in the petition.

Presented in Table 16, the total proposed cost to unselected registrants under the proposed registration requirement ranges from \$6.1 million to \$10.1 million, again depending on the type of preparer who submits the registration. These costs represent the opportunity costs of time to submit a registration in the electronic registration system.

DHS estimates a cost savings for unselected petitioners from the proposed registration requirement by subtracting the total proposed costs to unselected registrants from the total current costs to unselected petitioners. As summarized in Table 17, DHS estimates the total cost savings would range from \$47.3 million<sup>169</sup> to \$75.5 million,<sup>170</sup> depending on the type of preparer. This cost savings results because fewer resources would be required to create an account and complete registration than to complete and file H-1B cap-subject petitions.

TABLE 17—COSTS SAVINGS TO UNSELECTED PETITIONERS FROM THE PROPOSED REGISTRATION REQUIREMENT

| Annual H-1B petition filing costs              | Lower bound<br>(in house lawyer) | Upper bound<br>(outsourced lawyer) |
|--|----------------------------------|------------------------------------|
| Current Costs to Unselected Petitioners .....  | \$53,467,520                     | \$85,647,558                       |
| Proposed Costs to Unselected Petitioners ..... | 6,158,928                        | 10,145,726                         |
| Total Cost Savings .....                       | 47,308,592                       | 75,501,832                         |

Source: USCIS analysis.

Note: See Table 10 and Table 15 for cost calculations.

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

current costs to all petitioners (selected and unselected). As summarized in Table 18, DHS estimates the net quantitative impact of this proposed registration requirement for H-1B

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

TABLE 18—NET QUANTITATIVE IMPACT TO PETITIONERS FROM THE PROPOSED REGISTRATION REQUIREMENT

| Annual H-1B petition filing costs                           | Lower bound   | Upper bound   |
|---|---------------|---------------|
| Current Costs to Selected and Unselected Petitioners .....  | \$181,881,240 | \$246,739,508 |
| Proposed Costs to Selected and Unselected Petitioners ..... | 140,817,717   | 181,524,203   |
| Total Cost Savings .....                                    | 41,063,523    | 65,215,305    |

Source: USCIS analysis.

Note: See Table 12 and Table 16 for cost calculations.

<sup>169</sup> Calculation: \$53,467,520 (current total costs for unselected petitioners lower bound) – \$6,158,928 (proposed total costs for

unselected registrants lower bound) = \$47,308,592 cost savings.

<sup>170</sup> Calculation: \$85,647,558 (current total costs for unselected petitioners upper

bound) – \$10,145,726 (proposed total costs for unselected registrants upper bound) = \$75,501,832 cost savings.



## b. Benefits to the Government From the Proposed Registration Requirement

USCIS would expect net cost-savings as a result of the proposed registration requirement by no longer needing to receive, handle and return unselected

H-1B cap-subject petitions back to petitioners. Table 19 shows the costs to USCIS in FY 2017 from unselected H-1B cap-subject petitions at both the Vermont Service Center (VSC) and California Service Center (CSC), where such petitions are filed and processed.

DHS uses the FY 2017 costs to estimate USCIS' cost savings from this proposed rule.<sup>171</sup> USCIS would save \$1.6 million annually by removing petition handling, data entering, return shipping, and other costs.

TABLE 19—USCIS COSTS FOR UNSELECTED H-1B CAP-SUBJECT PETITIONS IN FY 2017

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

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

As stated in the cost section of this analysis, USCIS would incur maintenance costs of \$279,149 in the first year of the effectiveness of this proposed rule and \$200,000 per subsequent year. To measure the net

quantitative impact, USCIS estimates the difference between current costs associated with H-1B cap-subject petitions and costs estimated under this proposed rule. Summarized in Table 20, the net quantitative impact of this

proposed registration requirement for the government is cost savings of \$1.3 million in the first year, and \$1.4 million in each subsequent year.

TABLE 20—NET ANNUAL QUANTITATIVE IMPACT TO GOVERNMENT FROM THE PROPOSED REGISTRATION REQUIREMENT

| Annual H-1B cap-subject petition filing costs |  | Total costs to government |
|---|--|---------------------------|
| Current Costs .....                           |  | \$1,612,420               |
| Proposed Costs (First Year) .....             |  | 279,149                   |
| Cost Savings (First Year) .....               |  | 1,333,271                 |
| Annual H-1B cap-subject petition filing costs |  | Total costs to government |
| Current Costs .....                           |  | \$ 1,612,420              |
| Proposed Costs (Subsequent Year) .....        |  | 200,000                   |
| Cost Savings (Subsequent Year) .....          |  | 1,412,420                 |

Source: USCIS analysis.

The net quantitative impact of this proposed registration requirement for the government is cost savings of \$14.0 million (\$12.3 million discounted at 3 percent and \$10.5 million discounted at 7 percent over ten years) or an annualized cost savings of \$1.4 million discounted at 7 percent. In addition to the estimated cost savings, USCIS would eliminate any potential need to manually enter petition information into the database to eliminate duplicate petitions in order to administer the random selection process. The proposed registration system would allow USCIS to focus its efforts on adjudicating petitions over managing the intake, storage and return of tens of thousands

of unselected H-1B cap-subject petitions. DHS welcomes public comment on the estimated cost savings to the government from this proposed registration process.

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

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

As summarized in Table 19, DHS estimates the net quantitative impact of this proposed registration requirement

for H-1B petitioners overall is a positive net benefit ranging from \$41.0 million to \$65.2 million, depending on who the petitioners use to complete the H-1B petition process. As summarized earlier, the net quantitative impact of this proposed registration requirement for the government is cost savings of \$1.3 million in the first year, and \$1.4 million in each subsequent year. To estimate the net quantitative impact of this proposed registration requirement, DHS calculates the cost savings for the lower bound and upper bound using the total cost savings shown in Table 21.

<sup>171</sup> While DHS prefers to base assumptions on a longer time period (ideally years), 1 year was the

longest time period for which this data could be reported.

TABLE 21—NET ANNUAL QUANTITATIVE IMPACT FROM THE PROPOSED REGISTRATION REQUIREMENT  
[Undiscounted]

|   | Petitioner<br>net cost savings<br>(selected and<br>unselected) | Government<br>net cost savings | Total costs<br>savings |
|---|--|--------------------------------|------------------------|
| <b>Lower Bound (combination of HR specialist + in-house lawyer)</b>   |  |                                |                        |
| Year 1 .....  | \$41,063,523   | \$1,333,271                    | \$42,396,794           |
| Sub. Annual .....   | 42,063,523   | 1,412,420                      | 42,475,943             |
| <b>Upper Bound (combination of HR specialist + outsourced lawyer)</b> |  |                                |                        |
| Year 1 .....  | \$61,215,305   | \$1,333,271                    | \$66,548,576           |
| Sub. Annual .....   | 61,215,305   | 1,412,420                      | 66,627,725             |

Source: USCIS analysis.

Using lower bound figures, the net quantitative impact of this proposed registration requirement is cost savings of \$424.8 million over ten years.

Discounted over 10 years, these cost savings would be \$373.2 million based on a discount rate of 3 percent and \$319.2 million based on a discount rate

of 7 percent. This is summarized in Table 22.

TABLE 22—NET COST SAVINGS FROM THE PROPOSED REGISTRATION REQUIREMENT, LOWER BOUND  
[Discounted at 3 percent and 7 percent]

|               | Non-discounted<br>estimated cost | 3 Percent<br>discount rate | 7 Percent<br>discount rate |
|---------------|----------------------------------|----------------------------|----------------------------|
| Year 1 .....  | \$42,405,430                     | \$42,405,430               | \$42,405,430               |
| Year 2 .....  | 42,484,582                       | 41,247,167                 | 39,705,217                 |
| Year 3 .....  | 42,484,582                       | 40,045,793                 | 37,107,679                 |
| Year 4 .....  | 42,484,582                       | 38,879,411                 | 34,680,074                 |
| Year 5 .....  | 42,484,582                       | 37,747,001                 | 32,411,284                 |
| Year 6 .....  | 42,484,582                       | 36,647,574                 | 30,290,920                 |
| Year 7 .....  | 42,484,582                       | 35,580,169                 | 28,309,271                 |
| Year 8 .....  | 42,484,582                       | 34,543,853                 | 26,457,262                 |
| Year 9 .....  | 42,484,582                       | 33,537,721                 | 24,726,414                 |
| Year 10 ..... | 42,484,582                       | 32,560,895                 | 23,108,798                 |
| Total .....   | 424,766,668                      | 373,195,013                | 319,202,349                |

Source: USCIS analysis.

Using upper bound figures, the net quantitative impact of this proposed registration requirement is cost savings of \$666.4 million over ten years.

Discounted over ten years, these cost savings would be \$585.5 million based on a discount rate of 3 percent and \$500.8 million based on a discount rate

of 7 percent. This is summarized in Table 23.

TABLE 23—NET COST SAVINGS FROM THE PROPOSED REGISTRATION REQUIREMENT, UPPER BOUND  
[Discounted at 3 percent and 7 percent]

|               | Non-discounted<br>estimated cost | 3 Percent<br>discount rate | 7 Percent<br>discount rate |
|---------------|----------------------------------|----------------------------|----------------------------|
| Year 1 .....  | \$66,564,962                     | \$66,564,962               | \$66,564,962               |
| Year 2 .....  | 66,644,114                       | 64,703,023                 | 62,284,219                 |
| Year 3 .....  | 66,644,114                       | 62,818,469                 | 58,209,550                 |
| Year 4 .....  | 66,644,114                       | 60,988,805                 | 54,401,449                 |
| Year 5 .....  | 66,644,114                       | 59,212,432                 | 50,842,475                 |
| Year 6 .....  | 66,644,114                       | 57,487,798                 | 47,516,332                 |
| Year 7 .....  | 66,644,114                       | 55,813,396                 | 44,407,787                 |
| Year 8 .....  | 66,644,114                       | 54,187,763                 | 41,502,605                 |
| Year 9 .....  | 66,644,114                       | 52,609,479                 | 38,787,481                 |
| Year 10 ..... | 66,644,114                       | 51,077,164                 | 36,249,982                 |
| Total .....   | 666,361,988                      | 585,463,293                | 500,766,843                |

Source: USCIS analysis.

DHS notes that these overall cost savings result only in years when the demand for registrations and the subsequently filed petitions exceeds the number of available visas needed to meet the regular cap and advanced degree exemption allocation. For years where DHS has demand that is less than the number of available visas, this proposed registration requirement would result in costs.

DHS conducted a breakeven analysis to determine how many registrations and subsequently filed petitions would be needed to offset the costs imposed by this rule. This analysis shows the number of registrations and subsequently filed petitions that would need to be received to ensure that cost-savings exceed the costs added by this proposed registration requirement. The results of this analysis can be seen in Table 26.

**TABLE 24—PROJECTED H-1B CAP-SUBJECT PETITIONS NEEDED FOR BENEFITS (COST-SAVINGS) TO EXCEED COSTS UNDER THE PROPOSED REGISTRATION REQUIREMENT**

| Total annual cost under proposed registration requirement (petitioner and government costs) | Number of petitions |
|---|---------------------|
| \$141,025,632 (Lower Bound) .....   | 110,182             |
| \$181,732,118 (Upper Bound) .....   | 111,137             |

Source: USCIS analysis.

Total costs under this proposed registration requirement are a combination of costs to petitioners and costs to government, presented in Table 24 as a range with lower bound \$141.0 million (preparer types HR specialist and in-house lawyer) and upper bound, \$181.7 (preparer types HR specialist and outsourced lawyer).<sup>172</sup> To calculate the number of petitions at which the new costs under this proposed rule offset the total cost-savings, DHS used a standard formula.<sup>173</sup>

Based on each lower and upper bound cost estimate, DHS set receipt volume to the estimated number of H-1B cap-subject petitions randomly selected each year (97,198) and static target equal to 0 (representative of a breakeven point) and solved for the value of how many petitions were needed to reach the target value of 0. From the resulting output,

<sup>172</sup> The costs to petitioners are presented in Table 16 and the costs to government are estimated to be an annualized amount of \$210,532 as detailed in the costs section of this analysis.

<sup>173</sup> DHS conducted break-even analysis through Goal Seek in Microsoft Excel. Goal Seek sets a formula equal to a certain target (0 for breakeven analysis) and solves for the value of one parameter at that target.

DHS estimates that 110,182 petitions (registrations and subsequently filed petition under the proposed rule) would need to be received by USCIS for the program to break-even based on lower bound costs. Another way to say this is that this rule would break-even if USCIS received 12,984 registrations above the numerical limitations in a given year for the lower bound estimate. DHS estimates USCIS would need to receive 111,137 registrations and subsequently filed petitions (or an additional 13,939 registrations above the numerical limitations) for this proposed rule to break-even based on upper bound costs. DHS welcomes any public comments on the cost savings to petitioners presented in this proposed rule.

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

As discussed in the section 4 of this analysis, USCIS currently randomly selects an estimated 33,495 H-1B cap-subject petitions filed for beneficiaries with a master's or higher degree from a U.S. institution of higher education (see Table 7), which accounts for 17 percent of the total H-1B cap-subject petitions received annually. Under the proposed registration and selection process, in years when the number of registrations received during the initial registration period exceeds the projected number of registrations needed to meet the numerical limits, USCIS would randomly select an estimated 38,835 registrations relating to beneficiaries with a master's or higher degree from a U.S. institution of higher education, which would account for 20 percent of the total registrations received. USCIS anticipates that the probability of selecting registrations for H-1B beneficiaries with a master's or higher degree from a U.S. institution of higher education would rise by 3 percentage points, (shifting from 17 percent to 20 percent).<sup>174</sup>

#### 7. Labor Market Impacts

Congress currently limits the number of new cap-subject H-1B workers to 85,000, with 20,000 visas allocated to H-1B beneficiaries with a master's or higher degree from a U.S. institution of higher education and 65,000 visas allocated to the remaining pool of H-1B beneficiaries that could include H-1B workers eligible for either the advanced degree exemption or regular cap. The proposed provisions requiring registration prior to filing an H-1B cap-subject petition, as well as the proposal to amend the order in which

beneficiaries are counted toward the advanced degree exemption allocation and regular cap would change the H-1B cap-subject petitioning process. Neither of these proposed changes would amend the numerical limit on individuals who may be issued H-1B visas or otherwise accorded H-1B status as provided by Congress. In other words, neither of the proposed provisions changes the number of new H-1B workers entering the U.S. labor force. Therefore, this proposed rule does not directly impact the labor market. While this proposed rule does not change the numbers of H-1B workers in the labor market, it could change the composition of future H-1B workers. The proposed selection process would increase the probability that more H-1B workers with a master's or higher degree from a U.S. institution of higher education would obtain classification as an H-1B worker. While some of these beneficiaries might already be in the U.S. labor market based on an existing nonimmigrant status and associated employment authorization (e.g., F-1 nonimmigrant student status and Optional Practical Training employment authorization), others will be new to the U.S. labor market, thereby increasing the level of H-1B workers in the U.S. labor market educated at a U.S. institution of higher education. DHS welcomes comments from the public on the impact to the labor market as a result of this proposed rule.

DHS acknowledges that this regulation will likely result in a shift from one pool of H-1B cap-subject workers to another pool of H-1B cap-subject workers. DHS believes it is possible that petitioning employers may choose to petition for a higher number of H-1B beneficiaries that have advanced degrees from a U.S. institution of higher learning than may currently be the case. However, DHS was not able to estimate the magnitude of such transfers and seeks suggestions from the public regarding data sets which may help to quantify this transfer. DHS recognizes that there are potential wage increases for those that earn a master's degree compared to those with only a bachelor's degree. Overall, individuals with a master's degree earned 19.6 percent more in wages than individuals with a bachelor's degree. Additionally, workers with a master's degree in selected STEM occupations earned between 18 and 33 percent higher than workers with a bachelor's degree in those same occupations.<sup>175</sup> However,

<sup>174</sup> Calculation: 20 percent – 17 percent = 3 percent.

<sup>175</sup> Source: Bureau of Labor Statistics, Department of Labor, "Measuring the Value of Education April  
Continued

due to the variability in the composition and delineation of workers in our H-1B petition process, DHS is not able to estimate the magnitude of such transfers for the specific pool of H-1B workers. Importantly, within the regular cap there are H-1B beneficiaries that have bachelor's degrees as well as beneficiaries that have advanced degrees from foreign institutions of higher education.

Using fully loaded wages, and assuming that there is a shift of 5,000 visas from individuals in the general pool to individuals in the advanced degree pool, DHS finds that it is reasonable to conclude that the rule may have an annualized transfer that is greater than \$100 million.<sup>176</sup> For instance, with this assumption of 5,000 visas shifted from individuals in the general pool to individuals in the advanced degree pool, the fully-loaded wages transferred would only need to average at least \$20,000 to reach the \$100 million threshold. DHS notes that such transfers are uncertain at this juncture given that the cap allocation process is by definition unpredictable, that the regular cap includes individuals with advanced degrees from foreign universities, and that wages can vary widely between occupations, as well as location of employment (e.g., NYC v. Sioux Falls, South Dakota). However, DHS is seeking comments and data from the public on this point. In addition, DHS lacks adequate data to accurately predict effects.

## 8. Alternatives

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

In the development of this proposed rule, DHS considered an alternative to the proposed H-1B cap registration and selection process. The alternative considered was a first-in, first-out registration process, where USCIS would select the first petitioners to complete electronic registrations instead of using a random sampling process. This alternative would simplify the selection process for USCIS. However, it would likely create an unfair advantage for petitioners with relatively greater resources to complete registrations

faster and in greater volume than other small entities that may not have the same resources or experience. DHS determined that this option would create issues for small entities and decided against it.

### Alternative 2: Status Quo

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

Also, under the status quo, all petitioners seeking to file a petition on behalf of an H-1B worker would have to complete and file Form I-129 without any guarantee that their petition would be selected during the H-1B cap filing period, therefore expending time and resources to complete and submit the entire petition. As explained in section 5(a)(iii) of this analysis, under the current process, the total cost for all petitioners to complete and file an H-1B petition for an annual filling period ranges from \$181.9 million to \$246.7 million, using lower bound and upper bound calculations. The status quo alternative is a much more costly process for petitioners as long as demand continues to exceed available visas. Additionally, the high costs of filing a full H-1B petition without the guarantee of obtaining a worker under the status quo could be a barrier to some small entities. The lower costs of a registration system could allow more small entities to submit a registration that otherwise may not file a full H-1B petition.

### B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. The term “small entities” comprises of small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An “individual” is not defined by the RFA

as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform 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.

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

### 1. Initial Regulatory Flexibility Analysis

Small entities primarily impacted by this proposed rule are those that would incur additional direct costs to electronically register to file an H-1B cap-subject petition. DHS conducted a statistically valid sample analysis of H-1B cap-subject petitions to determine the number of small entities directly impacted by this rule.<sup>177</sup> These costs are related to the additional opportunity cost of time for a selected small entity to complete the registration process proposed in this rule. Additionally, if a lawyer or other accredited representative completed the electronic registration on behalf of a petitioner, these additional costs would also include the opportunity costs of time to submit Form G-28. These opportunity costs of time would be an additional burden to completing and filing H-1B cap-subject petitions for selected entities. DHS welcomes any public comment on the methodology and conclusions on the number of small entities estimated and the impacts to those small entities.

### a. A Description of the Reasons Why the Action by the Agency Is Being Considered

The purpose of this proposed rule is to streamline the H-1B cap-subject petition process. In the last several years, USCIS has received large numbers of H-1B cap-subject petitions

2018”: <https://www.bls.gov/careeroutlook/2018/data-on-display/education-pays.htm>. Visited November, 2018.

Bureau of Labor Statistics, Department of Labor, “Should I Get a Master’s Degree?”: <https://www.bls.gov/careeroutlook/2015/article/should-i-get-a-masters-degree.htm#STEM>. Visited November, 2018.

<sup>176</sup> As discussed elsewhere in the document, DHS uses a multiplier of 1.46 to establish a fully loaded wage that accounts for benefits and overhead costs in addition to gross salary.

<sup>177</sup> Although Form I-129 collects data on petitioners’ numbers of employees and annual business income, the use of statistically valid random samples allow us to draw conclusions on the population as a whole. Additionally, more in-depth research of petitioner’s information using this statistically valid sample ensures the integrity of the data needed to estimate the impact to small businesses likely to be affected by this proposed rule.

that have far exceeded the annual numerical limitations set by Congress in the first few days of the filing season. DHS has found that USCIS spends an inordinate amount of time on handling the volume of petitions received within the first few days of the H-1B filing period. After expending USCIS resources to ensure proper processing of these petitions, USCIS still must reject and return petitions and associated fees that are not selected in the current H-1B cap-subject selection process. Petitioners are also adversely affected by the current petition process. Preparing and mailing H-1B cap-subject petitions, with the required filing fee, can be burdensome and costly for petitioners, especially if USCIS returns the petition because it was not selected in the current H-1B-subject cap selection process. This proposed registration process would improve the agency's ability to manage the H-1B cap-subject petition process and reduce the burden on those petitioners whose registrations are not selected and who are therefore ineligible to file an H-1B cap-subject petition for that fiscal year.

**b. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule**

DHS objectives and legal authority for this proposed rule are discussed in the preamble.

**c. A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Changes Would Apply**

DHS conducted a statistically valid sample analysis of H-1B cap-subject petitions to determine the maximum potential number of small entities directly impacted by this proposed rule. DHS utilized a subscription-based online database of U.S. entities, Hoovers Online, as well as two other open-access, free databases of public and private entities, Manta and Cortera, to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity.<sup>178</sup> In order to determine a business' size, DHS first classified each entity by its NAICS code, and then used SBA guidelines to note the requisite revenue or employee count threshold for each entity. Some entities were classified as small based on their annual revenue and some by number of employees.

Using FY 2016 data on H-1B cap-subject petitions selected in the H-1B cap-subject selection process, DHS collected internal data for each filing organization.<sup>179</sup> Each entity may make multiple filings. For instance, there were 95,839 H-1B cap-subject petitions selected,<sup>180</sup> but only 20,046<sup>181</sup> unique entities that filed H-1B cap-subject

petitions. DHS devised a methodology to conduct the small entity analysis based on a representative, statistically valid random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 20,046 entities, DHS used the standard statistical formula to determine that a minimum sample size of 377 entities was necessary. DHS created a sample size 30 percent greater than the 377 minimum necessary in order to increase the likelihood that our matches would meet or exceed the minimum required sample. Of the 491 entities<sup>182</sup> sampled, 385 instances resulted in entities defined as small (Table 25). Of the 385 small entities, 293 entities were classified as small by revenue or number of employees. The remaining 92 entities were classified as small because information was not found (either no petitioner name was found or no information was found in the databases). A total of 103 entities were classified as not small. Therefore, of the 20,046 entities that filed at least one Form I-129 in FY 2016, DHS estimates that 78 percent or 15,636 entities are considered small based on SBA size standards.<sup>183</sup>

**TABLE 25—SUMMARY AND RESULTS OF SMALL ENTITY ANALYSIS OF H-1B CAP-SUBJECT PETITIONS**

| Parameter  | Quantity   | Proportion of sample (percent) |
|--|------------|--------------------------------|
| Population—Selected H-1B cap-subject petitions ..... | 95,839     | .....                          |
| Population—Unique Entities .....                     | 20,046     | .....                          |
| Minimum Required Sample .....                        | 377        | .....                          |
| Selected Sample .....                                | 491        | 100.00                         |
| Entities Classified as “Not Small”                   |            |                                |
| by revenue .....                                     | 98         | 19.96                          |
| by number of employees .....                         | 8          | 1.63                           |
| Entities Classified as “Small”                       |            |                                |
| by revenue .....                                     | 233        | 47.45                          |
| by number of employees .....                         | 60         | 12.21                          |
| because no information found in databases .....      | 92         | 18.75                          |
| <b>Total Number of Small Entities .....</b>          | <b>385</b> | <b>a 78.41</b>                 |

Source: USCIS analysis.

<sup>a</sup> Calculation: 47.45 percent (Entities classified as small by revenue) + 12.21 percent (Entities classified as small by number of employees) + 18.75 percent (Entities classified as small because no information found in database) = 78 percent (total number of small entities, rounded).

<sup>178</sup> The Hoovers website can be found at <http://www.hoovers.com/>; The Manta website can be found at <http://www.manta.com/>; and the Cortera website can be found at <https://www.cortera.com/>.

<sup>179</sup> USCIS Office of Performance and Qualify (OPQ), Performance Analysis and External Reporting (PAER), May 25, 2017.

<sup>180</sup> Number of petitions reported in this IRFA (95,839) shows 7 more receipts than is shown in the population section of the Economic Analysis (95,832). This discrepancy is due to OPQ pulling

the data for the IRFA (April 25, 2017) and the data for the Economic Analysis (May 22, 2017) from the same database at different times. During the time in between data pulls, petitioner(s) withdrew 7 H-1B petitions. We do not know which petitions were withdrawn. Therefore, the IRFA uses all petitions as of April 25, 2017.

<sup>181</sup> Number of unique entities reported in this IRFA (20,046) shows 426 more receipts than is shown in Table 7 of the costs section of the Economic Analysis (19,620). This discrepancy is due to OPQ pulling the data for the IRFA (April 25,

2017) and the data for the Economic Analysis (January 12, 2018) from the same database at different times. During the time in between data pulls, petitioner(s) withdrew H-1B petitions. We do not know which petitions were withdrawn. Therefore, the IRFA uses all petitions as of April 25, 2017.

<sup>182</sup> Calculation:  $377 + (377 * 30 \text{ percent}) = 491$  (rounded).

<sup>183</sup> Calculation:  $20,046 \text{ entities} * 78 \text{ percent} = 15,636$  small entities (rounded).

As previously stated, DHS classified each entity by its NAICS code to determine business' size. A list of the

top 10 NAICS codes can be seen in Table 26.

TABLE 26—TOP 10 NAICS INDUSTRIES SUBMITTING FORM I-129, SMALL ENTITY ANALYSIS RESULTS

| Rank     | NAICS code | NAICS U.S. industry title  | Size standards in millions of dollars <sup>a</sup> | Size standards in number of employees <sup>a</sup> |
|----------|------------|--|--|--|
| 1 .....  | 541511     | Custom Computer Programming Services .....                                 | \$27.5   | .....  |
| 2 .....  | 541512     | Computer Systems Design Services .....                                     | 27.5   | .....  |
| 3 .....  | 561499     | All Other Business Support Services .....                                  | 15.0   | .....  |
| 4 .....  | 541330     | Engineering Services .....   | 15.0   | .....  |
| 5 .....  | 511210     | Software Publishers .....  | 38.5   | .....  |
| 6 .....  | 541611     | Administrative Management and General Management Consulting Services ..... | 15.0   | .....  |
| 7 .....  | 334413     | Semiconductor and Related Device Manufacturing .....                       | .....  | 1,250  |
| 8 .....  | 541618     | Other Management Consulting Services .....                                 | 15.0   | .....  |
| 9 .....  | 541690     | Other Scientific and Technical Consulting Services .....                   | 15.0   | .....  |
| 10 ..... | 325412     | Pharmaceutical Preparation Manufacturing .....                             | .....  | 1,250  |

Source: USCIS analysis.

<sup>a</sup> The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR, section 121.201.

The increase in cost per petition to file Form I-129 (and if relevant, Forms I-907 or G-28) on behalf of a cap-subject H-1B worker is the opportunity cost of time to create an account, complete the registration and file Form G-28 if registration is completed by a lawyer. As previously stated in section

5(b), the proposed costs would add \$31.14<sup>184</sup> in cost to submit a registration for a single beneficiary if an HR specialist files, \$152.19<sup>185</sup> in cost to submit a registration for a single beneficiary if an in-house lawyer files, and \$264.35<sup>186</sup> in cost to submit a registration for a single beneficiary if an

outsourced lawyer files (an average proposed cost of \$149.23 per entity), which are summarized in Table 27. In order to calculate the impact of this increase, DHS estimated that the total costs associated with the registration increase for each entity, divided by sales revenue of that entity.<sup>187 188</sup>

TABLE 27—PROPOSED COST PER REGISTRATION ASSOCIATED WITH THE REGISTRATION REQUIREMENT BY TYPE OF PREPARER

|   | HR specialist | In-house lawyer | Outsourced lawyer |
|---|---------------|-----------------|-------------------|
| Proposed Cost for Single Registration ..... | \$31.14       | \$154.38        | \$264.35          |

Source: USCIS analysis.

Since entities can file multiple petitions, this analysis uses the number of petitions submitted by each entity. Entities that were considered small based on employee count with missing revenue data were excluded. Among the 229 small entities with reported revenue data, the greatest economic impact imposed by this proposed rule would be 2.227 percent if an HR specialist files, 11.035 percent if an in-house lawyer files, and 18.896 percent if an outsourced lawyer files. The smallest economic impact would be 0.0001 percent if an HR specialist files, 0.0007 percent if an in-house lawyer files and 0.0012 percent if an outsourced lawyer files. The average impact on all 229 small entities with revenue data would

be 0.186 percent if an HR specialist files, 0.921 percent if an in-house lawyer files and 1.576 percent if an outsourced lawyer files. DHS welcomes any public comments on the number of small entities estimated and the impact to those small entities, including whether or not it is more common for small entities to use in-house or outsourced lawyers during the H-1B cap selection process.

As seen in Table 4, 97,198 H-1B cap-subject petitions are selected annually. As seen in Table 22, DHS estimates that 78 percent of selected petitioners are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 97,198 selected petitioner population, 75,814<sup>189</sup>

selected petitions are submitted by small entities. Next, DHS estimates the number of selected small entities with beneficiaries holding a master's degree or higher from a U.S. institution of higher education. To estimate this, DHS assumes that the percentage of petitions for the advanced degree exemption received annually by USCIS (29 percent), from section 4, is a reasonable percentage to estimate the relevant distribution among small entities. As stated previously, anecdotal evidence suggests that very few petitions do not align with the education requirements of the numerical limitation under which the petition was submitted. Therefore, of the selected 75,814 petitions submitted by small entities, DHS

<sup>184</sup> Calculation: \$7.90 opportunity cost of account creation + \$23.24 opportunity cost of registration = \$31.14 added costs

<sup>185</sup> Calculation: \$16.93 opportunity cost of account creation + \$49.80 opportunity cost of registration + \$87.65 cost to complete Form G-28 for in-house lawyer = \$154.38 added costs.

<sup>186</sup> Calculation: \$28.99 opportunity cost of account creation + \$85.28 opportunity cost of registration + \$150.08 cost to complete Form G-28 for in-house lawyer = \$264.35 added costs.

<sup>187</sup> For HR specialists: Total Impact to Entity = Number of Petitions \* (\$31.14)/Entity Sales Revenue. For in-house lawyers: Total Impact to Entity = Number of Petitions \* (\$154.38)/Entity

Sales Revenue. For outsourced lawyers: Total Impact to Entity = Number of Petitions \* (\$264.35)/Entity Sales Revenue.

<sup>188</sup> USCIS used the lower end of the sales revenue range for those entities where ranges were provided.

<sup>189</sup> Calculation: 97,198 annually selected petitions \* 78 percent = 75,814 submitted by small entities (rounded).

estimates that 21,986<sup>190</sup> is the number of petitions with a beneficiary holding a master's degree or higher from a U.S. institution of higher education. DHS assumes 50,619<sup>191</sup> petitions are submitted by small entities for beneficiaries who have not earned a master's degree or higher from a U.S. institution of higher education (*i.e.* beneficiaries who have earned a bachelor's degree, foreign advanced degree, or advanced degree from an institution in the United States that does not qualify as a U.S. institution of higher education as defined at 20 U.S.C. 1001(a)). DHS is unable to quantitatively estimate the impact of the new selection process on petitioning employers. DHS does not anticipate petitioning employers would suffer economic harm from the decreased probability of selecting, under the proposed selection process, an H-1B beneficiary who has not earned a master's degree or higher from a U.S. institution of higher education. DHS welcomes any public comments on these estimations and the impact to those small entities.

d. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills

The proposed rule does not require any new professional skills for reporting, but does directly impose new "reporting" requirements in the form of registration for an H-1B cap subject petition. As stated earlier, DHS estimates that 78 percent of entities that filed at least one Form I-129 in FY 2016 were considered small based on SBA size standards. For unselected petitions the total cost would range from \$2,324,975 to \$19,736,899 depending on the preparer and for selected petitions the total cost for the proposed registration ranges from \$2,360,862 to \$20,041,430 depending on the preparer. DHS welcomes any public comment on these estimates and the impact to small entities.<sup>192</sup>

<sup>190</sup> Calculation: 75,814 petitions \* 29 percent = 21,986 petitions.

<sup>191</sup> Calculation: 75,814 - 21,986 = 53,828 petitions

<sup>192</sup> Calculation: Unselected petitions: HR specialist = (95,720 unselected petitions from Table 5 \* 78 percent) \* \$31.14 from Table 27 = \$2,324,975 (rounded); In-house lawyer = (95,720 unselected petitions from Table 5 \* 78 percent) \* \$154.38 from Table 27 = \$11,526,319; Outsourced lawyers = (95,720 unselected petitions from Table 5 \* 78 percent) \* \$264.35 from Table 27 = \$19,736,899. Selected petitions: HR specialists = (97,198 selected petitions from Table 5 \* 78 percent) \* \$31.14 from Table 27 = \$2,360,862 (rounded); In-house lawyer = (97,198 selected petitions from Table 5 \* 78 percent) \* \$154.38 from Table 27 = \$11,704,165; Outsourced lawyers = (97,198 selected petitions from Table 5 \* 78 percent) \* \$264.35 from Table 27 = \$20,041,430.

e. An Identification of All Relevant Federal Rules, to the Extent Practical, That May Duplicate, Overlap, or Conflict With the Proposed Rule

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any comment and information regarding any such rules.

f. Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The proposed rule would add a registration requirement for all petitioners who seek to file an H-1B cap-subject petition. DHS considered alternative solutions that are described in further detail in Executive Orders 12866 and 13653. One alternative was a first-in, first-out registration process where USCIS would select registrations strictly in the order in which registrations are properly submitted. This alternative would not minimize the impact on small entities, but rather would disadvantage small entities that would have to compete with the resources and personnel of larger entities, which may enable larger entities to submit registrations faster and sooner than small entities. DHS decided against the alternative described.

Additionally, the status quo alternative is a much more costly process for petitioners as long as demand continues to exceed available visas. The high costs of filing a full H-1B petition without the guarantee of obtaining a worker under the status quo could be a barrier to some small entities. The lower costs of a registration system could allow more small entities to submit a registration that otherwise may not file a full H-1B petition. DHS welcomes any public comments on other possible alternatives to help mitigate the proposed rule's impact to small entities.

C. *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

percent) \* \$154.38 from Table 27 = \$11,704,165; Outsourced lawyers = (97,198 selected petitions from Table 5 \* 78 percent) \* \$264.35 from Table 27 = \$20,041,430.

agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of \$100 million in 1995 adjusted for inflation to 2017 levels by the Consumer Price Index for All Urban Consumers (CPI-U) is \$161 million.

This proposed rule does not exceed the \$100 million expenditure in any 1 year when adjusted for inflation (\$161 million in 2017 dollars), and this rulemaking does not contain such mandates. The requirements of Title II of the Act, therefore, do not apply, and the Department has not prepared a statement under the Act.

D. *Small Business Regulatory Enforcement Fairness Act of 1996*

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This proposed rule would not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. However, as some small businesses may be impacted under this proposed regulation, DHS has prepared an Initial Regulatory Flexibility Analysis (IRFA) under the Regulatory Flexibility Act (RFA).

E. *Executive Order 13132 (Federalism)*

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132, DHS has determined that this rulemaking does not have significant Federalism implications to warrant the preparation of federalism summary impact statement.

F. *Executive Order 12988 (Civil Justice Reform)*

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

G. *National Environmental Policy Act*

DHS analyzes actions to determine whether NEPA applies to them and, if so, what degree of analysis is required. DHS Directive (Dir) 023-01 Rev. 01 and



Instruction (Inst.) 023–01–001 rev. 01 establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508. The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. DHS Instruction 023–01–001 Rev. 01 establishes such Categorical Exclusions that DHS has found to have no such effect. Inst. 023–01–001 Rev. 01 Appendix A Table 1. For an action to be categorically excluded, DHS Inst. 023–01–001 Rev. 01 requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the Categorical Exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Inst. 023–01–001 Rev. 01 section V.B (1)–(3).

DHS analyzed this action and has concluded that NEPA does not apply due to the excessively speculative nature of any effort to conduct an impact analysis. Nevertheless, if NEPA did apply to this action, the action clearly would come within our categorical exclusion A.3(d) as set forth in DHS Inst. 023–01–001 Rev. 01, Appendix A, Table 1.

As discussed in more detail throughout this NPRM, this proposed rule would require petitioners seeking to file H–1B cap-subject petitions to first electronically register with USCIS during a designated registration period, and USCIS would only allow those petitioners whose registrations are selected to file H–1B petitions for the beneficiary named in the registration. In addition, the proposed rule would amend the order in which USCIS randomly selects H–1B beneficiaries who may be counted toward the projected number of petitions needed to reach the H–1B regular cap (65,000) or the H–1B advanced degree exemption allocation (20,000). Under the proposed amendments, USCIS would randomly select registrations that may be counted toward the projected number of petitions needed to reach the H–1B advanced degree exemption allocation under the regular cap first until the

projected number needed to meet the regular cap is reached, and only then would USCIS randomly select registrations that are eligible for the advanced degree exemption until the projected number of petitions needed to meet the advanced degree exemption allocation is reached. This proposed change would be likely to increase the number of beneficiaries with a master’s or higher degrees from a U.S. institution of higher education that would be selected. However, this rule does not alter the statutory limitations on the numbers of nonimmigrants who may be issued new H–1B visas or granted initial H–1B status, or who would consequently be admitted into the United States as H–1B nonimmigrants, or allowed to change their status to H–1B, or extend their stay in H–1B status. This rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, if NEPA were determined to apply, this rule would be categorically excluded from further NEPA review.

#### *H. Paperwork Reduction Act*

##### **USCIS H–1B Registration Tool**

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–NEW in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### *Overview of information collection:*

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

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

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No Agency Form Number; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS uses the data collected on this form to determine which petitioners would be informed that they may submit a USCIS Form I–129 H–1B cap-subject nonimmigrant petition. USCIS is proposing to collect the minimum amount of information needed to identify the prospective H–1B cap-subject petitioner and the named beneficiary, to eliminate duplicate registrations, and to match selected registrations with subsequently filed H–1B cap-subject petitions.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H–1B Registration Tool is 192,918 and the estimated hour burden per response is .5 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 is 96,459 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.

#### **USCIS Form I–129**

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments

regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule.

All submissions received must include the OMB Control Number 1615–0009 in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Overview of information collection:*

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

(2) *Title of the Form/Collection:* Petition for 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 temporarily enter as a nonimmigrant in certain classifications. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the alien worker. The form serves the purpose of standardizing requests for certain nonimmigrant workers, and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It

also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–129 is 294,751 and the estimated hour burden per response is 2.34 hours; the estimated total number of respondents for the information collection E–1/E–2 Classification Supplement to Form I–129 is 4,760 and the estimated hour burden per response is 0.67; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I–129 is 3,057 and the estimated hour burden per response is 0.67; the estimated total number of respondents for the information collection H Classification Supplement to Form I–129 is 96,291 and the estimated hour burden per response is 2; the estimated total number of respondents for the information collection H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement is 96,291 and the estimated hour burden per response is 1; the estimated total number of respondents for the information collection L Classification Supplement to Form I–129 is 37,831 and the estimated hour burden per response is 1.34; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I–129 is 22,710 and the estimated hour burden per response is 1; the estimated total number of respondents for the information collection Q–1 Classification Supplement to Form I–129 is 155 and the estimated hour burden per response is 0.34; the estimated total number of respondents for the information collection R–1 Classification Supplement to Form I–129 is 6,635 and the estimated hour burden per response is 2.34.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,072,810 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 \$70,680,553.

USCIS Form G–28

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all agencies are required to submit to OMB, for

review and approval, any reporting requirements inherent in a rule.

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule.

All submissions received must include the OMB Control Number 1615–0105 in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Overview of information collection:*

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

(2) *Title of the Form/Collection:* Notice of Entry of Appearance as Attorney or Accredited Representative; Notice of Entry of Appearance as Attorney In matters Outside the Geographical Confines of the United States.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* G–28; G–28I; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. The data collected on Forms G–28 and G–28I is used by DHS to determine eligibility of the individual to appear as a representative. Form G–28 is used by attorneys admitted to the

practice of law in the United States and accredited representatives of certain non-profit organizations recognized by the Department of Justice. Form G-28I is used by attorneys admitted to the practice of law in countries other than the United States and only in matters in DHS offices outside the geographical confines of the United States. If the representative is eligible, the form is filed with the case and the information is entered into DHS systems for whatever type of application or petition it may be.

(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 G-28 paper filing is 2,638,276 and the estimated hour burden per response is 0.833 hours; the estimated total number of respondents for the information collection G-28 electronic filing is 281,950 and the estimated hour burden per response is 0.667 hours; the estimated total number of respondents for the information collection G-28I is 25,057 and the estimated hour burden per response is 0.700 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 2,403,285 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.

#### USCIS ICAM

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615-0122 in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of information collection:

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

(2) *Title of the Form/Collection:* USCIS Identity and Credentialing Access Management (ICAM).

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No Form; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. In order to interact with USCIS electronic systems accessible through the USCIS ICAM portal, a first-time user must establish an account. The account creation process requires the user to submit a valid email address; create a password; select their preference for receiving a one-time password (via email, mobile phone, or both); select five password reset questions and responses; and indicate the account type they want to set up (customer or legal representative). The account creation and the account login processes both require the user to receive and submit a one-time password. The one-time password can be provided either as an email to an email address or to a mobile phone via text message.

USCIS ICAM currently grants access to myUSCIS and the information collections available for online filing. ICAM would also be the portal through which accounts to submit H-1B cap registrations would be created and accessed.

(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 ICAM is 2,813,225 and the

estimated hour burden per response is 0.167 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 is 469,809 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.

#### 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 proposes to amend part 214 of chapter I of title 8 of the Code of Federal Regulations as follows:

#### PART 214—NONIMMIGRANT CLASSES

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

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

■ 2. Section 214.2 is amended by:

- a. Redesignating paragraph (h)(9)(i)(B) as paragraph (h)(2)(i)(I) and revising newly redesignated paragraph (h)(2)(i)(I);
- b. Adding paragraph (h)(8)(iii);
- c. Redesignating paragraph (h)(8)(ii)(F) as paragraph (h)(8)(iii)(F);
- d. In newly redesignated paragraphs (h)(8)(iii)(F)(6)(i) and (ii), removing the reference to “(h)(8)(ii)(F)(6)” and adding in its place “(h)(8)(iii)(F)(6)”;
- e. Removing paragraph (h)(8)(ii)(B);
- f. Redesignating paragraphs (h)(8)(ii)(C) and (D) as paragraphs (h)(8)(ii)(B) and (C), respectively;
- g. Adding paragraphs (h)(8)(iv) and (v);
- h. Redesignating paragraphs (h)(8)(ii)(E) introductory text and (h)(8)(ii)(E)(1) through (6) as paragraphs (h)(8)(vi) introductory text and (h)(8)(vi)(A) through (F), respectively;
- i. Adding a heading for newly redesignated paragraph (h)(8)(vi);
- j. In newly redesignated paragraph (h)(8)(vi)(A), removing the reference to “(h)(8)(ii)(F)(3)” and adding in its place “(h)(8)(vi)(C)”;
- k. In newly redesignated paragraph (h)(8)(vi)(B), removing the references to

“(h)(8)(ii)(F)(1)” and “(h)(8)(ii)(F)(3)” and adding in their place “(h)(8)(vi)(A)” and “(h)(8)(vi)(C),” respectively;  
 ■ l. Adding paragraph (h)(8)(vii); and  
 ■ m. Revising paragraph (h)(9)(i).

The additions and revisions read as follows:

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

\* \* \* \* \*

(h) \* \* \*

(2) \* \* \*

(i) \* \* \*

(I) *Time of filing.* A petition filed under section 101(a)(15)(H) of the Act may not be filed earlier than 6 months before the date of actual need for the beneficiary's services or training.

\* \* \* \* \*

(8) \* \* \*

(iii) H-1B numerical limitations—(A) *Registration*—(1) Registration requirement. Except as provided in paragraph (h)(8)(iv) of this section, before a petitioner can file an H-1B cap-subject petition for a beneficiary who may be counted under section 214(g)(1)(A) of the Act (“H-1B regular cap”) or under section 214(g)(5)(C) of the Act (“H-1B advanced degree exemption”), the petitioner must register to file a petition on behalf of an alien beneficiary electronically through the USCIS website ([www.uscis.gov](http://www.uscis.gov)). To be eligible to file a petition for a beneficiary who may be counted against the H-1B regular cap or the H-1B advanced degree exemption for a particular fiscal year, a registration must be properly submitted in accordance with 8 CFR 103.2(a)(1), paragraph (h)(8)(iii) of this section, and the form instructions. A petitioner may file an H-1B cap-subject petition on behalf of a registered beneficiary only after the petitioner's registration for that beneficiary has been selected for that fiscal year. USCIS will notify the petitioner of the selection of the petitioner's registered beneficiaries.

(2) *Limitation on beneficiaries.* A petitioner must electronically submit a separate registration to file a petition for each beneficiary it seeks to register, and each beneficiary must be named. A petitioner may only submit one registration per beneficiary in any fiscal year. If a petitioner submits more than one registration per beneficiary in the same fiscal year, all registrations filed by that petitioner relating to that beneficiary for that fiscal year will be considered invalid.

(3) *Initial registration period.* The annual initial registration period will last a minimum of 14 calendar days and will start at least 14 calendar days

before the earliest date on which H-1B cap-subject petitions may be filed for a particular fiscal year, consistent with paragraph (h)(2)(i)(I) of this section. USCIS will announce the start and end dates of the initial registration period on the USCIS website at [www.uscis.gov](http://www.uscis.gov) for each fiscal year.

(4) *Limitation on requested start date.* A petitioner may submit a registration during the initial registration period only if the requested start date for the beneficiary is the first business day for the applicable fiscal year. If USCIS keeps the registration period open beyond the initial registration period, or determines that it is necessary to re-open the registration period, a petitioner may submit a registration with a requested start date after the first business day for the applicable fiscal year, as long as the date of registration is no more than 6 months before the requested start date.

(5) *Regular cap selection.* In determining whether there are enough registrations to meet the H-1B regular cap, USCIS will consider all properly submitted registrations relating to beneficiaries that may be counted under section 214(g)(1)(A) of the Act, including those that may also be counted under section 214(g)(5)(C) of the Act.

(i) *Fewer registrations than needed to meet the H-1B regular cap.* At the end of the annual initial registration period, if USCIS determines that it has received fewer registrations than needed to meet the H-1B regular cap, USCIS will notify all petitioners that have properly registered that their registrations have been selected. USCIS will keep the registration period open beyond the initial registration period, until it determines that it has received a sufficient number of registrations to meet the H-1B regular cap. Once USCIS has received a sufficient number of registrations to meet the H-1B regular cap, USCIS will no longer accept registrations for petitions subject to the H-1B regular cap under section 214(g)(1)(A). USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the “final registration date”). The day the public is notified will not control the applicable final registration date. When necessary to ensure the fair and orderly allocation of numbers under Section 214(g)(1)(A) of the Act, USCIS may randomly select the remaining number of registrations deemed necessary to meet the H-1B regular cap from among the registrations received on the final registration date.

This random selection will be made via computer-generated selection.

(ii) *Sufficient registrations to meet the H-1B regular cap during initial registration period.* At the end of the initial registration period, if USCIS determines that it has received more than sufficient registrations to meet the H-1B regular cap, USCIS will no longer accept registrations under section 214(g)(1)(A) of the Act and will notify the public of the final registration date. USCIS will randomly select from among the registrations properly submitted during the initial registration period the number of registrations deemed necessary to meet the H-1B regular cap. This random selection will be made via computer-generated selection.

(6) *Advanced degree exemption selection.* After USCIS has determined it will no longer accept registrations under section 214(g)(1)(A) of the Act, USCIS will determine whether there is a sufficient number of remaining registrations to meet the H-1B advanced degree exemption.

(i) *Fewer registrations than needed to meet the H-1B advanced degree exemption numerical limitation.* If USCIS determines that it has received fewer registrations than needed to meet the H-1B advanced degree exemption numerical limitation, USCIS will notify all petitioners that have properly registered that their registrations have been selected. USCIS will continue to accept registrations to file petitions that may be counted toward the H-1B advanced degree exemption numerical limitation under section 214(g)(5)(C) of the Act until USCIS determines that it has received enough registrations to meet the H-1B advanced degree exemption numerical limitation. USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the “final registration date”). The day the public is notified will not control the applicable final registration date. When necessary to ensure the fair and orderly allocation of numbers under Section 214(g)(1)(A) of the Act, USCIS may randomly select the remaining number of registrations deemed necessary to meet the H-1B advanced degree exemption numerical limitation from among the registrations properly submitted on the final registration date. This random selection will be made via computer-generated selection.

(ii) *Sufficient registrations to meet the H-1B advanced degree exemption numerical limitation.* If USCIS determines that it has received more than enough registrations to meet the H-1B advanced degree exemption

numerical limitation, USCIS will no longer accept registrations that may be counted under section 214(g)(5)(C) of the Act and will notify the public of the final registration date. USCIS will randomly select the number of registrations needed to meet the H-1B advanced degree exemption numerical limitation from among the remaining registrations that may be counted against the advanced degree exemption numerical limitation. This random selection will be made via computer-generated selection.

(7) *Increase to the number of registrations projected to meet the H-1B regular cap or advanced degree exemption allocations in a fiscal year.* Unselected registrations will remain on reserve for the applicable fiscal year. If USCIS determines that it needs to increase the number of registrations projected to meet the H-1B regular cap or advanced degree exemption allocation, and select additional registrations, USCIS will select from among the registrations that are on reserve a sufficient number to meet the H-1B regular cap or advanced degree exemption numerical limitation, as applicable. If all of the registrations on reserve are selected and there are still fewer registrations than needed to meet the H-1B regular cap or advanced degree exemption numerical limitation, as applicable, USCIS may reopen the applicable registration period until USCIS determines that it has received a sufficient number of registrations projected as needed to meet the H-1B regular cap or advanced degree exemption numerical limitation. USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the new “final registration date”). The day the public is notified will not control the applicable final registration date. When necessary to ensure the fair and orderly allocation of numbers, USCIS may randomly select the remaining number of registrations deemed necessary to meet the H-1B regular cap or advanced degree exemption numerical limitation from among the registrations properly submitted on the final registration date. If the registration period will be re-opened, USCIS will announce the start of the re-opened registration period on the USCIS website at [www.uscis.gov](http://www.uscis.gov).

(B) *Confirmation.* Petitioners will receive electronic notification that USCIS has accepted a registration for processing.

(C) *Notification to file H-1B cap-subject petitions.* USCIS will notify all petitioners with selected registrations

that the petitioner is eligible to file an H-1B cap-subject petition on behalf of the beneficiary named in the notice within the filing period indicated on the notice.

(D) *H-1B cap-subject petition filing following registration—(1) Filing procedures.* In addition to any other applicable requirements, a petitioner may file an H-1B petition for a beneficiary that may be counted under section 214(g)(1)(A) or section 214(g)(5)(C) of the Act only if the petitioner’s registration to file a petition on behalf of the beneficiary named in the petition was selected beforehand by USCIS and only within the filing period indicated on the notice. A petitioner may not substitute the beneficiary named in the original registration or transfer the registration to another petitioner. If a petitioner files an H-1B cap-subject petition based on a registration that was not selected beforehand by USCIS, or based on a registration for a different beneficiary than the beneficiary named in the petition, the H-1B cap-subject petition will be denied or rejected.

(2) *Filing period.* An H-1B cap-subject petition must be properly filed within the filing period indicated on the relevant selection notice. The filing period for filing the H-1B cap-subject petition will be at least 60 days. If petitioners do not meet these requirements, USCIS will deny or reject the H-1B cap-subject petition.

(E) *Calculating the number of registrations needed to meet the H-1B regular cap and H-1B advanced degree exemption allocation.* When calculating the number of registrations needed to meet the H-1B regular cap and the H-1B advanced degree exemption numerical limitation for a given fiscal year, USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. If necessary, USCIS may increase those numbers throughout the fiscal year.

\* \* \* \* \*

(iv) *Suspension of registration requirement—(A) Determination to suspend registration requirement.* USCIS may suspend the H-1B registration requirement, in its discretion, if it determines that the registration process is inoperable for any reason. If USCIS suspends the registration requirement, USCIS will make an announcement of the suspension on its website (<http://www.uscis.gov>) along with the opening date of the applicable H-1B cap-subject petition-filing period.

(B) *Petition-based cap-subject selections in event of suspended*

*registration process.* In any year in which USCIS suspends the H-1B registration process for cap-subject petitions, USCIS will allow for the submission of H-1B petitions notwithstanding paragraph (h)(8)(iii) of this section and conduct a cap-subject selection process based on the petitions that are received. USCIS will deny petitions indicating that they are exempt from the H-1B regular cap and the H-1B advanced degree exemption if USCIS determines that they are subject to either the H-1B regular cap or H-1B advanced degree exemption, unless the petition can still be counted under the H-1B regular cap or advanced degree exemption at the time of determination. If a petition is denied under this paragraph (h)(8)(iv)(B), USCIS will not return or refund filing fees.

(1) *H-1B regular cap selection in event of suspended registration process.* In determining whether there are enough H-1B cap-subject petitions to meet the H-1B regular cap, USCIS will consider all petitions properly submitted in accordance with 8 CFR 103.2 relating to beneficiaries that may be counted under section 214(g)(1)(A) of the Act, including those that may also be counted under section 214(g)(5)(C) of the Act. When calculating the number of petitions needed to meet the H-1B regular cap USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received and will announce on its website the date that it receives the number of petitions projected as needed to meet the H-1B regular cap (the “final receipt date”). The date the announcement is posted will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers under the H-1B regular cap, USCIS may randomly select via computer-generated selection the remaining number of petitions deemed necessary to meet the H-1B regular cap from among the petitions properly submitted on the final receipt date. If the final receipt date is any of the first five business days on which petitions subject to the H-1B regular cap may be received (*i.e.*, if the cap is reached on any one of the first five business days that filings can be made), USCIS will randomly select from among all the petitions properly submitted during the first five business days the number of petitions deemed necessary to meet the H-1B regular cap. After any random selection under this paragraph (h)(8)(iv)(B)(1), petitions that are subject to the H-1B regular cap and that do not qualify for the H-1B advanced degree

exemption will be rejected if they are not randomly selected or were received after the final receipt date.

(2) *Advanced degree exemption selection in event of suspended registration process.* After USCIS has received a sufficient number of petitions to meet the H-1B regular cap and, as applicable, completed the random selection process of petitions for the H-1B regular cap, USCIS will determine whether there is a sufficient number of remaining petitions to meet the H-1B advanced degree exemption numerical limitation. When calculating the number of petitions needed to meet the H-1B advanced degree exemption numerical limitation USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received and will announce on its website the date that it receives the number of petitions projected as needed to meet the H-1B advanced degree exemption numerical limitation (the “final receipt date”). The date the announcement is posted will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers under the H-1B advanced degree exemption, USCIS may randomly select via computer-generated selection the remaining number of petitions deemed necessary to meet the H-1B advanced degree exemption numerical limitation from among the petitions properly submitted on the final receipt date. If the final receipt date is any of the first five business days on which petitions subject to the H-1B advanced degree exemption may be received (*i.e.*, if the numerical limitation is reached on any one of the first five business days that filings can be made), USCIS will randomly select from among all the petitions properly submitted during the first five business days the number of

petitions deemed necessary to meet the H-1B advanced degree exemption numerical limitation. After any random selection under this paragraph (h)(8)(iv)(B)(2), petitions that are not randomly selected or that were received after the final receipt date will be rejected.

(v) *Severability.* The requirement to submit a registration for an H-1B cap-subject petition and the selection process based on properly submitted registrations under 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 regulation, as consistent with law.

(vi) *H-1C numerical limitations.*

\* \* \*

(vii) *H-2B numerical limitations.* When calculating the numerical limitations under section 214(g)(1)(B) and 214(g)(10) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the “final receipt date”). The day the public is notified will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers subject to the numerical limitations in 214(g)(1)(B) and 214(g)(10) of the Act, USCIS may

randomly select from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded. If the final receipt date is any of the first five business days on which petitions subject to the applicable numerical limit may be received (*i.e.*, if the numerical limit is reached on any one of the first five business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those five business days.

(9) \* \* \*

(i) *Approval.* USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication. USCIS will notify the petitioner of the approval of the petition on a Notice of Action. The approval notice will include the beneficiary's (or beneficiaries') name(s) and classification and the petition's period of validity. A petition for more than one beneficiary and/or multiple services may be approved in whole or in part. The approval notice will cover only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act.

\* \* \* \* \*

**Kirstjen M. Nielsen,**  
*Secretary.*

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