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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF MANUFACTURERS; BAY AREA COUNCIL; NATIONAL RETAIL FEDERATION; AMERICAN ASSOCIATION OF INTERNATIONAL HEALTHCARE RECRUITMENT; PRESIDENTS' ALLIANCE ON HIGHER EDUCATION AND IMMIGRATION; CALIFORNIA INSTITUTE OF TECHNOLOGY; CORNELL UNIVERSITY; THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY; UNIVERSITY OF SOUTHERN CALIFORNIA; UNIVERSITY OF ROCHESTER; UNIVERSITY OF UTAH; and ARUP LABORATORIES,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF LABOR; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security; and EUGENE SCALIA, in his official capacity as Secretary of Labor,

Defendants.

Case No. 20-CV-7331

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Once again, defendants attempt to use the COVID-19 pandemic as pretext to fundamentally disrupt high-skilled immigration. In June, Presidential Proclamation 10052 banned the entry of individuals traveling on H-1B, H-2B, L-1, and J-1 visas to the United States. Following suit by several plaintiffs to this action, this Court recently enjoined that unlawful act. *See Nat'l Assoc. of Mfrs. v. U.S. Dep't of Homeland Sec.*, __ F. Supp. 3d ___, 2020 WL 5847503, at *1, 13 (N.D. Cal. Oct. 1, 2020) (White, J.). As Judge White concluded, there is "a significant mismatch of facts regarding the unemployment caused by the proliferation of the pandemic and the classes of noncitizens who are barred by the Proclamation." *Id.* at *13.

2. Five days later, having failed to demolish the H-1B program by imposing an entry ban, the Department of Homeland Security (DHS) and the Department of Labor (DOL) announced interim final rules designed to substantially restrict, if not outright eliminate, the H-1B visa category. These rules are extraordinary: If left unchecked, they would sever the employment relationship of hundreds of thousands of existing employees in the United States, and they would virtually foreclose the hiring of new individuals via the H-1B program. They would also gut EB-2 and EB-3 immigrant visas, which provide for employment-based permanent residence in the United States.

3. Despite their massive impact, defendants promulgated these Rules without the notice-and-comment rulemaking required by the Administrative Procedure Act (APA). Because defendants have no "good cause" to dispense with the APA's most fundamental protection for the regulated public, the Court should swiftly set these Rules aside.

4. Prompt judicial action is imperative. The DOL Rule was *immediately* effective, and it is causing ongoing harm. The DHS Rule is set to become effective December 7, 2020, and an injunction prior to that date is essential. Judicial action is required to maintain the employment-based immigration programs as Congress intended—and to preserve thousands of jobs across the country.

* * *

5. In the Immigration and Nationality Act, Congress established the H-1B visa category to allow entry of noncitizens who are "coming temporarily to the United States to perform services . . . in a specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). These workers support the Nation's welfare. Robust evidence confirms that H-1B workers contribute mightily to the U.S. economy: They perform crucial services where U.S. labor markets lack capacity, boosting economic output and helping businesses grow.[1] They meet essential needs in underserved communities; more than 10,000 physicians are employed each year via the H-1B program to provide medical services, many in remote areas.[2] H-1B workers are critical members of U.S. higher education institutions, performing ground-breaking new research and educating thousands of American students. All this productivity, in turn, creates net new jobs for the domestic labor market. And H-1B visa holders inject ingenuity, entrepreneurship, and cultural diversity across the United States.

6. The twin final rules at issue here—both published in *The Federal Register* on October 8, 2020—constitute a coordinated assault on the H-1B visa category. The DOL rule also inflicts drastic harm upon many employment-based immigrants seeking to live and work permanently in the United States. Despite the magnitude of these Rules, defendants have purported to invoke the "good cause" exception to forgo the APA's requirement of notice-and-comment rulemaking, thus depriving all stakeholders the right to participate in the creation of these monumental regulations.

7. The "DHS Rule," *Strengthening the H-1B Nonimmigrant Visa Classification Program*, issues sweeping changes to H-1B eligibility. 85 Fed. Reg. 63,918 (Oct. 8, 2020). It redefines what qualifies as a "specialty occupation," restricting the category of individuals who will qualify—all at odds with the statutory definition. The DHS Rule also targets H-1B workers employed at third-party job sites by restricting the maximum validity period of their visa status for only one year, as compared to three for other H-1B workers. In addition, the administration's as-

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[1] Madeline Zavodny, American Enterprise Institute & Partnership for a New American Economy, *Immigration and American Jobs* 11 (Dec. 2011), perma.cc/66K3-NZDQ.

[2] *See* Peter A. Kahn & Tova M. Gardin, *Distribution of Physicians With H-1B Visas By State and Sponsoring Employer*, JAMA: The Journal of the American Medical Association (June 6, 2017), perma.cc/3FN5-FLE9.

sault on H-1B employers that provide professional services includes the imposition of burdensome compliance requirements regarding third party contracts and work itineraries, which substantially restricts the ability of H-1B workers to fill these roles. When the government earlier attempted to enact these policies via a policy memorandum, a court enjoined it. *See ITServe Alliance, Inc. v. Cissna*, 443 F. Supp. 3d 14, 42 (D.D.C. 2020).

8. The "DOL Rule," *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, is a poison pill that would destroy the whole H-1B system. 85 Fed. Reg. 63,872 (Oct. 8, 2020). The DOL Rule raises the minimum wages employers must pay to H-1B workers (as well as to workers with EB-2 and EB-3 visas) to artificially high levels—wages that vastly exceed what comparable domestic workers are paid. For some 18,000 combinations of occupations and geographic locations, DOL has set the prevailing wage rate at $100 an hour, or $208,000 a year. This includes, for example, a software developer in the San Jose-Sunnyvale-Santa Clara area. While a private wage survey from Willis Towers Watson shows that an entry level employee in this field and location earns approximately $70,600 per year, DOL would raise that amount by $137,400.

9. To take just one concrete example, the University of Utah, a plaintiff here, currently seeks to renew an existing H-1B employee. (Employees must be renewed at least once every three years.) That individual is currently paid approximately $80,000, far above the pre-rule required wage of $62,760. Under the DOL Rule, however, the University of Utah would be obligated to pay this same individual $208,000. That is untenable.

10. The total economic consequences of these Rules are staggering. Although its own data is mistaken in several important respects, DOL itself calculates that its Rule alone will result in at least $198.29 *billion* in costs imposed on employers over a 10-year period. 85 Fed. Reg. at 63,908. This is not a wage increase designed to protect workers. It is the imposition of astronomically high wages—increasing pre-Rule wages by 35% to 200% or more—in order to destroy the H-1B program.

11. Defendants have acknowledged that these Rules are designed to disrupt the relationship between employer and employee. Ken Cuccinelli, the "Senior Official Performing the

Duties of the Director, U.S. Citizenship and Immigration Services," described at a press conference that the DHS Rule by itself will render ineligible at least one-third of H-1B positions that are currently approved.[3] Critically, these Rules are not just forward looking. They apply when current H-1B holders seek to renew their status. Thus, these Rules will render hundreds of thousands of H-1B workers—individuals who are currently living and working in the United States—ineligible to renew their visas. If that occurs, H-1B employees will lose their jobs and be forced to leave the country, to the detriment of their employers that rely upon those employees for their experience, continuity, and high productivity.

12. Indeed, many of the H-1B employees that will be affected by these Rules are individuals for whom their employer is seeking to obtain permanent residence, as the employer greatly values the employee's contributions. There are hundreds of thousands of individuals living and working in the U.S. as H-1B nonimmigrants, who are awaiting their green cards. This delay is attributable to a quota system that limits the number of green cards annually available to individuals based on birthplace.[4] These employers relied upon the long-standing rules of the program in making various broad decisions with regard to where they would build out their operations, as well as how much time, effort, and expense to invest in sponsoring their H-1B workers (and often their families) for lawful permanent residence.

13. Similarly, the DOL Rule will devastate the process for receiving EB-2 and EB-3 permanent employment-based immigrant visas. The DOL Rule would raise dramatically the minimum wages a company must pay to hire immigrants through these programs. As just one example, there is a well-established and longstanding shortage of domestic nurses. Thousands of foreign nurses arrive annually to the United States on EB-3 immigrant visas every year and obtain green cards, often working in rural, inner-city, and other underserved areas. Many healthcare sys-

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[3] *See* Michelle Hackman, *Trump Administration Announces Overhaul of H-1B Visa Program*, Wall Street Journal (Oct. 6, 2020) ("Ken Cuccinelli, the No. 2 official at DHS, said on a news conference call Tuesday that he expects about one-third of H-1B visa applications would be rejected under the new set of rules."), perma.cc/U466-K969.

[4] *See* David J. Bier, *Backlog for Skilled Immigrants Tops 1 Million: Over 200,000 Indians Could Die of Old Age While Awaiting Green Cards,* Cato Institute (Mar. 30, 2020), perma.cc/PY6L-SGVA.

tems will be unable to afford the artificially inflated minimum wages for these nurses now required by the DOL Rule, resulting in needed positions going unfilled and patients being undertreated.

14. Those who employ workers under the H-1B, EB-2, and EB-3 programs—hospitals, businesses small and large, higher education institutions, and countless others—have relied on the durability of these employment relationships. They have invested substantially, building laboratories, opening new clinical facilities, and developing new product lines in reliance on the invaluable contributions of H-1B, EB-2, and EB-3 employees. Unless promptly enjoined, these Rules will shatter long-held reliance interests, causing enormous loss of productivity, creativity, and innovation.

15. Individual employees hold deep reliance interests, too. For example, barring judicial relief, hundreds of thousands of H-1B employees will have their lives upended by these Rules. These individuals accepted offers of employment in the United States, *positions that were approved by defendants*; they uprooted their families and moved here to provide high-skilled labor badly needed by the U.S. economy. In so doing, they have bettered their employers and improved their communities. Along the way, these individuals have built lives here—they have gotten married, purchased homes and taken mortgages, and they have begun families. H-1B employees remade their lives in the United States—*at defendant's express approval*—in reliance on their continued employment here. Now, however, defendants seek to pull the rug out from underneath them, tossing aside the employer-employee relationships that all parties wish to continue.

16. Against these substantial reliance interests, the government offers slapdash economic theory that, in multiple respects, is demonstrably wrong. The government essentially disregards the interests of employers and employees, failing to account for the agreements entered—and the personal life choices made—on the basis of functional visa programs. These Rules are unlawfully arbitrary and capricious, and they conflict with the basic statutory structure.

17. Most immediately, these Rules fail for an essential threshold reason: Defendants have forgone notice-and-comment rulemaking, asserting instead that they may invoke the "good cause" exception within the Administrative Procedure Act. 5 U.S.C. § 553(b)(B). Thus, the DOL

Rule became effective immediately, and the DHS Rule will, unless enjoined, become effective on December 7, 2020. These rules are of enormous public concern, impacting many thousands of individuals, and the scores of hospitals, universities, businesses, and others that employ them. Defendants themselves acknowledge impacts reaching into the hundreds of billions of dollars. Yet defendants did not give the public an opportunity to comment, much less take into account the views and data that crucial stakeholders, including plaintiffs, would supply.

18. Defendants attempt to justify the failure to provide notice-and-comment rulemaking by invoking the COVID-19 pandemic. That claim is mere pretext. In the DHS Rule, DHS asserts that the "COVID-19 pandemic is an unprecedented 'economic cataclysm,'" constituting one of the "direst national emergencies the United States has faced in its history."[5] It thus reached the conclusion that "DHS must respond to this emergency *immediately*."[6] In making this argument, DHS relied on two articles appearing on the front page of *The New York Times*—on March 27, 2020.[7] That is, after learning information supposedly obligating the government to act "immediately," DHS and DOL waited about seven months to issue the Rules. That sort of delay categorically forecloses the government from invoking the APA's good-cause exception.

19. And just as Judge White concluded that the government failed to show that Proclamation 10052 was really about COVID-19, these Rules are not a genuine response to COVID-19 related unemployment. Unemployment rates in the categories most heavily utilized by H-1B employees, for example, remain exceedingly low.

20. Rather, these regulatory actions have long been on the administration's formal Unified Agenda, but defendants, on their own accord, simply ran out of time to accomplish them via ordinary notice-and-comment rulemaking before the impending election. Indeed, in the Fall 2017 Statement of Regulatory Priorities, DHS identified its intention to promulgate this very rule. It had the same title: "Strengthening the H-1B Nonimmigrant Visa Classification Program." And

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[5] 85 Fed. Reg. at 63,938.

[6] *Id*. (emphasis added).

[7] *Id*. n.138 (quoting Ben Casselman et al., *New Data Shows Staggering Toll of Outbreak*, N.Y. Times, Mar. 27, 2020, at A1); *id*. n.139 (quoting *Front Page* of *The New York Times*, N.Y. Times, Mar. 27, 2020, at A1).

DHS proposed doing just what it attempts now: It sought to "revise the definition of specialty occupation" and "revise the definition of employment and employer-employee relationship."[8] At the time, DHS anticipated issuing an "NPRM"—that is, a notice of *proposed* rulemaking—in October 2018, which would "propose" (not adopt) these regulatory changes.[9] Now, with the defendants perceiving that the clock may be nearing midnight, they seek to promulgate these same rules absent notice-and-comment.

21. There is objective proof from the government itself that these Rules are proceeding in substantially irregular fashion. Executive Order 12866 obligates an agency, prior to promulgating a rule, to obtain approval from the Office of Information and Regulatory Affairs (OIRA). The OIRA review process is a cornerstone of modern administrative rulemaking; that office serves an essential quality control function, ensuring that agencies comply with the minimum requirements of law.

22. But that process was scuttled here, with defendants side-stepping it. OIRA failed to "complete its review without any requests for further consideration."[10] Instead, OIRA issued a highly unusual "waiver" of OIRA approval, thus declining to complete its review in the normal course.[11] OIRA's refusal to sanction defendants' conduct—an end-run around the APA's basic requirements—is revealing. It is extraordinary for rules of this substantial significance to be published in *The Federal Register* without OIRA's oversight, but that is exactly what occurred here. Both Rules are unlawful, and the Court should enjoin them.

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[8] DHS, *Fall 2017 Statement of Regulatory Priorities*, perma.cc/RP75-RZYM.

[9] *Strengthening the H-1B Nonimmigrant Visa Classification Program*, View Rule, perma.cc/4W8M-ESBX.

[10] Executive Order 12866 § 8, perma.cc/ZWU7-ASYB.

[11] *See* DOL Rule, 85 Fed. Reg. at 63,902 ("Pursuant to E.O. 12866, OIRA has determined that this is an economically significant regulatory action. However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A)."); DHS Rule, 85 Fed. Reg. at 63,940 ("Pursuant to E.O. 12866 (Regulatory Planning and Review), the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget has determined that this is an economically significant regulatory action. However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A)."); Suzanne Monyak, *H-1B Visa Rule Advances After Budget Office Waives Review*, Law360 (Oct. 1, 2020), perma.cc/EE8F-ESCM.

PARTIES

23. Plaintiff Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. Part of the U.S. Chamber's mission is advocating for its members' abilities to bring the world's best and brightest to America to foster innovation and economic growth. Because many of the U.S. Chambers' members face acute labor shortages as to certain specialty occupation workers, they employ individuals via the H-1B, EB-2, and EB-3 visa categories. The Rules at issue here thus directly injure the interests of the members of the U.S. Chamber.[12] The U.S. Chamber is a 501(c)(6) nonprofit organization headquartered in Washington, D.C.

24. Plaintiff National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly three-quarters of private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. Part of the NAM's mission is advocating for its members' abilities to access global talent and retain workers who drive innovation in manufacturing. NAM recognizes that immigrants help build America's manufacturing industry and that temporary workers

[12] A Court in this District recently concluded that plaintiffs the U.S. Chamber, the NAM, and the NRF each have standing to address government policies adversely impacting their numerous members that employ individuals via the H-1B program. *See Nat'l Ass'n of Manufacturers v. United States Dep't of Homeland Sec.*, No. 20-CV-04887-JSW, 2020 WL 5847503, at *5 (N.D. Cal. Oct. 1, 2020) ("Plaintiffs have filed eight declarations from the heads of the Associations and its constituent members outlining in detail the specific harms they have incurred and continue to incur as individual members and as organizations as a result of the Proclamation. … The ample record plainly belies the contention that the Associations have failed to establish that they and their members have interests adversely affected by the Proclamation that are germane to their purposes and are facing specific harms as a result of the imposition of the Proclamation and its effectuating guidelines.").

from abroad are essential to the Nation's manufacturing competitiveness. Because many of NAM's members have hired—and intend to hire—employees via the H-1B, EB-2, and EB-3 visa categories, the Rules will directly injure its members' interests. The NAM is a 501(c)(6) nonprofit organization headquartered in Washington, D.C.

25. Plaintiff Bay Area Council is a business-sponsored, public policy advocacy organization for the nine-county Bay Area. The Council proactively advocates for a strong economy, a vital business environment, and a better quality of life for everyone who lives there. Its membership includes an array of prominent businesses with longstanding ties to the region. The Bay Area Council advocates to ensure its members have access to high-skilled workers necessary to respond to shortages in the U.S. labor market. Because its members have and will hire employees via the H-1B, EB-2, and EB-3 visa categories, its members are immediately injured by the Rules. The Bay Area Council is headquartered in San Francisco, California.

26. Plaintiff National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. The NRF advocates for policies that benefit its members and, ultimately, the Nation as a whole, including for immigration laws that reflect the value international employees bring to U.S. employers. The NRF's members utilize global talent to fill many employment needs, and, because its members currently hire employees via the H-1B, EB-2, and EB-3 visa categories, its members are harmed by the Rules addressed here. The NRF is a 501(c)(6) nonprofit organization headquartered in Washington, D.C.

27. Plaintiff American Association of International Healthcare Recruitment (AAIHR) is a Delaware not-for-profit 501(c)(6) organization that is the voice of the international healthcare recruitment and staffing industry. AAIHR was founded in 2006 to represent the mutual interests of U.S.-based organizations that participate in the recruitment of foreign-educated healthcare professionals, and to promote legal, ethical, socially responsible, and professional practices for international healthcare recruitment. AAIHR member organizations recruit, screen, train, test, credential, sponsor, relocate, resettle, and employ a variety of foreign-educated healthcare professionals

including Registered Nurses, Physical Therapists, Occupational Therapists, Speech Language Pathologists, and Medical Technologists for U.S. employment. AAIHR's members rely on the H-1B, EB-2, and EB-3 programs to attract thousands of foreign professionals in these fields to our labor force every year. The members of AAIHR are thus directly injured by the Rules at issue here. AAIHR is based in Washington, D.C.

28. Plaintiff Presidents' Alliance on Higher Education and Immigration, a project of the National Center for Civic Innovation, is a nonpartisan association of American college and university leaders that brings college and university presidents, chancellors and their institutions together on the immigration issues that impact higher education. The Alliance works to advance just immigration policies and practices at the federal, state and campus level that are consistent with our heritage as a nation of immigrants and the academic values of equity and openness. The Presidents' Alliance represents approximately 500 public and private colleges and universities of all sizes and institutional types, including doctoral, master's level, baccalaureate, community college, and special focus institutions, from across the United States. Altogether, members' institutions enroll over five million students and are located in forty-two states, D.C. and Puerto Rico. Because many of the its members have and will hire international employees via the H-1B, EB-2, and EB-3 visa categories, its members will be directly harmed by the Rules, and advocating on these issues is central to the mission of the Presidents' Alliance on Higher Education and Immigration. The National Center for Civic Innovation is a 501(c)(3), headquartered in New York, New York.

29. Plaintiff California Institute of Technology (Caltech) is a world-renowned, privately endowed research university that marshals some of the world's brightest minds and most innovative tools to address fundamental scientific questions and pressing societal challenges. Caltech employs thousands of scientists, engineers, scholars, faculty, and staff, and educates more than 2,200 students annually across a broad range of interdisciplinary fields. The community, which is physically distributed across the country—from the main Pasadena campus to a number of large-scale research facilities and astronomical observatories—is diverse and representative of the international scientific community.

30. Plaintiff Cornell University is a privately endowed research university and a partner of the State University of New York. As the federal land-grant institution in New York State, it has a responsibility—unique within the Ivy League—to make contributions to all fields of knowledge in a manner that prioritizes public engagement to help improve the quality of life in its state, the nation, and the world. Cornell has graduate and professional programs in over 100 fields and attracts students from around the world. Cornell's new graduate technology campus in New York City has joined its medical school, Weill Cornell Medicine, which is among the nation's top-ranked medical schools. Cornell's main campus is located in Ithaca, New York.

31. Plaintiff Board of Trustees of the Leland Stanford Junior University ("Stanford University") is one of the world's leading teaching and research universities. Since its opening in 1891, Stanford has been dedicated to finding solutions to big challenges and to preparing students for leadership in a complex world. With students from across the United States and throughout the world, representing diverse perspectives, experiences, backgrounds, and cultures, it is a place of learning, discovery, expression and innovation. Stanford University through its School of Medicine and three hospitals, provides patients with outstanding care, while engaging in scientific discovery, technological innovation, and translational medicine. The university is located in Stanford, California.

32. Plaintiff University of Rochester is a global leader among research universities, with a long tradition of breaking boundaries. The university transforms ideas into enterprises that create value and make the world ever better; its diverse community includes more than 3,000 faculty and 11,000 students. In total, the University of Rochester employs nearly 25,000, and more than 32,000 when counting each UR Medicine regional healthcare affiliate. It is home to the University of Rochester Medical Center (URMC), one of the nation's leading academic medical centers. The University of Rochester is the largest private sector employer based in Upstate New York and the sixth-largest employer in the state. The University of Rochester is located in Rochester, New York.

33. Plaintiff University of Southern California (USC) is a leading private research university—a global center for arts, technology, and international business. Its community is dedi-

cated to the development of human beings and society as a whole through extensive interdisciplinary study, teaching, and collaboration, as well as highly advanced research and world-class scholarly and creative work. The university's medical enterprise, Keck Medicine of USC, includes three hospitals and serves the Los Angeles region with exceptional patient care, cutting-edge research, and translational medicine. USC employs approximately 30,000, provides instruction to nearly 50,000 students annually, and has representation from more than 135 countries among its faculty, staff, and students. USC is located in Los Angeles, California.

34. The University of Utah is the flagship institution of higher learning in Utah. Founded in 1850, it serves over 31,000 students from across the U.S. and the world. With 17 colleges and schools, nearly 100 departments, more than 72 undergraduate majors, 90 graduate majors, and 500 student organizations, the University of Utah prepares students to live and compete in the global workplace. The University of Utah Health is the Mountain West's only academic health care system; its more than 1,400 board-certified physicians and more than 5,000 health care professionals staff five hospitals and twelve community clinics across the state. The University of Utah is headquartered in Salt Lake City, Utah.

35. ARUP Laboratories is a national nonprofit and academic reference laboratory at the forefront of diagnostic medicine. Affiliated with the University of Utah, ARUP is a CAP-, ISO 15189-, and CLIA-certified diagnostic lab with more than 35 years of experience supporting clients through unparalleled quality and service. It is located in Salt Lake City, Utah.

36. Defendant United States Department of Homeland Security is the federal agency with substantial responsibility for immigration policy and enforcement.

37. Defendant United States Department of Labor is the federal agency with responsibility for labor issues, including issues surrounding wages paid to foreign workers.

38. Defendant Chad F. Wolf is the Acting United States Secretary of Homeland Security. He is sued in his official capacity.

39. Defendant Eugene Scalia is the United States Secretary of Labor. He is sued in his official capacity.

JURISDICTION AND VENUE

40. Plaintiffs bring this suit under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and this Court's inherent equitable powers.

41. The court's jurisdiction is invoked under 28 U.S.C. § 1331, as this case arises under the Constitution and laws of the United States.

42. Venue is proper in this district under 28 U.S.C. § 1391(e) because both plaintiff Bay Area Council and plaintiff Stanford University maintain their principal places of business in this district, and no real property is involved in this action.

INTRADISTRICT ASSIGNMENT

43. Assignment to either the San Francisco Division or the Oakland Division of this Court is proper because venue is based on plaintiff Bay Area Council's residence in the City and County of San Francisco.

LEGAL BACKGROUND

A. The Administrative Procedure Act.

44. Under the Administrative Procedure Act (APA), an agency may issue rules and regulations carrying the force of law only after providing notice of the proposed rulemaking and allowing the public to participate in the rulemaking process by submitting comments. 5 U.S.C. § 553. This requirement "serves both (1) to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies[,] and (2) to assure that the agency will have before it the facts and information relevant to a particular administrative problem." *MCI Telecommc'ns Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (quotation marks omitted); *accord, e.g.*, *Make the Road N.Y. v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020) ("[A] central purpose of notice-and-comment rulemaking is to subject agency decisionmaking to public input and to obligate the agency to consider and respond to the material comments and concerns that are voiced.").

45. An agency may be excused from following the notice-and-comment procedure if it "for good cause finds . . . that notice and public procedure" with respect to a proposed rule "are

impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). However, this good-cause exception to notice and comment "is to be narrowly construed and only reluctantly countenanced." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

46. A reviewing court will "hold unlawful and set aside" a rule that was issued "without observance of procedure required by law," including when an agency claims good cause to forego notice and comment when no such good cause in fact exists. 5 U.S.C. § 706(2)(D). Agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" will similarly be set aside. *Id.* § 706(2)(A).

B. The H-1B Visa Program.

47. The Immigration and Nationality Act (INA) governs the admission of noncitizens into the United States. *See generally* 8 U.S.C. §§ 1101 *et seq.* Among other things, the INA provides for various categories of nonimmigrant visas for noncitizens planning to enter the United States temporarily and for a specific purpose. *See id.* §§ 1101(a)(15), 1184. Nonimmigrant visas are distinct from immigrant visas, which are issued to those intending to become permanent residents of the United States.

48. The H-1B visa[13] is issued to highly skilled workers with expertise in one or more specialty fields. This visa is available to a noncitizen "who is coming temporarily to the United States to perform services . . . in a specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b).

49. "Specialty occupation" is defined by the INA to mean "an occupation that requires . . . theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1).

50. The current regulatory definition of specialty occupation closely tracks the statutory language:

> Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor

[13] The visa categories are designated according to the subsection of 8 U.S.C. § 1101(a)(15) in which each category is defined. *See* 8 C.F.R. § 214.1(a)(2) (table of designations for nonimmigrant visas).

> including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

8 C.F.R. § 214.2(h)(4)(ii).

51. Before hiring an H-1B worker, an employer must complete the temporary labor condition application (LCA) process. The employer must certify to the Department of Labor that (among other things) the company will pay its H-1B employee, at a minimum, the greater of "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question" or "the prevailing wage level for the occupational classification in the area of employment." 8 U.S.C. § 1182(n)(1)(A)(i); *see generally* 20 C.F.R. part 655 (DOL regulations governing Labor Condition Application process).

52. Current regulations provide multiple methods by which an employer may establish the prevailing wage. *See* 20 C.F.R. § 655.731(a)(2). In many cases, employers determine the relevant prevailing wage by submitting information about the position to DOL, and the agency itself issues a determination based on a statistical analysis. In brief, that procedure involves the calculation of four "skill levels" and corresponding wages for workers in the occupation and location in which the employer is seeking to employ the H-1B worker, based on statistics compiled by the Bureau of Labor Statistics. *See* DOL Rule, 85 Fed. Reg. at 63,875-63,876; *see also* 8 U.S.C. § 1182(p)(4). Employers identify in the LCA the skill level to which the position corresponds; if approved by DOL, the wage associated with that skill level is the prevailing wage for H-1B purposes.

53. Prior to the DOL Rule at issue in this case, the wages associated with the four skill levels were set by DOL guidance documents at the following percentiles of the wages earned by all workers in the same occupation and location:

Level I ("entry level"): 17th percentile

Level II ("qualified"): 34th percentile

Level III ("experienced"): 50th percentile

Level IV ("fully competent"): 67th percentile

See DOL Rule, 85 Fed. Reg. at 63.875-63,876.

54. Thus, for example, a company planning to hire an entry-level applications software developer in New York on an H-1B visa would have been required to pay that employee, under the prior DOL framework, a wage at least equal to the wage earned by the 17th percentile of all application software developers in New York (at all experience levels).[14]

55. The annual quota for new H-1B workers is generally limited to 65,000 per year, with an additional 20,000 visas per year available to individuals with an advanced degree from a U.S. higher education institution. Certain entities, including non-profit higher education institutions, are exempt from this cap.

56. The current regulations provide that H-1B status "shall be valid for a period of up to three years," with the opportunity for one three-year extension. 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), (h)(15)(ii)(B). In practice, many employers request the full three-year term for their H-1B employees, and DHS has "almost uniformly granted a visa petition for three years until recently." *ITServe Alliance, Inc. v. Cissna*, 443 F. Supp. 3d 14, 42 (D.D.C. 2020). The period may be extended in the event that an individual has a pending petition for a green card.

C. Permanent Labor Certification Process.

57. To sponsor an employment-based immigrant (that is, one admitted for permanent immigration) under the second and third preference employment categories (EB-2 and EB-3), a U.S. employer must undertake the permanent labor certification ("PERM") process. *See* 20 C.F.R. §§ 656.15, 656.40; DOL Rule, 85 Fed. Reg. at 63,873. Prior to filing the labor certification application, an employer must obtain a Prevailing Wage Determination from the National Prevailing Wage Center at DOL. That prevailing wage is considered by examining any relevant collective bargaining agreement, a wage determination under the Davis-Bacon Act or McNamara-O'Hara Service Contract Act, a survey that complies with DOL's standards governing employer-

[14] If that company in fact paid similarly situated employees at a rate higher than the prevailing wage rate resulting from this calculation, it would be required to pay the H-1B employee that higher, actual wage rate rather than the prevailing wage. *See* 8 U.S.C. § 1182(n)(1)(A) (companies must pay the "prevailing wage" or "the actual wage level paid by the employer to all other individuals with similar work experience and qualifications," "whichever is greater"); *see supra* ¶ 51.

provided wage data, or alternatively data from the Bureau of Labor Occupational Employment Statistics (OES) survey. Generally, the prevailing wage for applications under the PERM program is determined using the same four "skill levels" as used for under the H-1B program. *See* DOL Rule, 85 Fed. Reg. at 63,877.

58. During the PERM application process, the employer must attest that the job opportunity has been and is clearly open to any U.S. worker and that all U.S. workers who applied for the job opportunity were rejected for lawful, job-related reasons. DOL Rule, 85 Fed. Reg. 63,873.

59. Generally, employers must also undertake specific pre-application recruitment steps before filing a PERM application. *See* 20 C.F.R. § 656.17(e). But DOL has established a categorical designation known as "Schedule A" for occupations with well-established labor shortages, such as registered nurses, which dispenses with the recruitment requirements. *See* 20 C.F.R. § 656.5; 20 C.F.R. § 656.15; *see also* U.S. Dep't of Labor, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77,326, 77,338 (Dec. 27, 2004) ("[N]o recruitment is required for Schedule A applications.").

FACTUAL BACKGROUND

A. Contributions of Foreign Nonimmigrant and Immigrant Workers.

60. United States Citizenship and Immigration Services estimated that, as of September 30, 2019 (the most recent statistics), the H-1B visa population of foreign workers in specialized occupations was approximately 580,000.[15]

61. These workers contribute enormously to American productivity, prosperity, and innovation. To take just one example, it is well understood that the United States faces an acute shortage of doctors: "Even as the nation's health care workforce combats the spread and lethality of COVID-19, a report from the Association of American Medical Colleges (AAMC) projects that the United States will face a shortage of between 54,100 and 139,000 physicians by 2033."[16]

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[15] U.S. Citizenship & Immigration Services, Office of Policy & Strategy, Policy Research Division, *H-1B Authorized-to-Work Population Estimate* 1, perma.cc/N9R4-XNQM.

[16] Patrick Boyle, *U.S. physician shortage growing*, AAMC (June 26, 2020), perma.cc/9LX2-CQWM (referencing Association of American Medical Colleges, *The Complexities of Physician Supply and Demand: Projections From 2018 to 2033* (June 2020), perma.cc/8GQ4-4CQN)).

H-1B workers are one way to address this labor shortage; each year, there are roughly 10,000 H-1B approvals (both new employees and arrivals) for physicians living and working in the United States.[17] Community health systems, including University of Utah Health (part of plaintiff University of Utah) rely on H-1B physicians to staff hospitals and medical clinics, including in rural and remote regions. Services from these H-1B workers are important contributions to the health of Americans nationwide.

62. Similarly, our nation faces a drastic shortage in medical laboratory professionals, which perform routine and highly specialized tests.[18] These laboratory professionals are on the front lines of the coronavirus pandemic and their diagnostic services are vital to addressing the pandemic. Significant numbers of medical laboratory professionals are attracted to our labor force under the H-1B program.

63. Individuals entering the United States via H-1B visas are also important parts of higher education. Many leading colleges and universities—including plaintiffs here—routinely hire professors, scholars, and researchers from abroad via H-1B visas. Plaintiff University of Rochester, for example, has faculty members living and working in the United States pursuant to H-1B visas, teaching in the fields of nursing, computer science, and mathematics. In 2020, more than 28,000 labor condition applications were filed for higher education, confirming the central importance of these programs.[19]

64. H-1B employees also contribute substantially to crucial academic research. The University of Rochester, for example, specializes in disease discovery and vaccine research, through interdisciplinary collaborations between biology, chemistry, physics, and optics. Among its many outstanding research programs, the University features a Center for RNA Biology, which is currently at the forefront in investigating COVID-19. Several leading researchers in the

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[17] *See* Peter A. Kahn & Tova M. Gardin, *Distribution of Physicians With H-1B Visas By State and Sponsoring Employer*, JAMA: The Journal of the American Medical Association (June 6, 2017), perma.cc/3FN5-FLE9.

[18] Am. Soc'y for Clinical Lab. Sci., *Addressing the Clinical Laboratory Workforce Shortage* 4 (Aug. 2, 2018) (observing that "total demand" for these professionals "exceeds current [domestic] educational output by more than double"), perma.cc/FU3B-HEUB.

[19] 2020 H1B Visa Report: Top H1B Visa NAICS Industry, perma.cc/B3BM-DWAY.

University of Rochester's RNA laboratories live and work in the United States pursuant to H-1B visas.

65. The H-1B visa category has profound implications for innovation of all sorts. The Cato Institute recently summarized many of the latest economic analyses, and explained that:

> H-1B workers have an especially big impact on American innovation. New technology and knowledge allow for more efficient machines and production processes that increase nationwide productivity. Highly skilled migrants on H-1B visa[s] … directly increase the production of knowledge through patents, innovation, and entrepreneurship. These effects are localized and diffuse throughout the country.[20]

66. Some of this innovation occurs in the biomedical field. Weill Cornell Medicine, a leading medical research center and part of plaintiff Cornell University, employs many H-1B workers among its research scientists and doctors. These individuals are integral components of teams working tirelessly to advance medical sciences, seeking betterment of the country as a whole.

67. Indeed, temporary foreign workers broadly boost innovation in the United States—as measured by proxies such as patenting activity—driving the economy and helping to ensure American competitiveness on the global stage.[21] The U.S. economy, particularly in manufacturing and certain STEM fields, faces a structural shortage of domestic workers qualified and available to fill the roles needed for research institutions, businesses, and universities to perform.[22]

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[20] Alex Nowrasteh, *Don't Ban H-1B Workers: They Are Worth Their Weight in Innovation*, Cato at Liberty (May 14, 2020) (summarizing and linking to several leading studies), perma.cc/SMW4-UUJT.

[21] *See, e.g.*, U.S. Dep't of Homeland Security, *Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*, 81 Fed. Reg. 13,040, 13,048 (Mar. 11, 2016) (collecting authorities).

[22] *See, e.g.*, Deloitte & The Manufacturing Institute, *The jobs are here, but where are the people?: Key findings from the 2018 Deloitte and The Manufacturing Institute skills gap and future of work study* 2 (2018) ("[R]esearch reveals an unprecedented majority (89 percent) of executives agree there is a talent shortage in the US manufacturing sector."), perma.cc/W2ND-RRLB; *id.* at 3 fig. 2 ("[The p]ersistent skills shortage could risk US$2.5 trillion [in] economic output over the next decade."); New American Economy Research Fund, *Sizing Up the Gap in our Supply of STEM Workers: Data & Analysis* (Mar. 29, 2017) (noting that in 2016, "13 STEM jobs were posted online for each unemployed worker that year—or roughly 3 million more jobs than the number of available, trained professionals who could potentially fill them."), perma.cc/4BZR-ED9S. In fact, because there are substantial costs involved with the hiring of new temporary worker employees—including all the legal fees and costs associated with the immigration process—employers have financial incentives to avoid hiring temporary workers where possible.

68. "Having the workers to fill such jobs" in the high-skilled arena—through nonimmigrant visa programs like H-1B—"allows American employers to continue basing individual operations or offices in the United States, a move that creates jobs at all levels—from the engineers and computer programmers based in American offices to the secretaries, HR staff, and mailroom employees that support them."[23] Economists and other scholars therefore agree that, far from taking jobs from Americans, the employment of temporary workers from abroad actually has the net effect of *creating* jobs for American-born workers.

69. A study jointly authored by the American Enterprise Institute and the Partnership for a New American Economy, titled *Immigration and American Jobs*, concluded that "[o]verall, when looking at the effect of all immigrants on employment among US natives, there is no evidence that immigrants take jobs from US-born workers."[24] That study showed that "states with greater numbers of temporary workers in the H-1B program for skilled workers … had higher employment among US natives."[25] Specifically, "[a]dding 100 H-1B workers results in an additional 183 jobs among US natives."[26] In sum, "[t]he results give clear evidence that … the H-1B … program[] for temporary workers correspond[s] to greater job opportunities for US-born workers."[27]

70. In a seminal 2015 economic evaluation of H-1B visas and productivity in 219 American cities, economists concluded that, per their simulations, an increased number of H-1B visa holders in a city resulted in productivity gains. Specifically, the economists found that "foreign STEM growth explained between one-third and one-half of the average [Total Factor Productivity] growth during the period" 1990 to 2010.[28]

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[23] Partnership for a New American Economy, *The H-1B Employment Effect: H-1Bs awarded between 2010-2013 will create more than 700,000 jobs for U.S.-born workers by 2020* at 1-2 (2015), perma.cc/C6T2-6TKZ.

[24] Madeline Zavodny, American Enterprise Institute for Public Policy Research & the Partnership for a New American Economy, *Immigration and American Jobs* 11 (Dec. 2011), perma.cc/66K3-NZDQ.

[25] *Id*. at 4.

[26] *Id*.

[27] *Id*. at 11.

[28] Giovanni Peri, Kevin Shih, Chad Sparber, *STEM Workers, H-1B Visas, and Productivity in US Cities* (July 2015), perma.cc/N4GV-YJJ6.

71. An economic study in 2018 on the relationship between H-1B visa petitions and the entry of new products and exit of outdated products (product reallocation) concluded that firm-level analysis shows H-1B visa petitions are associated with higher rates of product reallocation. Generating product reallocation is one measure to identify where smaller, incremental innovations are occurring.[29]

72. As described in a July 2019 economic study on the impact of highly skilled STEM immigration on the U.S. economy, the foreign-born share of STEM professionals in the United States over the period 2000 to 2015 created an estimated benefit of $103 billion for American workers. This was almost all "attributed to the generation of ideas associated with high-skilled STEM immigration which promotes the development of new technologies that increase the productivity and wage of U.S.-born workers."[30]

73. A May 2020 study by the National Foundation for American Policy examined 2005 to 2018 data and concluded that "[a]n increase in the share of workers with an H-1B visa within an occupation, on average, reduces the unemployment rate in that occupation."[31] Indeed, "[t]he results indicate that a 1 percentage point increase in the share of workers with an H-1B visa in an occupation reduces the unemployment rate by about 0.2 percentage points."[32] H-1B workers thus improve the employment prospects of all, and there is "no evidence that the H-1B program has an adverse impact on labor market opportunities for U.S. workers."[33]

74. A literature review by the National Academies of Sciences, Engineering, and Medicine likewise concludes that:

> Importantly, immigration is integral to the nation's economic growth. Immigration supplies workers who have helped the United States to avoid the problems facing stagnant economies created by unfavorable demographics—in particular, an aging (and, in the case of Japan, a shrinking) workforce. Moreover, the infusion by high-skilled immigration of human capital has boosted the nation's capacity for innova-

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[29] Gaurav Khanna, Munseob Lee, *High-Skill Immigration, Innovation, and Creative Destruction*, Nat'l Bureau of Economic Research (2018), perma.cc/QE87-KDAC.

[30] Christian Gunadi, *An inquiry on the impact of highly-skilled STEM immigration on the U.S. economy*, 61 Labour Economics (2019), perma.cc/AA3A-M365.

[31] Madeline Zavodny, *The Impact of H-1B Visa Holders on the U.S. Workforce*, NFAP Policy Brief 1 (May 2020), perma.cc/Y6UE-23TL.

[32] *Id.*

[33] *Id.*

> tion, entrepreneurship, and technological change. The literature on immigrants and innovation suggests that immigrants raise patenting per capita, which ultimately contributes to productivity growth. The prospects for long-run economic growth in the United States would be considerably dimmed without the contributions of high-skilled immigrants.[34]

75. At least three factors account for the link between robust high-skilled immigration and economic growth—*first*, those individuals who are motivated to leave home, and who are selected by U.S. colleges or companies for opportunities here, have an overabundance of entrepreneurship and innovative talent; *second*, high-skilled temporary workers tend to focus in "quantitative skills and STEM fields," which are specialties that fuel growth; and *third*, high-skilled temporary workers are often instrumental in the creation of new technologies.[35]

76. Congress itself has recognized this dynamic. As one Senate Report states:

> Critics of H–1B visas claim that they result in taking away jobs from Americans and giving them to foreigners. In fact, however, failure to raise the H–1B ceiling is what will deprive Americans of jobs. This is because artificially limiting companies' ability to hire skilled foreign professionals will stymie our country's economic growth and thereby partially atrophy its creation of new jobs.
>
> . . .
>
> Many of the concerns about H–1B visas revolve around the fear that individuals entering on H–1B visas will "take" a job from an American worker. This fear arises from the premise that there is a fixed number of jobs for which competition is a zero-sum game. But this premise is plainly flawed[.][36]

77. The EB-2 and EB-3 immigrant visa programs likewise offer substantial benefits to our society. The EB-3 visa, for example, is instrumental in managing our nation's longstanding shortage of registered nurses.[37] There are only about 11 registered nurses for every 1,000 people

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[34] National Academies of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration*, The National Academies Press 6-7 (2017), perma.cc/JU7U-LVJ2.

[35] Giovanni Peri & Chad Sparber, *Presidential Executive Actions Halting High Skilled Immigration Hurt the US Economy*, UC Davis Global Migration Center Policy Brief 2 (July 2020), perma.cc/3B6B-25YU.

[36] S. Rep. 106-260, at 11-12 (Apr. 11, 2000).

[37] *See, e.g.*, Letter from Sens. David Perdue, Kelly Loeffler, & Bill Cassidy to Secretaries Pompeo & Scalia and Acting Secretary Wolf (Apr. 3, 2020), /perma.cc/D5A3-HPVQ.

in the United States.[38] And with the increased growth, life expectancy, and average age of the U.S. population—not to mention the effects of the current pandemic—demand for registered nurses keeps growing as well. DOL projects that employment of registered nurses will grow 12% between 2019 and 2029, "faster than the average for all occupations"—which is 4%.[39]

78. In recognition of this shortage, DOL has for decades designated registered nurses as a "Schedule A" shortage occupation, which is a categorical determination that "there are not sufficient United States workers who are able, willing, qualified, and available" in the field and that "the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of" foreign registered nurses. 20 C.F.R. § 656.5. And the EB-3 program has been instrumental in addressing this shortage. Each year, thousands of foreign nurses are attracted to our labor force under the EB-3 program.[40]

B. COVID-19 and Unemployment.

79. The first confirmed cases of COVID-19 in the United States were identified in January 2020, and state and local governments began shutting down parts of the economy in mid-March.

80. As a result, unemployment increased dramatically. The last two weeks of March saw record numbers of new unemployment filings,[41] and the Bureau of Labor Statistics reported a 14.7% total unemployment rate in April.[42]

81. That unemployment crisis has steadily abated, however. As shown in the chart below,[43] the overall unemployment situation has improved in every month since April 2020, and BLS reported a 7.9% total unemployment rate for September:

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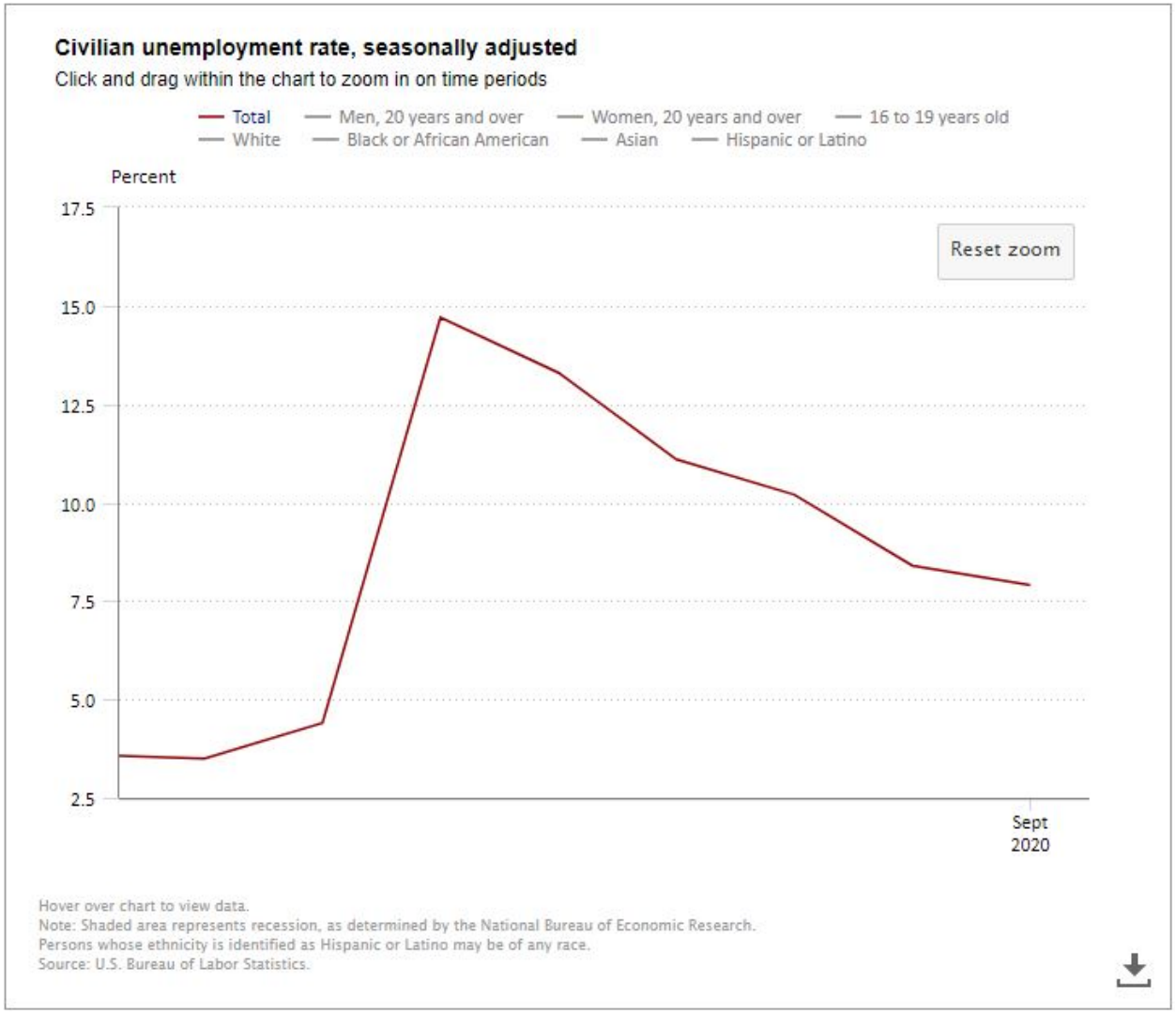
[38] *See Active RN Licenses: A Profile of Nursing Licensure in the U.S.*, National Council of State Boards of Nursing, Inc. (Oct. 15, 2020), perma.cc/8J2M-K7V9.

[39] *Occupation Outlook Handbook, Registered Nurses: Job Outlook*, Bureau of Labor Statistics, U.S. Dep't of Labor (Sept. 1, 2020), perma.cc/3E7C-YYNB.

[40] *See, e.g.*, Letter from Am. Hosp. Ass'n & Am. Org. for Nursing Leadership to Sen. Rand Paul (July 26, 2019), perma.cc/DD9A-C84X.

[41] *See, e.g.*, Heather Long, *Over 10 Million Americans Applied for Unemployment Benefits in March as Economy Collapsed*, Wash. Post (Apr. 2, 2020), perma.cc/J6LY-R7HM.

[42] *See* U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, perma.cc/GJ6R-EYL2.



82. While 7.9% total unemployment is higher than the historically low rates seen prior to the pandemic, it is certainly not unprecedented. The total unemployment rate was higher than (or comparable to) 7.9% during the entire four-year period from January 2009 through January 2013, during the last recession and subsequent recovery.[44]

[43] Derived from the interactive tool available at U.S. Bureau of Labor Statistics, *Graphics for Economic News Releases: Civilian Unemployment Rate*, perma.cc/V26A-JL3S.

[44] *See* U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, perma.cc/GJ6R-EYL2.

83. For those with a bachelor's degree or greater education, which DOL measures with individuals starting at age 25, the unemployment rate is even less—4.8% in September 2020.[45] Likewise, this unemployment rate is comparable to that of the last recession. In June 2009, unemployment among this group reached 4.8%, peaking at 5% in both September 2009 and November 2010. It was not until 2011 that unemployment in this group fell to consistently less than 4%.[46] This population is more relevant to H-1Bs than is the overall unemployment rate.

84. But this data is still too general. The COVID-related spike in unemployment was not distributed evenly across occupations. While certain jobs in tourism, hospitality, and related service industries were hit hardest, an analysis of Bureau of Labor Statistics data shows that the unemployment rate in computer occupations rose only slightly, and is now essentially back to the pre-pandemic baseline: The unemployment rate in computer occupations was 3.0% in January 2020 (before the economic impacts of the virus were felt) and now stands at 3.5% in September 2020.[47]

85. Nearly two-thirds of approved H-1B visa petitions are for jobs in "computer-related occupations," according to DHS data.[48]

86. According to a June 2020 analysis by the Federal Reserve, the lowest rate of unemployment the economy can sustain is likely between 3.5% and 4.5%.[49] The exceedingly low unemployment rate in computer-related jobs indicates that there is significant unmet demand for individuals in these occupations.

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[45] *See* U.S. Bureau of Labor Statistics, *The Employment Situation—September 2020* at 18 & tbl. A-4, perma.cc/G752-FCV9.

[46] *See* U.S. Bureau of Labor Statistics, *Unemployment rates for persons 25 years and older by educational attainment*, perma.cc/QPE2-P2GT.

[47] Nat'l Foundation for American Policy, *Employment Data for Computer Occupations for January to September 2020* at 2-3 (Oct. 2020), perma.cc/5F78-AJ2N. *See also* Stuart Anderson, *Tech Unemployment Data Contradict Need for Quick H-1B Visa Rules*, Forbes (Oct. 13, 2020), perma.cc/3GAN-86SS.

[48] U.S. Dep't of Homeland Security, U.S. Citizenship & Immigration Services, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress* 12 & tbl 8A (Mar. 5, 2020), perma.cc/VL4G-FVNN.

[49] Bd. of Governors of the Federal Reserve System, *What is the lowest level of unemployment that the U.S. economy can sustain*? (June 10, 2020), perma.cc/R79F-QVFE; *see also id.* ("Even in good times, a healthy, dynamic economy will have at least some unemployment as workers switch jobs, and as new workers enter the labor market and other workers leave it.").

87. Moreover, during the 30 days ending October 2, 2020, there were over 655,000 active job vacancy postings advertised online for jobs in common computer occupations—including over 280,000 postings for "software developers, applications" alone—indicating that overall demand for high-skilled workers in these occupations still exceeds the domestic supply.[50]

C. The DHS Rule.

88. On October 8, 2020, DHS published in *The Federal Register* one of the rules at issue in this case. *See Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918 (Oct. 8, 2020) (DHS Rule). The DHS Rule is also attached as Exhibit 1 to this Complaint.

89. Purporting to invoke the APA's good-cause exception, DHS published the DHS Rule as an interim final rule, meaning that it becomes effective without notice and comment. *See* DHS Rule, 85 Fed. Reg. at 63,918, 63,938-63,940; *see also* ¶¶ 110-132, *infra*. If it is not enjoined, the DHS Rule will take effect on December 7, 2020, and will apply to new H-1B petitions, transfer petitions for current H-1B workers, and extension petitions for current H-1B workers filed on or after that date. *Id.* at 63,918, 63,924.

90. The DHS Rule makes multiple changes to the existing regulatory structure for H-1B visas, two categories of which are particularly critical here.

91. First, the rule amends the regulatory definition of "specialty occupation" and related requirements to restrict the categories of jobs that will qualify as specialty occupations for which H-1B visas may be issued.

92. Under the DHS Rule, the new definition for "specialty occupation" will be the following:

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

[50] Nat'l Foundation for American Policy, *Employment Data for Computer Occupations for January to September 2020* at 4 (Oct. 2020), perma.cc/5F78-AJ2N.

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

DHS Rule, 85 Fed. Reg. at 63,964 (emphasis added); *see id.* at 63,924-63,926.

93. This new definition constrains the universe of specialty occupations, compared to existing law. For example, DHS takes the position that under the new definition, positions requiring an engineering degree are not specialty occupations—notwithstanding that engineering constitutes "a body of highly specialized knowledge." *See* 8 U.S.C. § 1184(i)(1). Instead, the DHS Rule (in DHS's view) requires specific *sub*-specialties of engineering to be a hiring prerequisite in order for a position to qualify as a "specialty occupation." DHS Rule, 85 Fed. Reg. at 63,925 ("For example, a requirement of a *general* engineering degree"—or of "an engineering degree in any or all fields of engineering"—"for a position of software developer would not satisfy the specific specialty requirement."); *see also id.* at 63,926 ("Similarly, a requirement of a bachelor's degree in an unspecified 'quantitative field' (which could include mathematics, statistics, economics, accounting, or physics) for a software developer position would be insufficient to meet the requirements of a specialty occupation.").

94. This heightened specialization requirement makes it more difficult for positions to qualify, particularly in technology fields where positions do not match up neatly with universities' labels for their degree programs. As one commentator put it, the DHS Rule

> will greatly limit the use of an H-1B in computer-related professions as well as in new and growing fields like data analytics, where the background required usually comes from two distinct majors, computer science and statistics. . . . It will be more difficult to get H-1Bs for positions that require some computer science background but not necessarily an in-depth computer science degree, such as software quality assurance, some web programming and positions that are more coding than analysis.[51]

95. The DHS Rule also imposes a heightened proof requirement for petitioners to demonstrate that a particular degree is a prerequisite for a job (and therefore for that job to qualify

[51] Stuart Anderson, *Trump Administration Issues Two New Rules to Restrict H-1B Visas*, Forbes (Oct. 7, 2020), perma.cc/XFX9-2L93.

as a specialty occupation). The existing regulations state that a particular position qualifies as a specialty occupation if "[a] baccalaureate or higher degree or its equivalent is ***normally*** the minimum requirement for entry into the particular position," or "[t]he employer ***normally*** requires a degree or its equivalent for the position." 8 C.F.R. § 214.2(h)(4)(iii)(A) (emphases added). The DHS Rule changes this requirement: "[T]he petitioner will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that this is ***always*** the requirement." DHS Rule, 85 Fed. Reg. at 63,926 (emphasis added); *see also id.* ("It will no longer be sufficient to show that a degree is normally, commonly, or usually required."). This heightened evidentiary burden to prove the minimum requirements for an occupation categorically, without exception, will be difficult if not impossible to meet for many positions.

96. The second major category of changes imposed by the DHS Rule is a suite of new restrictions aimed at crippling the business model of consulting and other professional services companies who employ H-1B workers and contract their employees out to perform services onsite at third-party firms. The availability of the specialized contract labor provided by these firms is critical to the competitiveness of American businesses, research facilities, and medical institutions, particularly in the technology sector, which frequently need to expand and contract their capabilities with more speed and flexibility than would be possible by hiring new employees directly.

97. The DHS Rule imposes a new definition of the employer-employee relationship that, for the first time, differentiates between work performed at the employer's worksite and work performed at a third-party worksite. *See* DHS Rule, 85 Fed. Reg. at 63,931, 63,964 (factors including "[w]hether the petitioner supervises the beneficiary and, if so, where such supervision takes place," and "[w]here the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision."). This new definition makes it more difficult for consulting firms to establish that their prospective H-1B employees are, in fact, employees, when they perform their work at the physical worksite of the consulting firm's clients as is common practice.

98. The DHS Rule also severely restricts the duration of H-1B status for employees performing work on third-party worksites. Under current regulations, H-1B status "shall be valid for a period of up to three years," with the opportunity for one three-year extension, and the courts found that DHS should be granting such petitions usually for the full three-year period. *See* 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), (h)(15)(ii)(B); *ITServe Alliance*, 443 F. Supp. 3d at 42-43. The DHS rule, by contrast, "set[s] a 1-year maximum validity period for all H-1B petitions in which the beneficiary will be working at a third-party worksite." DHS Rule, 85 Fed. Reg. at 63,935; *see also id.* at 63,965 (new regulatory text).

99. The DHS Rule is designed to have a clear effect: to substantially reduce the range of engagements that count as a "specialty occupation" and the range of individuals qualified to hold the jobs that do meet this new definition. Defendants have said as much publicly. In a briefing call for journalists upon release of the DHS Rule, Ken Cuccinelli specifically identified that the purpose and effect of the Rule is to render ineligible at least one-third of H-1B positions that are currently approved.[52]

100. By its terms, the DHS Rule applies both to new petitions filed on or after the effective date *as well as* petition extensions. *See* DHS Rule, 85 Fed. Reg. at 63,924. Thus, when any of the approximately 580,000 H-1B workers currently in the United States seek to renew their H-1Bs (which, under prior rules, they generally must do every three years[53]), these new restrictions will apply. Per Mr. Cuccinelli's estimate, nearly 200,000 existing positions would cease to qualify. Thus, while the government had previously approved the positions as specialty occupations—and found the H-1B worker qualified—this DHS Rule intends to reverse those determinations in the renewal context for hundreds of thousands of individuals.

101. None of the substantive changes in the DHS Rule relate in any way to the COVID-19 pandemic.

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[52] *See* Michelle Hackman, *Trump Administration Announces Overhaul of H-1B Visa Program*, Wall Street Journal (Oct. 6, 2020), ("Ken Cuccinelli, the No. 2 official at DHS, said on a news conference call Tuesday that he expects about one-third of H-1B visa applications would be rejected under the new set of rules."), perma.cc/U466-K969.

[53] The DHS Rule of course sets renewal to an annual basis for employees who work at third part sites.

D. The DOL Rule.

102. The second rule challenged in this case was published by DOL in *The Federal Register* on October 8, 2020, the same day as the DHS Rule. *See Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872 (Oct. 8, 2020) (DOL Rule). The DOL Rule is also attached as Exhibit 2 to this Complaint.

103. As with the DHS Rule, DOL purported to invoke the APA's good-cause exception to publish the DOL Rule as an interim final rule, meaning that it becomes effective without notice and comment. *See* DOL Rule, 85 Fed. Reg. at 63,872, 63,898-63,902; *see also* ¶¶ 110-132, *infra*. Unlike the DHS Rule, the DOL Rule took effect *immediately* upon publication on October 8. *See* DOL Rule, 85 Fed. Reg. at 63,872.

104. The DOL Rule changes the way DOL calculates the prevailing wage that employers must pay their H-1B employees, as well as employees under the EB-2 and EB-3 employment-based immigrant visas, resulting in a huge increase in prevailing wage levels over DOL's previous calculations. The DOL Rule keeps the four-tier structure from preexisting guidance, but adjusts the percentiles at which those four tiers are established.

105. Under the DOL Rule, "[t]he Level I Wage shall be computed as the arithmetic mean of the fifth decile of the OES wage distribution," setting the wage at approximately the 45th percentile. DOL Rule, 85 Fed. Reg. at 63,915; *see also id.* at 63,890-63-891.

106. "The Level IV Wage shall be computed as the arithmetic mean of the upper decile" (DOL Rule, 85 Fed. Reg. at 63,915), which DOL intended to correspond to "approximately the 95th percentile" (*id.* at 63,893). As discussed below, however, calculating the mean of the upper decile actually results in a level significantly higher than the 95th percentile.

107. As under the prior system, Levels II and III under the DOL Rule are set at approximately even intervals between Levels I and IV as provided by 8 U.S.C. § 1182(p)(4). The result under the DOL Rule is that Level II is set at approximately the 62nd percentile of wages, and Level III at approximately the 78th percentile. DOL Rule, 85 Fed. Reg. at 63,893.

108. The following table compares the four prevailing wage levels, as a percentile of the surveyed wages among all professionals at all levels (from the most entry-level to the most experienced) in a given occupation, set under the existing methodology and under the DOL Rule:

	Existing Methodology	**DOL Rule**
Level I	17th percentile	45th percentile
Level II	34th percentile	62nd percentile
Level III	50th percentile	78th percentile
Level IV	67th percentile	95th percentile*

109. The new calculations imposed by the DOL Rule have an even more outsized effect on the actual dollar wages H-1B, EB-2, and EB-3 employers are now required to pay. A new analysis by the National Federation for American Policy compared the prevailing wages calculated on June 30, 2020 under the prior system with those now required under the DOL Rule, and the increases are staggering.[54] For example, the required minimum wage for software developers—a common H-1B occupation—is about 45% higher under the DOL Rule than under the agency's prior practice; for computer network architects, the new minimum is about 40% higher. The same pattern is seen across many occupations frequently held by H-1B workers:

[54] *See* Nat'l Foundation for American Policy, *An Analysis of the DOL H-1B Wage Rule* 9-11 (Oct. 2020), perma.cc/9Y2C-2YKG.

Table 2
Average Increase in Required Minimum Salary Under New DOL Wage Rule By Occupation

OCCUPATION	Level 1	Level 2	Level 3	Level 4
Biochemists and Biophysicists	+57.6%	+60.9%	+64.8%	+67.9%
Chemical Engineers	+40.4%	+40.7%	+41.5%	+42.3%
Computer Hardware Engineers	+47.6%	+43.4%	+41.1%	+39.7%
Computer/Information Research Scientists	+48.9%	+44.6%	+42.7%	+41.8%
Computer Network Architects	+40.3%	+39.6%	+39.7%	+40.0%
Computer Programmers	+42.8%	+42.3%	+42.7%	+43.2%
Computer Systems Analysts	+36.5%	+40.7%	+43.7%	+45.9%
Database Administrators	+44.5%	+42.1%	+41.0%	+40.5%
Electrical Engineers	+35.7%	+36.5%	+37.2%	+37.8%
Mechanical Engineers	+34.4%	+38.4%	+41.2%	+43.4%
Petroleum Engineers	+99.5%	+60.6%	+39.5%	+26.2%
Software Developers	+46.0%	+45.1%	+45.1%	+45.3%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the average increase in required minimum salary between the Department of Labor's system in place on June 30, 2020 and after the new wage system on October 8, 2020. All geographic areas.

110. Certain combinations of occupation and location will result in wage increases that exceed 200%. That is, the DOL Rule will *triple* existing prevailing wages in certain circumstances:

Table 3
Required Minimum Salaries (Level 1) Under New DOL Wage Rule In Specific Occupations and Locations

OCCUPATION	LOCATION	Increase in Required Minimum Salary
Computer and Information Systems Managers	East Stroudsburg, PA	206.5%
Pediatricians	Wichita, KS	177.0%
Physicists	Northwest Lower Peninsula of Michigan (nonmetropolitan area)	153.0%
Nuclear Engineers	Abilene, TX	168.1%
Electronics Engineers	Florence, SC	160.8%
Pharmacists	West Northwestern Ohio (nonmetropolitan area)	126.7%
Petroleum Engineers	Cape Coral-Fort Myers, FL	107.7%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the increase in required minimum salary between the Department of Labor's system in place on June 30, 2020 and after the new wage system on October 8, 2020.

111. For more than 18,327 combinations of occupations and geographic labor markets, DOL has concluded that it lacks sufficient data to identify a prevailing wage rate under the new DOL Rule. For these individuals, the minimum wage rate is set at $208,000. This includes a software developer for the San Jose-Sunnyvale-Santa Clara region.[55]

112. As that analysis puts it, "[t]he significant increases in the mandated minimum salaries would lead a rational observer to conclude the purpose of the DOL wage rule is to price foreign nationals out of the U.S. labor market. The increases for common occupations in technical fields are so large that complying with the rule would likely create havoc for any company."[56]

113. None of the substantive changes in the DOL Rule relate in any way to the COVID-19 pandemic.

[55] Nat'l Foundation for American Policy, *An Analysis of the DOL H-1B Wage Rule* 12 (Oct. 2020), perma.cc/9Y2C-2YKG.

[56] Nat'l Foundation for American Policy, *An Analysis of the DOL H-1B Wage Rule* 10 (Oct. 2020), perma.cc/9Y2C-2YKG.

THE RULES ARE UNLAWFUL.

A. There is no "good cause" for bypassing notice and comment.

114. Both the DHS Rule and the DOL Rule purported to invoke the APA's good-cause exception to avoid the general mandate that agencies must provide the public with notice and an opportunity to comment on a proposed rule before that rule may become effective. Both Rules at issue here have or will become effective without the benefit of a public record or any opportunity for public input whatsoever.

115. Both Rules' assertions of good cause are based on claims respecting the unemployment situation caused by the COVID-19 pandemic and the subsequent government response. *See generally* DHS Rule, 85 Fed. Reg. at 63,938-63,940; DOL Rule, 85 Fed. Reg. at 63,898-63,902. These assertions are insufficient to satisfy the APA's good-cause exception, and the Rules are therefore unlawful.

116. Most obvious, the unemployment caused by COVID-19—which was apparent in March 2020 and peaked in April 2020—cannot constitute good cause to escape the notice-and-comment requirement now, in October 2020. The good-cause exception is intended to apply when an emergency makes a sometimes lengthy rulemaking process impracticable or harmful; courts thus "have repeatedly rejected good cause when *the agency* delays implementing its decision." *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 16-17 (D.D.C. 2017) (emphasis added) (collecting cases). That is, the good cause exception is not available when an agency is faced with an emergency, waits seven months (enough time to solicit comments), and then attempts to issue a rule without notice and comment. But that is precisely what both DHS and DOL have done here.

117. For example, the DHS Rule pointedly relies on news articles characterizing the COVID-19 pandemic as "an unprecedented 'economic cataclysm,'" in which weekly new unemployment claims "skyrocketed" to "[n]early quintuple the previous worst-ever level of unemployment claims." DHS Rule, 85 Fed. Reg. at 63,938. As a result, the DHS Rule claims, "DHS must respond to this emergency immediately." *Id.* But the articles it cites were published *in March 2020*. *Id.* at 63,938 nn.138 & 139. A seven-month delay is hardly "respond[ing] . . . im-

mediately." DHS may not wait seven months, skip notice and comment based on an emergency that was apparent in March, and then credibly maintain that it was "immediately" responding to the emergency.[57]

118. Indeed, it is no secret that the administration has sought to adopt the policies established by both the DHS Rule and the DOL Rule for several years. These policies long pre-date the COVID-19 pandemic. This all suggests that the COVID-19 pandemic is simply a pretext to ram substantial policy changes through without having to face the gauntlet of public notice and comment.

119. Perhaps most clearly, in its Statement of Regulatory Priorities for 2017 (the first such statement under the current administration), DHS listed:

> a proposed rule that would revise the definition of specialty occupation to increase focus on truly obtaining the best and brightest foreign nationals via the H-1B program and would revise the definition of employment and employer-employee relationship to help better protect U.S. workers and wages. (*Strengthening the H-1B Nonimmigrant Visa Classification Program.*)[58]

DHS has thus contemplated this Rule at least three years prior to its publication in October 2020. And, in the years since, DHS has routinely identified this regulation as on its agenda.

120. Similarly, the DOL Rule itself "acknowledges" that "[t]he reforms to the prevailing wage levels that the Department is undertaking in this rulemaking . . . should have been undertaken years ago." DOL Rule, 85 Fed. Reg. at 63,900.

121. When the Executive Order titled "Buy American, Hire American" issued in 2017, Senior Advisor to the President Stephen Miller held a press conference, inaccurately asserting that "about 80 percent of H1B workers are paid less than the median wage in their fields."[59] Mil-

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[57] Elsewhere, defendants say that the emergency justifying these Rules began even earlier. DHS and DOL both point to the January 21, 2020 declaration of a public health emergency by the Secretary of Health and Human Services. 85 Fed. Reg. at 63,939; 85 Fed. Reg. at 63,898. And they refer to the President's March 13 declaration of a national emergency, retroactive to March 1. *Id.* Those observations, if anything, merely expand the length of the government's delay, rendering the "good cause" exception unavailable.

[58] DHS, *Fall 2017 Statement of Regulatory Priorities*, perma.cc/RP75-RZYM.

[59] Background Briefing on Buy American, Hire American Executive Order (Apr. 17, 2017), perma.cc/3D97-Y3V6.

ler said that the administration would consider "adjust[ing] the wage scale," and that "we do think that we can make improvements to wages for H1B workers administratively."[60]

122. The regulatory changes brought about by these Rules have thus been contemplated for years. This history confirms that defendants' invocation of the COVID-19 pandemic now is mere pretext, particularly since the Rules were promulgated *seven months* after the beginning of the emergency to which they are putatively an "immediate[]" response. DHS Rule, 85 Fed. Reg. 63,938.

123. In fact, while defendants claim it was reasonable to invoke the good cause exception in October 2020 because the United States was in the midst of "an unprecedented 'economic cataclysm'" (DHS Rule, 85 Fed. Reg. at 63,938), defendants separately recognized that the economy had already recovered substantially from the depths of the crisis. Thus, on October 1, 2020, defendant Secretary Scalia stated that "we've rebounded a lot more quickly" than anticipated, with jobs recovering far faster than they did during "last financial downturn, the so-called Great Recession," where "[i]t took Obama nearly three years to get unemployment under 8.5%."[61] On October 8, the same day it published the DOL Rule in *The Federal Register*, defendant DOL tweeted about the "stronger job market" reflected in its September jobs report.[62]

124. Defendants' claims that the failure to undertake notice-and-comment rulemaking in October 2020 was justified by "an unprecedented economic cataclysm" is also inconsistent with statements routinely made at the highest level of government. Defendants publicly released the Rules on October 6.[63] That *very same day*, President Trump tweeted: "Our Economy is doing very well. The Stock Market is at record levels, JOBS and unemployment also coming back in record numbers. We are leading the World in Economic Recovery."[64] Similarly, on October 12, President Trump stated that "Economy is about ready to go through the roof. Stock Market ready

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[60] *Id.*

[61] Salena Zito, *Labor Secretary Eugene Scalia boosts manufacturing apprenticeships*, Washington Examiner (Oct. 1, 2020), perma.cc/UN3N-X89E.

[62] US Labor Department (@USDOL), Twitter (Oct. 8, 2020, 10:40am), perma.cc/XK84-4MCR.

[63] *See* Michelle Hackman, *Trump Administration Announces Overhaul of H-1B Visa Program*, Wall Street Journal (Oct. 6, 2020), perma.cc/U466-K969.

[64] President Donald J. Trump (@realDonaldTrump), Twitter (Oct. 6, 2020, 2:48pm), perma.cc/G7TQ-PM2E.

to break ALL-TIME RECORD. 401k's incredible. New Jobs Record."[65] As the President explained, the "Economy is starting to boom"[66] and the United States is "Heading to the Greatest Economy Of All Time!!!"[67] The President's description of the economy as substantially recovered from the COVID-19-induced retraction confirms that defendants' good cause claim is pretextual.

125. Further, defendants are simply wrong to claim that the nature and extent of the exigency caused by COVID-related unemployment justifies emergency action regarding these Rules. Both agencies cite the 14.7% unemployment rate in April, characterizing it as "a rate not seen since the Great Depression." DOL Rule, 85 Fed. Reg. at 63,899; *see also* DHS Rule, 85 Fed. Reg. at 63,940 ("Given exceptionally high unemployment in the United States—highest since the Great Depression . . . these regulatory changes are urgently needed."). But they do not acknowledge that the peak in unemployment has passed, and the rate is now at a level at which it remained for years during the recovery from the last recession. *See* ¶¶ 81-82, *supra*. While the rate remains higher than it was before the pandemic—7.9% for September 2020—current overall unemployment was not at an unprecedented level when defendants promulgated these Rules.[68] That is to say, defendants cannot rest on economic conditions as they existed in March 2020, which have since changed dramatically, in order to invoke the good cause exception in October 2020.

126. The existing rate of unemployment, 7.9%, cannot itself be a legitimate basis to invoke the good cause exception for regulations that are putatively related to the labor markets. Were it otherwise, whenever unemployment reaches this level—again, a level at which unem-

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[65] President Donald J. Trump (@realDonaldTrump), Twitter (Oct. 12, 2020, 12:47pm), perma.cc/JK6V-2RK4. *See also id.* at 10:16am ("A New Record for Stocks and Jobs Growth."), perma.cc/6MFH-DHUB.

[66] President Donald J. Trump (@realDonaldTrump), Twitter (Oct. 13, 2020, 12:13am), perma.cc/ZZ73-5ALN.

[67] President Donald J. Trump (@realDonaldTrump), Twitter (Oct. 12, 2020, 3:51pm), perma.cc/T2B5-A2D8.

[68] DHS misleadingly cites a 10.2% overall unemployment rate "as of August 7, 2020" (*see* DHS Rule, 85 Fed. Reg. at 63,939)—but that is actually the *July* 2020 figure, already several months outdated by the time DHS issued its rule. *See* U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, perma.cc/GJ6R-EYL2. At the time the rule was issued, the most recent overall unemployment rate was September's 7.9% figure. *Id.*

ployment has remained for extended periods in the recent past—the government would have virtually unlimited authority to promulgate regulations impacting the labor markets without notice-and-comment rulemaking. That would gut the notice-and-comment requirement of the APA.

127. What is more, the overall unemployment rate is not the relevant comparator for H-1B workers who, by definition, must work in a "specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). As discussed above, COVID-related unemployment has hit service and hospitality occupations the hardest, while nearly two-thirds of approved H-1B visa petitions are for jobs in "computer-related occupations," according to DHS data.[69] And unemployment in computer occupations is only half a percentage point above its January 2020, pre-pandemic rate[70]—certainly not an emergency justifying invocation of the "narrowly construed and only reluctantly countenanced" good cause exception. *Mack Trucks*, 682 F.3d at 93.

128. Nor is the overall unemployment rate the relevant comparator for EB-2 and EB-3 visas. For example, registered nurses are EB-3 workers listed under DOL's Schedule A. *See* 20 C.F.R. § 656.5. Regardless of the overall unemployment rate, as DOL has determined, "there are not sufficient United States workers who are able, willing, qualified, and available for" Schedule A occupations and "the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of" foreign workers in these occupations. *Id.*

129. For its part, the DHS Rule also asserts "a significant jump in unemployment due to COVID-19 between August 2019 and August 2020 in two industry sectors where a large number of H-1B workers are employed," citing numbers for "the Information sector" and "the Professional and Business Services Sector." DHS Rule, 85 Fed. Reg. at 63,939. But the unemployment figures for those "sectors" consist of *all* jobs in the companies that constitute those sectors—

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[69] U.S. Dep't of Homeland Security, U.S. Citizenship & Immigration Services, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress* 12 & tbl 8A (Mar. 5, 2020), perma.cc/VL4G-FVNN.

[70] Nat'l Foundation for American Policy, *Employment Data for Computer Occupations for January to September 2020* at 2-3 (Oct. 2020), perma.cc/5F78-AJ2N. *See also* Stuart Anderson, *Tech Employment Data Contradict Need for Quick H-1B Visa Rules*, Forbes (Oct. 13, 2020), perma.cc/3GAN-86SS; ¶¶ 84-86, *supra*.

janitors, receptionists, and all. In fact, only roughly 10% of jobs in the information and professional services sectors are in occupations similar to those occupied by high-skilled H-1B professionals.[71] Sector-wide unemployment figures are therefore not probative with respect to competition from H-1B workers.

130. As noted at the outset, a Court in this District recently enjoined Presidential Proclamation 10052—which had sought to ban the entry of H-1B workers to prevent them from "taking jobs from American citizens" during the coronavirus emergency—on exactly the basis of this "mismatch" between COVID-related unemployment and the types of positions typically filled by high-skilled H-1B workers. *Nat'l Ass'n of Mfrs. v. DHS*, __ F. Supp. 3d ___, 2020 WL 5847503, at *1, 13 (N.D. Cal. Oct. 1, 2020). Defendants fail to substantiate their alternative view with material evidence.

131. DOL's circumvention of notice and comment on the basis of the coronavirus pandemic is particularly troubling because its Rule will *exacerbate* the pandemic. For example, our nation's ability to respond to the pandemic is hampered directly by the chronic shortage of registered nurses.[72] For decades, the EB-3 visa has been instrumental in addressing this shortage. Each year, healthcare-staffing companies and other healthcare employers attract thousands of registered nurses to our labor force under the EB-3 program. And the administration has repeatedly recognized the importance of immigrant nurses during the pandemic.[73] By making it too expensive to hire foreign nurses by artificially inflating their wages, DOL's Rule ensures that far fewer nurses

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[71] Nat'l Foundation for American Policy, *Employment Data for Computer Occupations for January to September 2020* at 8-9 (Oct. 2020), perma.cc/5F78-AJ2N.

[72] *See, e.g.*, Letter from Sens. David Perdue, Kelly Loeffler, & Bill Cassidy to Secretaries Pompeo & Scalia and Acting Secretary Wolf (Apr. 3, 2020), perma.cc/7FYC-J47E; Sarah Fitzpatrick et al., *U.S. Hospitals Brace for Another Challenge—An Unprecedented Shortage of Nurses*, NBC News (Mar. 24, 2020), perma.cc/S9Q4-PCCB.

[73] *See* Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak § 2(b)(ii) (Apr. 22, 2020), perma.cc/8D8V-SM6N (exempting "nurse[s]" from ban on entry into U.S. by immigrants); *see also* Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak § 4(a)(i) (June 22, 2020), perma.cc/V45E-6D29 (instructing officials to establish standards to exempt workers who are "involved with the provision of medical care to individuals who have contracted COVID-19" from ban on entry into U.S.)

will be able to join our labor force. So contrary to alleviating the effects of the pandemic, DOL's Rule threatens to make it worse.

132. Finally, good cause is lacking because the agencies' entire unemployment-based good-cause argument is reliant on the "plainly flawed" "premise" that foreign temporary workers "take" jobs from U.S. citizens.[74] In fact, as study after study has shown, the presence of foreign workers on H-1B visas tends to *create* jobs, on net, for domestic American workers. *See* ¶¶ 67-69, *supra*. And as DOL has recognized under the EB-3 program, "the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment" of foreign workers in Schedule A occupations, like registered nursing. 20 C.F.R. § 656.5.

133. The DOL Rule also offers a second good-cause theory, separate from COVID-related unemployment. Good cause to dispense with notice and comment is also satisfied, DOL asserts, because "[a]dvance notice of the intended changes would create an opportunity, and the incentives to use it, for employers to attempt to evade the adjusted wage requirements." DOL Rule, 85 Fed. Reg. at 63,898. In other words, DOL's theory is that if the changes were announced in advance of their effective date, companies would "rush" to submit Labor Certification Applications (LCAs) under the old rules, thereby "lock[ing] in" the prior wage rates. *Id.* at 63,901.

134. This argument is flawed in several respects. First, DOL admits that companies are "not permitted to file an LCA earlier than six months before the beginning date of the period of intended employment" (DOL Rule, 85 Fed. Reg. at 63,901)—significantly limiting the amount of "locking in" that could be accomplished during the notice and comment period. *See* 20 § C.F.R. 655.730(b).

135. Next, courts considering similar claims—including the Ninth Circuit—have required evidence in the record that regulated actors in fact *would* rush to take advantage of expiring regulations, not merely that they would have "opportunity" and "incentives." DOL Rule, 85 Fed. Reg. at 63,898; *see, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1278 (9th Cir. 2020). Here, DOL offers no specifics to substantiate its speculative fear.

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[74] S. Rep. 106-260, at 11-12 (Apr. 11, 2000).

136. In any event, "[t]he lag period before *any* regulation, statute, or proposed piece of legislation allows parties to change their behavior in response. If we were to agree with the government's assertion that notice-and-comment procedures increase the potential harm the Rule is intended to regulate, these procedures would often cede to the good-cause exception." *E. Bay*, 950 F.3d at 1278 (emphasis added). Particularly in light of the six-month limitation, applying the good-cause exception here would swallow the rule: Notice and comment is required.

137. Finally, in light of the serious substantive deficiencies in both Rules, the agencies' short-circuiting of the notice and comment process was far from harmless. As the Ninth Circuit has repeatedly explained, "[t]he failure to provide notice and comment is harmless only where the agency's mistake *clearly* had no bearing on the procedure used or the substance of [the] decision reached." *E.g.*, *California v. Azar*, 911 F.3d 558, 580 (9th Cir. 2018) (emphasis added; quotation marks omitted). That is not so here. Although plaintiffs need not "identify any specific comment that they would have submitted" in order to avoid harmless error (*id.*), here plaintiffs would have pointed out (at a minimum) the wholesale disruption of entire industries caused by the Rules, along with their serious logical and methodological shortcomings—including the massive wage hikes imposed by the DOL Rule in practice. In addition, in submitting comments and evidence, such as studies and expert submissions, for the agencies' records, plaintiffs would have demonstrated the magnitude of the reliance interests at stake. The agencies would then have then been obligated to respond to these comments, engaging in cost-benefit analysis—including analysis of the enormous reliance interests—that is entirely absent from the Rules as they stand. *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 753 (2015). Because the rush to avoid notice and comment short-circuited that analysis, the agencies' failure to satisfy the good-cause exception is not harmless.

138. In previously issuing regulations related to H-1Bs and other related issues, DHS (and its predecessor agencies) routinely changed proposed rules in response to public comments. *See*, *e.g.*, 51 Fed. Reg. 28,576; 55 Fed. Reg. 43,217. In fact, the agencies at times so substantially changed the rules that it reissued the notice of proposed rulemaking for a second round of comments. 53 Fed. Reg. 43,218. Because the public comment period matters enormously in this context, the Defendants' failure to provide it renders the Rules unlawful.

B. These Rules are arbitrary, capricious, and contrary to law.

139. In addition to their procedural failings, the substance of the DHS Rule and DOL Rule is arbitrary and capricious in multiple respects.

140. To begin, the DHS Rule's restrictive redefinition of "specialty occupation" is at odds with the statutory definition, which contains no text that permits DHS to deny specialty occupation status for a job that, for example, requires an engineering degree but not a super-specialized engineering degree. *See* 8 U.S.C. § 1184(i)(1); *cf.* DHS Rule, 85 Fed. Reg. at 63,925-63,926. Indeed, courts have previously rejected DHS's recent effort to impose the same policy by means of individual adjudications rather than rulemaking. *See, e.g.*, *InspectionXpert Corp. v. Cuccinelli*, 2020 WL 1062821, at *26 (M.D.N.C. Mar. 5, 2020) ("In short, the Decision requires a subspecialized degree, contrary to the governing statute and the Agency's past practices, which declined to mandate such a heightened level of specialization. . . . That the Decision deemed an engineering degree requirement too generalized further confirms the unreasonableness of the Decision's interpretation.").

141. The DHS Rule's new requirement that a specialized degree must *always* be a minimum requirement for an occupation to qualify as specialized is also arbitrary and capricious. For example, DHS "failed to consider an important aspect of the problem" (*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) by not recognizing that this places an insurmountable barrier to specialty occupation in many cases simply because such proof does not exist. In particular, DHS states that it will continue to use DOL's Occupational Outlook Handbook in determining the minimum requirements of a position—but that handbook generally only speaks to what qualifications a position "usually" or "normally" requires (not what it *always* requires) and thus cannot satisfy DHS's new evidentiary standard. The requirement is also contrary to the purpose of the H-1B statute, which is to balance the needs of the American economy and American labor, not to make it impossible to hire needed temporary foreign workers.

142. For new and emerging fields, it will be difficult, and often impossible, to show that a particular degree is "always" required for a certain occupation. Take, for example, the important

emerging field of bioinformatics. Individuals specialized in this area may have degrees in the fields of computer science, engineering, biology, or health sciences. Under the new DHS Rule, a university seeking to hire a researcher in bioinformatics may no longer qualify. Similarly, to engage in post-doctoral research in an economics field, an individual may qualify by holding a PhD in economics, statistics, mathematics, healthcare administration, or social science. Again, there are multiple degrees that may qualify an individual. The Rule, by contrast, sets an enormously demanding (and arbitrary) standard, contrary to the text of the governing statute, that will hinder if not preclude qualifying new fields for H-1B employees. In this way, DHS has rendered the H-1B program incapable of fulfilling its statutory objective.

143. DHS has also broken the program from the opposite end. As time marches forward, degrees often become increasingly specialized. The DHS Rule would have the pernicious effect of foreclosing individuals with older, often more generalized degrees, from qualifying for an H-1B position. For example, not too long ago, there was no "computer science" degree. Individuals specialized in computers by obtaining a degree in "electrical engineering" or a related field. Today, individuals may specialize in artificial intelligence by achieving a degree in computer science. But schools are now starting to offer specialized artificial intelligence degrees.[75] Because degrees become more specialized overtime, DHS's improper approach will lock-out individuals with older, more generalized degrees—due to no fault of their own. Additionally, because not all schools create more specialized degrees at the same time, DHS's approach would yield the arbitrary result that only individuals who graduate from schools that offer more specialized degree descriptions can qualify, even though other institutions will offer comparable training, but linked to a more general degree title. At bottom, disqualifying individuals with degrees in fields like "electrical engineering" from taking on a "specialized occupation" is contrary to H-1B program's purpose and longstanding operation.

[75] Plaintiff USC currently offers a "M.S. in Computer Science—Artificial Intelligence." Plaintiff University of Rochester now officers a "M.S. in Computer Science: Artificial Intelligence & Machine Learning." Plaintiff Caltech offers a "B.S. in Computer Science: Machine Learning & Artificial Intelligence Study Track." And plaintiff Stanford offers a "B.S. in Computer Science: Artificial Intelligence Track."

144. The DHS Rule's assault on third-party worksites is also arbitrary and capricious because it fails to articulate "a rational connection between the facts found and the choice[s] made" in imposing a one-year cap on H-1Bs at third-party worksites, and because it "fail[s] to consider" that it will likely result in making an entire industry's business model untenable. *State Farm*, 463 U.S. at 43 (quotation marks omitted).

145. The substance of the prevailing wage adjustments contained in the DOL Rule is likewise arbitrary and capricious. To begin, DOL has apparently made a basic mistake in assuming that setting the Level IV wage category at "the mean of the upper decile of the OES wage distribution" would result in a wage at "approximately the 95th percentile." DOL Rule, 85 Fed. Reg. at 63,892. That is wrong: As one commentator has noted, "[s]ince the top decile (the top 10 percent of wage earners) includes some extreme outliers and a very small sample size, those outliers skew the level 4 wage far higher than the 95th percentile."[76] And since Levels II and III are based in part on where Level IV is set, this mistake skews them as well. Analysis thus confirms that the actual wage rates calculated using the DOL Rule's methodology are up to 26% higher than predicted in the DOL Rule itself.[77] This is a massive error, the sort of thing that would have been identified and corrected via notice-and-comment rulemaking.

146. DOL also failed to supply any evidentiary basis to elevate the Level IV wage category to the 95th percentile. Basic market evidence would have confirmed to DOL that employees performing supervisory functions are found at a far broader range of the wage spectrum, and are not so concentrated at the very highest end. Again, notice and comment would have informed and corrected this elementary failing.

147. The DOL Rule is further arbitrary and capricious in that it sets the entry level wage—the minimum that an H-1B employee or individual on an EB-2 or EB-3 visa may earn—as

[76] David J. Bier, *DOL's H-1B Wage Rule Massively Understates Wage Increases by up to 26 Percent*, Cato at Liberty (Oct. 9, 2020), perma.cc/NZQ9-WQZZ.

[77] *Id.*

the 45th percentile of reported wages for the position. But that is irrational, because few entry level employees jump to a salary level that places them in the 45th percentile.[78]

148. DOL's analysis is also internally inconsistent. It creates a 4-level structure based on experience, but then it requires paying the bottom quartile (Level 1 entry employees) a minimum of the 45th percentile. That is, it requires the employer to set the minimum wage at nearly the median salary for *all* employees in a relevant professional and geography, even though Level 1 workers are, by definition, in the bottom quartile of experience level. One analyst has explained the irrationality inherent in this approach: "Entry level workers cannot be both at the bottom quarter of the wage scale and at almost median of the wage scale at the same time." [79]

149. DOL attempts to justify this approach by asserting that it can exclude the bottom portion of wages in various occupational classifications because H-1Bs are restricted to those who perform a specialty occupation. 85 Fed. Reg. 63,879-63,880. The crucial flaw here is that several occupational classifications are, in their whole, specialty occupations. Thus, for those professions—many of which are the professions in which H-1Bs are used most heavily—the entire spectrum of wage data is relevant for H-1B prevailing wage calculation. DOL's decision to exclude this data is arbitrary and capricious.

150. And adjusting the wage levels for applications under *all* the programs—like EB-3 visas—to which the DOL Rule applies based in large part on assumptions that apply only to the H-1B program also does not make any sense.

151. In this way, the DOL Rule is contingent on—and fails for the same reason as—the DHS Rule. The DOL Rule recognizes that many occupations, as described in DOL's Occupational Outlook Handbook, do not *require* a particular degree. 85 Fed. Reg. 63,879-63,880. DOL then concludes that it may exclude the bottom portion of wage information, reasoning that those workers may not possess a bachelor's degree in the specific field. But this reasoning disregards the statutory phrase "or its equivalent." 8 U.S.C. § 1184(i)(1). The entire range of an occupational

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[78] Nat'l Foundation for American Policy, *An Analysis of the DOL H-1B Wage Rule* 10 (Oct. 2020), perma.cc/9Y2C-2YKG.

[79] Nat'l Foundation for American Policy, *An Analysis of the DOL H-1B Wage Rule* 8 (Oct. 2020), perma.cc/9Y2C-2YKG.

classification may qualify as a specialty occupation where, as common, the minimum entry requirement is either a bachelor's degree or training equivalent to that. This flaw renders the DOL Rule further arbitrary and capricious.

152. In addition, DOL has identified no evidence indicating that employees with alternative degrees are actually paid at the bottom end of the wage scale. DOL takes the example of a computer systems analysis; while a degree in computer science or information science is common, DOL asserts that some entities may hire analysts with business or liberal arts degrees. 85 Fed. Reg. 63,880. But DOL never supplies the data necessary to support its argument: That individuals with degrees in fields like business or liberal arts are in fact paid at the bottom end of the spectrum. Thus, even if DOL's reasoning were sound (it is not), DOL fails to introduce any evidence to support its claim.

153. DOL certainly lacks evidence as to *why* it chose to place entry level H-1B and EB-2 and EB-3 workers at a minimum threshold of the 45th percentile. Even if there were evidence that individuals with allegedly non-specialized degrees may hold positions, DOL would still have to show why the relevant wage rate for entry-level employees under the H-1B, EB-2, and EB-3 programs actually reaches the 45th percentile, rather than a far lower rate, commensurate with a starting position.

154. Further, the statute pegs a specialty occupation as one where a "bachelor's or higher degree" or "its equivalent" is usually required. 8 U.S.C. § 1184(i). Level 1 wages are for *entry level* individuals. But, in setting the prevailing wage rate for *entry level* employees, DOL "determined that an individual with a master's degree and little-to-no work experience is the appropriate comparator for entry-level workers in the Department's PERM and specialty occupation programs for purposes of estimating the percentile at which such workers' wages fall within the OES wage distribution." 85 Fed. Reg. at 63,889. This is utterly irrational: Although the statute provides that the threshold requirement is attainment of a bachelor's degree or its equivalent, DOL has set minimum wages to rates to those earned if someone has an *advanced* degree.

155. The DOL Rule also "fail[s] to consider . . . important aspect[s] of the problem" (*State Farm*, 463 U.S. at 43), including that the labor market is global. That is, making H-1B em-

ployees (and certain employment-based immigrants) much more expensive to employ will inevitably result in multinational companies choosing to situate many of those positions abroad, rather than benefitting American workers.[80] The rule also fails to offer a "rational connection between the facts found and the choice" (*id.*) to increase the prevailing wage levels by such radical amounts over the existing methodology. Here, "the evidence tells a story that does not match the explanation the Secretary gave for his decision" (*Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019)), suggesting instead an intent to make employing foreign workers prohibitively expensive for some companies—a result that conflicts with the purpose of the H-1B and employment-based immigration statutes themselves.

156. In issuing these rules, Defendants failed to address substantial publicly available data and studies that bear directly on the issues. Defendants failed to address this material no doubt because it declined to provide an opportunity for the public to comment. Defendants failed to address evidence showing that many employers pay H-1B and EB-2 and EB-3 workers wages *above* market, that these programs do not negatively impact the U.S. labor market, and that the hiring of workers under these programs causes employers to hire more domestic workers. Defendants make no attempt to study whether the rules issued here will cause employers to move jobs offshore, to the detriment of domestic workers and the U.S. economy as a whole.

157. The limited data DOL did reply upon does not support its conclusions. The central problem the Rule is apparently designed to address is an allegation of wage suppression among non-H-1B workers. But the Rule fails to identify evidence that such wage suppression actually exists. DOL has to acknowledge that the studies it relies on do not "directly comparing workers with the same levels of education, experience, and responsibility." 85 Fed. Reg. at 63,882. And the "[a]cademic research" on which DOL relies, it must confess, "generally focuses on low-

[80] *See, e.g.*, Stuart Anderson, *Trump Administration Issues Two New Rules to Restrict H-1B Visas*, Forbes (Oct. 7, 2020) ("'[A]ny policies that are motivated by concerns about the loss of native jobs should consider that policies aimed at reducing immigration have the unintended consequence of encouraging firms to offshore jobs abroad,' according to firm-level data in research by Britta Glennon, an assistant professor at the Wharton School of Business."), perma.cc/XFX9-2L93.

skilled immigrant labor," not high-skilled professions at issue here. *Id*. at 63,883 & n.126. DOL has no basis to show that the high-skilled labor market works the same way.

158. DOL also failed to "identify and make available [the] technical studies and data that it has employed in reaching the decision" to set the four prevailing wage categories at the points it selected, an independent APA violation. *E.g. Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (emphasis omitted).

159. Moreover, both rules—and their aggressive implementation schedules—seriously erode the "significant reliance interests" of universities, businesses, research facilities, and healthcare providers that have organized themselves around the existing regulations, and of the foreign workers who set up their lives here in reliance on those policies. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *see also, e.g., DHS v. Regents of the Univ. of Cal*., 140 S. Ct. 1891, 1913 (2020) ("Because DHS was not writing on a blank slate, it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.") (emphasis, citation, and quotations omitted). The upsetting of investment-backed reliance interests these Rules would accomplish is enormous. As defendants see it, roughly one-third of the existing approximately 580,000 employees currently in the United States will be rendered ineligible to renew their visas—and thus separated from their job and the home that they have made in America.

160. This would devastate employers. Plaintiffs and members of the plaintiff associations have invested considerable sums in recruiting and training leading talent. Plaintiffs and their members employ tens of thousands—if not hundreds of thousands—of H-1B employees. The higher education institutions have thousands of professors and research scholars on faculty pursuant to H-1B. Defendants' plan to forcibly disrupt at least a third of those employment relationships, by virtue of the DHS Rule alone, will cause hospitals, universities, and employers of all shapes to lose their enormous investments in this skilled-workforce. This will have ripple effects throughout employers and, by extension, the economy at large.

161. Meanwhile, the consequences for H-1B workers themselves would be even worse. These individuals have made lives in America—they have married here, bought homes here, and

they have had children here. These individuals did so in direct reliance on the government's affirmative approval of their original H-1B petition. The government must give real consideration to these significant reliance interests before changing the rules of the road, especially in this hasty and haphazard manner.

162. While the rules pay passing lip service to reliance interests (*see* DHS Rule, 85 Fed. Reg. at 63,928; DOL Rule, 85 Fed. Reg. at 63,893-63,8944), neither rule makes any attempt to quantify those reliance interests, an indispensable step if an agency is going to meaningfully consider whether the purported benefits of a rule outweigh them.

163. Finally, both rules fail to consider another aspect of the problem: the net benefits that the employment of high-skilled foreign workers brings to domestic workers, and to the United States economy as a whole—benefits that will be diminished or lost as a result of the rules challenged here. *See* ¶¶ 70-75, *supra*. "As a general rule, the costs of an agency's action are a relevant factor that the agency must consider before deciding whether to act." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting); *see also Michigan*, 576 U.S. at 753 ("[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."). By failing to consider the costs to the economy of restricting the employment of H-1B workers, both rules are arbitrary and capricious for this reason, as well.

164. Plaintiffs would have brought all of these issues, and more, to the attention of defendants had they allowed for notice-and-comment rulemaking. The failure to engage in that essential process has resulted in a rule that fails as arbitrary and capricious.

C. The Rules harm American employers, including plaintiffs and the members of the plaintiff associations.

165. The DHS Rule and DOL Rule will harm American employers across the economy, including small businesses, higher education, and medical institutions. As the Editorial Board of the Wall Street Journal put it:

> Congress ought to reform the H-1B visa system. But the Trump Administration is rushing through new rules, without notice and comment, that will hurt small employers under the false premise that U.S. tech workers are threatened during the

> pandemic by foreigners. Unemployment in computer occupations was 2.7% in May. The economy is bouncing back faster than expected, but the Trump Administration's H-1B rules will slow the recovery ….[81]

166. Plaintiffs and the members of the plaintiff associations collectively employ tens of thousands—if not hundreds of thousands—of H-1B, EB-2, and EB-3 workers. These Rules will thus cause quite immediate and substantial harm. The DHS Rule will, by design, preclude many existing H-1B workers from renewing their H-1B status, thus severing the employer-employee relationship. It will also substantially hinder—along with the DOL Rule—the prospective hiring of new H-1B, EB-2, and EB-3 employees to fill critical needs. The administration itself estimates that approximately one-third of existing and future H-1B employees will be precluded by this rule.

167. The DOL Rule will obligate employers to raise wages drastically if they wish to retain employees at renewal periods—or if they wish to hire new H-1B, EB-2, or EB-3 employees. These wage increases are enormous, increasing the pre-rule prevailing wage by 35% to 200%. If an employer pays the enhanced rates, it will be fiscally harmed. If it does not, it will be harmed via the loss of a valuable employee. These astronomical wage rates, in some cases requiring a literal tripling of employee salary, are designed for one central purpose—to kill the H-1B, EB-2, and EB-3 programs.

168. H-1B, EB-2, and EB-3 applications, and especially H-1B renewals, occur on a rolling basis. Because the DOL Rule is effective *now*, it is causing ongoing harm to employers under these programs. Likewise, as soon as it is operative, the DHS Rule will cause immediate harm to H-1B employers. An immediate injunction is necessary.

169. As just one example, the University of Utah must soon file Labor Condition Applications in connection with renewals for several individuals on H-1Bs, in order for those employees to work past April. The University of Utah would typically begin that process now, as it often takes six months, if not much longer, for USCIS to process renewals. But the new Rules make this impossible. One University of Utah employee, a computer science teacher, currently

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[81] *Bollixing Up H-1B Visas*, Wall Street J. (Oct. 7, 2020), perma.cc/A8TR-FU4D.

earns approximately $80,000 annually; DOL had previously required a minimum wage of $62,760 and University of Utah paid much more. Now, however, DOL requires wages for this individual of $208,000. This would constitute a more than 150% increase in existing salary (and an increase from the prior prevailing wage far in excess of 200%). That increase is untenable for the University of Utah. Likewise, a scientist in the computer field is currently paid approximately $77,000. Under the old scale, the individual's prevailing wage would rise to $78,998 at renewal. The new DOL Rule requires a minimum salary of $108,077.

170. Similarly, the University of Utah is seeking to transition a database architect from OPT to H-1B status. Per DOL's Occupational Outlook Handbook (OOH), "*[m]ost* database administrators have a bachelor's degree in an information- or computer-related subject such as computer science."[82] Under the new DHS Rule, accordingly, this may not qualify as a specialty occupation because DOL does not assert that a bachelor's degree is *always* required for the position.

171. Unless the Rules are enjoined, the University of Utah cannot proceed with the labor certifications it needs to retain its valued employees. This would constitute substantial harms in several respects. It would forcibly sever the employment relationship between the University of Utah and these valued employees. It would obligate the University of Utah to spend considerable resources recruiting and training other employees *if* any can be found in the market. But the reason that the University of Utah hired these individuals on H-1B visas in the first place was because of a lack of high skilled labor for it to hire.

172. Similarly, plaintiff the University of Rochester employs H-1B researchers at its Center for RNA Biology. When their H-1B renewal comes due, the DOL Rule would obligate the University to increase their salaries by amounts ranging up to 127%, which would very likely preclude their renewal if the University is unable to make the major financial investment required to maintain the positions at the newly mandated salary levels. The DOL Rule would thus disrupt important employment relationships and undermine critical ongoing research.

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[82] Department of Labor, Occupational Outlook Handbook, Database Administrators, perma.cc/5XC5-R3XU (emphasis added).

173. The University of Rochester's professors on H-1B visas would also be negatively impacted. The University currently employs H-1B faculty in diverse fields, including nursing, computer science, and mathematics. Upon renewals to be filed over the next three years, the DOL Rule would require salary increases ranging from 82% to 271%. If these enormously-high increases prevent renewal of these H-1B visas, it will negatively impact these individuals and their families and have cascading effects on students as well as research outcomes.

174. These Rules would likewise harm employers that sponsor immigrants on EB-2 or EB-3 PERM visas—that is, employment-based visas intended for permanent residence in the United States. To take just one example, members of Plaintiff the American Association of International Healthcare Recruitment (AAIHR) work to recruit medical professionals to work in underserved capacities in the United States. These members hire and sponsor international nurses on EB-3 visas to enter the United States, and place them at client healthcare facilities with urgent staffing needs. The Rules, however, will so dramatically raise the wages involved that many healthcare systems, especially those in less affluent areas, will be unable to afford the costs to accept those placements. The harm to members of AAIHR and their clients are immediate and substantial—as are the harms to the American people who will lack the services of these medical professionals.

175. Defendants in fact acknowledge the harms that the Rules will impose on Plaintiffs. By their own calculations—which are flawed in several substantial ways—defendants estimate that the DOL Rule alone will impose $198.29 billion in extra costs on employers over a ten-year period. 85 Fed. Reg. at 63,908. Additionally, defendants acknowledge that the Rules would lead to "a potential reduction in labor demand by 7.74 percent." *Id*. What this means is that, by drastically increasing wages, defendants recognize that employers will be unable to afford to hire the employees they need. Defendants themselves thus recognize the direct and palpable harm imposed by the Rule.

176. The Rules' resulting impact on small businesses and non-profit organizations is especially severe and consequential. DOL identifies more than 20,000 small business employers that will be harmed by the rule. 85 Fed. Reg. at 63,911-63,912. Among the most significantly af-

fected sectors are providers of "Engineering Services," "Colleges, Universities, and Professional Schools," "Software Publishers," "Offices of Physicians," and other technology-focused sectors. That is, the rule would affect those sectors of the economy that are most responsible for technological innovation, job growth, and delivery of advanced services to consumers.

177. For many employers, including higher education institutions, the requirement to pay foreign workers more would also require the payment of domestic workers more. But, because there are finite resources, that would necessarily mean the loss of jobs for domestic workers as well as those on H-1B, EB-2, and EB-3 visas.

178. The DHS Rule, by targeting third-party placements, also severely harms those specialized businesses that provide professional services to other organizations. In the current economy, it has proved especially important that professional service firms are able to match specialized employees with companies facing short-term haps in specialized capabilities. These matching capabilities boost overall growth, enhancing the employment prospects for all. Because it targets this matching process, the DHS Rule directly injured Plaintiffs and their members.

179. All these harms are irreparable. Once employment relationships are severed, there is no gluing them back together. Individuals would be forced to leave the country—at great personal cost—and to find work elsewhere. Once that occurs, which would be the direct result of the Rules, employers will forever lose the value inherent in their relationship with their trusted employees.

180. Additionally, these harms cannot be remedied by money damages. There is no ability to win a money award from the government to repair these losses. Injunctive relief, to preclude these injuries from the outset, is necessary.

CLAIMS FOR RELIEF

COUNT I
Administrative Procedure Act
DHS Rule – rule issued without notice and comment

181. Plaintiffs incorporate and re-allege the foregoing paragraphs as though fully set forth herein.

182. Outside of a few narrowly defined exceptions, the Administrative Procedure Act permits agencies to issue binding rules only after notice to the public and consideration of public comments. 5 U.S.C. § 553.

183. The DHS Rule did not follow those procedural requirements; instead, it purported to invoke the APA's good-cause exception, 5 U.S.C. § 553(b)(B).

184. Agency assertions of good cause are subject to judicial review, in which "[t]he government must make a sufficient showing that delay would do real harm to life, property, or public safety, or that some exigency interferes with its ability to carry out its mission." *E. Bay*, 950 F.3d at 1278 (quotation marks and citation omitted). "The exception is a 'high bar' because it is 'essentially an emergency procedure.'" *Id.* The court does not defer to the agency's views on the existence of good cause, instead reviewing the issue de novo. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

185. Here, there was not good cause to dispense with notice and comment in the promulgation of the DHS Rule.

186. The agency's failure to adhere to its notice and comment obligations is harmful error. *See* 5 U.S.C. § 706.

187. The DHS Rule was therefore issued "without observance of procedure required by law," and must be set aside on that basis. 5 U.S.C. § 706(2)(D).

COUNT II
Administrative Procedure Act
DOL Rule – rule issued without notice and comment

188. Plaintiffs incorporate and re-allege the foregoing paragraphs as though fully set forth herein.

189. Outside of a few narrowly defined exceptions, the Administrative Procedure Act permits agencies to issue binding rules only after notice to the public and consideration of public comments. 5 U.S.C. § 553.

190. The DOL Rule did not follow those procedural requirements; instead, it purported to invoke the APA's good-cause exception, 5 U.S.C. § 553(b)(B).

191. Agency assertions of good cause are subject to judicial review, in which "[t]he government must make a sufficient showing that delay would do real harm to life, property, or public safety, or that some exigency interferes with its ability to carry out its mission." *E. Bay*, 950 F.3d at 1278 (quotation marks and citation omitted). "The exception is a 'high bar' because it is 'essentially an emergency procedure.'" *Id.* The court does not defer to the agency's views on the existence of good cause, instead reviewing the issue de novo. *Sorenson Commc'ns*, 755 F.3d at 706.

192. Here, there was not good cause to dispense with notice and comment in the promulgation of the DOL Rule.

193. The agency's failure to adhere to its notice and comment obligations is harmful error. *See* 5 U.S.C. § 706.

194. The DOL Rule was therefore issued "without observance of procedure required by law," and must be set aside on that basis. 5 U.S.C. § 706(2)(D).

COUNT III
Administrative Procedure Act
DHS Rule – arbitrary and capricious or otherwise contrary to law

195. Plaintiffs incorporate and re-allege the foregoing paragraphs as though fully set forth herein.

196. The APA empowers courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

197. It likewise authorizes courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C).

198. The DHS Rule violates these APA requirements. It fails to "articulate . . . a 'rational connection between the facts found and the choice made,'" it "fail[s] to consider . . . important aspect[s] of the problem," and it "offer[s] an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. It also conflicts with provisions of the INA, and is therefore in excess of statutory authority.

199. The DHS Rule must therefore be set aside. 5 U.S.C. § 706(2).

COUNT IV
Administrative Procedure Act
DOL Rule – arbitrary and capricious or otherwise contrary to law

200. Plaintiffs incorporate and re-allege the foregoing paragraphs as though fully set forth herein.

201. The APA empowers courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

202. It likewise authorizes courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C).

203. The DOL Rule violates these APA requirements. It fails to "articulate . . . a 'rational connection between the facts found and the choice made,'" it "fail[s] to consider . . . important aspect[s] of the problem," and it "offer[s] an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. It also conflicts with provisions of the INA, and is therefore in excess of statutory authority.

204. The DOL Rule must therefore be set aside. 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court enter judgment in their favor, and that the Court:

(a) vacate and set aside the DHS Rule and the DOL Rule;

(b) issue a declaratory judgment establishing that the DHS Rule and the DOL Rule were unlawfully issued without notice and comment and are arbitrary, capricious, or otherwise not in accordance with law;

(c) enjoin defendants from enforcing or otherwise carrying out the DHS Rule and the DOL Rule;

(d) under 5 U.S.C. § 705, postpone the effective dates of the DHS Rule and the DOL rule and preliminarily enjoin the defendants from implementing the DHS Rule and

the DOL Rule against plaintiffs and their members pending conclusion of this litigation;

(e) award plaintiffs reasonable attorney's fees and costs; and

(f) award plaintiffs such further relief as the Court may deem just and proper.

MCDERMOTT WILL & EMERY LLP

DATED: October 19, 2020

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EXHIBIT 1

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

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

RIN 1615–AC13

Strengthening the H–1B Nonimmigrant Visa Classification Program

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

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

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

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

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

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

SUPPLEMENTARY INFORMATION:

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II. Public Participation

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

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS–2020–0018 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at *http://www.regulations.gov.*

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

III. Executive Summary

A. Purpose and Summary of the Regulatory Action

Congressional intent behind creating the H–1B program was, in part, to help U.S. employers fill labor shortages in positions requiring highly skilled or educated workers using temporary workers.[1] A key goal of the program at its inception was to help U.S. employers obtain the temporary employees they need to meet their business needs.[2] To address legitimate countervailing concerns of the adverse impact foreign workers could have on U.S. workers, Congress put in place a number of measures intended to protect U.S. workers to ensure that H–1B workers would not adversely affect them. Immigration and Nationality Act (INA) section 212(n) and (p); 8 U.S.C. 1182(n) and (p). However, over time, legitimate concerns have emerged that indicate that the H–1B program is not functioning as originally envisioned and that U.S. workers are being adversely affected. On April 18, 2017, the President of the United States issued Executive Order (E.O.) 13788, *Buy American and Hire American,* instructing DHS to ''propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of U.S. workers in the administration of our immigration system.'' [3] E.O. 13788 specifically directed DHS and other agencies to ''suggest reforms to help ensure that H–1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.'' [4]

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

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

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

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

[3] *See* Executive Order 13788, *Buy American and Hire American,* 82 FR 18837, sec. 5 (Apr. 18, 2017).

[4] *See id.* at sec. 5(b).

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

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

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

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

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

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

B. Legal Authority

The Secretary of Homeland Security's authority for these regulatory amendments is found in various sections of the INA, 8 U.S.C. 1101 *et seq.,* and the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* General authority for issuing this rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, as well as section 102 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations. *See also* 6 U.S.C. 202(4) (charging the Secretary with ''[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States''). Further authority for these regulatory amendments is found in:

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

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

C. Summary of Costs and Benefits

This interim final rule will impose new annual costs of $24,949,861 for petitioners completing and filing H–1B petitions[9] with an additional time burden of 30 minutes. The changes in the H–1B petition, resulting from this interim final rule, result in additional time to complete and file the petition as compared to the time burden to complete the current form. By reducing uncertainty and confusion surrounding disparities between the statute and the regulations, this rule will better ensure that approvals are only granted for positions adhering more closely to the statutory definition. This rule will also result in more complete petitions and allow for more consistent and efficient adjudication decisions.

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

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

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

While the maximum validity period for a specialty occupation worker is

Following the 2019 Novel Coronavirus Outbreak, 85 FR 38263 (Jun. 25, 2020).

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

[9] DHS estimates the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this rule may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I–129.

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

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

IV. Background

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

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

The number of aliens who may be issued initial H–1B visas or otherwise provided initial H–1B nonimmigrant status during any fiscal year has been capped at various levels by Congress over time, with the current numerical limit generally being 65,000 per fiscal year. *See* INA section 214(g)(1)(A); 8 U.S.C. 1184(g)(1)(A). Congress has also provided for various exemptions from the annual numerical allocations, including an exemption for 20,000 aliens who have earned a master's or higher degree from a United States institution of higher education. *See* INA section 214(g)(5) and (7); 8 U.S.C. 1184(g)(5) and (7). Additionally, Congress has exempted from the annual numerical allocations H–1B workers who are or will be employed at a nonprofit or public institution of higher education or a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization. *See* INA section 214(g)(5)(A)–(B), 8 U.S.C. 1184(g)(5)(A)–(B). The 5-year average annual number of H–1B petitions approved outside the numerical limitations established by Congress, which also includes petitions for continuing H–1B workers who were previously counted toward an annual numerical allocation and who have time remaining on their 6-year period of authorized admission, *see* INA section 214(g)(7), 8 U.S.C. 1184(g)(7), was approximately 214,371 based on DHS data.[10] As of September 30, 2019, the total H–1B authorized-to-work population was approximately 583,420.[11] The total H–1B authorized-to-work population, rather than the yearly cap, is more indicative of the scope of the H–1B nonimmigrant program and the urgent need to strengthen it to protect the economic interests of U.S. workers.

Despite Congress' efforts to protect the interest of U.S. workers to ensure that H–1B workers will not adversely affect them,[12] data show that the H–1B program has been subject to abuse or otherwise adversely affected U.S. workers from its inception.[13] When the Immigration Act of 1990 (IMMACT 90) was introduced, Congress specifically sought to address ''the problem of H-visa abuse.'' [14] As early as 1992, the U.S. Government Accountability Office (GAO) published a report noting concerns by representatives of organized labor that H–1B nonimmigrants were adversely affecting the wages and working conditions of U.S. workers, and were allowing U.S. employers to excessively rely on foreign labor.[15] In September 2000, the GAO published another report highlighting documented allegations of and concerns relating to program misuse—such as employers paying workers less than comparable wages or employees using false credentials—and questioning whether the program adequately serves employers or protects workers.[16] This report concluded that the H–1B ''program is vulnerable to abuse—both by employers who do not have bona fide jobs to fill or do not meet required labor conditions, and by potential workers who present false credentials.'' [17] Such abuse threatens the wages and job opportunities of qualified U.S. workers. More GAO reports followed in 2003, 2006, and 2011, all continuing to report on the pervasive abuses and shortcomings in the H–1B program. For instance, the 2006 report highlighted common violations such as employers not paying their H–1B workers the required wage and owing them back wages.[18] The 2011 reports cited to the high incidence of wage-related complaints against staffing companies, and concluded that the involvement of staffing companies in the H–1B program further weakens U.S. labor protections.[19] Several news alerts and

[10] Office of Policy and Strategy, Policy Research Division (PRD) Claims 3 and USCIS analysis. July 29, 2020.

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

[12] *See* INA section 212(n) and (p); 8 U.S.C. 1182(n) and (p).

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

[14] 1990 U.S.C.C.A.N. 6710, 6724.

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

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

[17] GAO/HEHS–00–157, at 19.

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

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

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

DHS believes that the same concerns have persisted in recent years, as highlighted by certain petitions filed by entities within the information technology (IT) industry. In recent years, there has been a 75 percent increase in the proportion of IT workers in the population of H–1B approved petitions—from 32 percent in FY 2003 to 56 percent in FY 2019.[21] As a comparison, there has been a 16 percent increase in the proportion of IT workers in the U.S. civilian workforce—from 2.5 percent in 2000 to 2.9 percent in 2014.[22] At the same time, wages have largely remained flat in IT fields.[23] For instance, the average IT wage was 189 percent of the national average in FY 2003 and 182 percent in FY 2019.[24] The disproportionate growth of H–1B petitions for computer-related occupations versus the percentage growth of IT positions in the U.S. economy, and the stagnation of IT wages, demands DHS seriously consider whether petitioners are using the H–1B program in a way that disproportionally benefits foreign IT workers and the companies who petition for them to the detriment of U.S. IT workers. DHS must also consider whether there is a correlation between the large flow of H–1B workers into the economy and the stagnation of wages for U.S. IT workers generally.[25] If the employment of H–1B workers is having an adverse effect on similarly employed U.S. workers by way of reducing their wages or displacing U.S. workers by hiring H–1B workers, that adverse effect likely will be proportionately greater in the IT industry.

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

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

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

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

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

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

[23] Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, Economic Policy Institute, *Guestworkers in the High-Skill U.S. Labor Market: An analysis of supply, employment, and wage trends,* Apr. 24, 2013, at 2, 23, available at *https://files.epi.org/2013/bp359-guestworkers-high-skill-labor-market-analysis.pdf* (''However, following the crash of 2001, wages declined and have been essentially flat for the decade.''); Sean McLain and Dhanya Ann Thoppil, *Bulging Staff Cost, Shrinking Margins,* CRISIL Research, (2019), available at *https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html* (analyzing local wages for computer-based occupations, along with H–1B wage rates prevalent for the same computer-based occupations across the U.S., and concluding that the average per hour rate for an H–1B-based employee is ~$33 while a locally-based employee is ~$42). *See generally* Hira and Gopalaswamy, *supra* note 5, at 11 (''H–1B workers are underpaid and placed in substandard working conditions, while U.S. workers' wages are depressed, and they lose out on job opportunities'').

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

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

[26] The term ''staffing companies'' refers to ''employers that apply for H–1B workers but ultimately place these workers at the worksites of other employers as part of their business model.'' GAO–11–26, at 19.

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

[28] GAO–11–505T, at 12; *OIG Investigations Newsletter* (Dec. 1, 2019–Jan. 30, 2020), *supra; OIG Investigations Newsletter* (Oct. 1, 2019–Nov. 30, 2020), *supra; News Release* (Feb. 19, 2020, *supra; News Release* (Mar. 17, 2020), *supra.*

[29] *See supra* note 17.

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

Outsourcing companies have been criticized as ''gaming the system'' so that they have a ready pool of low-paid temporary workers, which ultimately hurts the wages of U.S. workers.[31] The ''outsourcing'' business model involves using H–1B visas to bring relatively low-cost foreign workers into the United States and then contracting them out to other U.S. companies seeking their services.[32] These H–1B workers are relatively ''low-paid'' or ''low-cost'' in the sense that they are often paid less than the local median salary for workers in the same occupation, in other words, often paid less than what the worker would command in a truly competitive open job market.[33] H–1B employers are able to ''take advantage of program rules in order to legally pay many of their H–1B workers below the local median wage for the jobs they fill.'' [34] By bringing in lower-paid foreign workers, U.S. companies, in turn, may be incentivized to avoid hiring more U.S. workers or, even worse, lay off their own, higher-paid U.S. workers who previously performed those services adequately and replace them with lower-paid H–1B workers of lesser qualifications employed by a staffing company.[35] An employer's preference for hiring H–1B workers based on their citizenship, immigration status, or national origin could violate the INA's anti-discrimination provision at INA section 274B, 8 U.S.C. 1324b.[36] Further still, the outsourcing companies may ultimately send their H–1B nonimmigrant workers back to their home countries to perform their jobs or move a significant amount of work overseas to capitalize on lower costs of business, taking away even more U.S. jobs.[37] As a result, DHS is concerned that the current regulatory regime encourages some companies to use the H–1B visa as a tool to lower business costs at the expense of U.S. workers.[38]

U.S.-based companies that are not traditionally in the staffing or outsourcing business also have exploited the H–1B program in ways not contemplated by Congress.[39] In recent years, U.S. companies such as The Walt Disney Company, Hewlett-Packard, University of California San Francisco, Southern California Edison, Qualcomm, and Toys ''R'' Us have reportedly laid off their qualified U.S. workers and replaced them with H–1B workers provided by H–1B-dependent outsourcing companies.[40] In some cases, the replaced U.S. workers were even forced to train the foreign workers who were taking their jobs and sign nondisclosure agreements about this treatment as a condition of receiving any form of severance.[41] These examples illustrate how the current regulatory regime of the H–1B program allows employers, whether staffing, outsourcing, or other types of companies, to exploit the H–1B program in ways not contemplated by Congress.

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

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

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

[32] Pedersen, Eckstein, and Robinson, *supra* note 33.

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

[34] Costa and Hira, *supra* note 30. As this article explains, these actions comport with the existing legal framework in which H–1B employers are only required to pay the higher of the actual wage level for similarly situated employees or the prevailing wage. *See* section 212(n)(1)(A) of the Act. Further, based on the way the four wage levels are set, the lowest two permissible H–1B wage levels fall below the local median salaries. *See* section 212(p)(4) of the Act. For more general information on wage levels and how they are calculated, *see* Amy Marmer Nice, *Wages and High-Skilled Immigration: How the Government Calculates Prevailing Wages and Why It Matters,* American Immigration Council, Dec. 2017, available at *https://www.americanimmigrationcouncil.org/sites/default/files/research/wages_and_high-skilled_immigration.pdf.*

[35] Preston, *supra* note 33.

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

[37] Preston, *supra* note 33.

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

[39] Paayal Zaveri and Aditi Roy, *Big American Tech Companies are Snapping up Foreign-Worker Visas, Replacing Indian Outsourcing Firms,* CNBC, Apr. 20, 2018, available at *https://www.cnbc.com/2018/04/20/big-american-tech-companies-are-snapping-up-h1-b-visas.html. See also* H.R. REP. 105–657, 20–21 (stating ''[b]ecause the bill is so dramatically increasing the supply of foreign workers without there being firm evidence of a domestic labor shortage, it is imperative that we build into the H–1B program adequate protections for U.S. workers'').

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

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

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

Moreover, H–1B employers that displace U.S. workers are not necessarily violating the law, either. While section 212(n)(1)(E) through (G) of the Act, 8 U.S.C. 1182(n)(1)(E)–(G), requires H–1B-dependent employers [44] to make certain attestations such as not displacing U.S. workers and taking good faith steps to recruit U.S. workers, the statute also offers broad exceptions to these requirements that, over time, have effectively gutted the U.S. worker recruitment requirement such as by utilizing third-party contractors [45] or paying a $60,000 annual salary, among other things.[46] DOL data establishes that 99.3 percent of all H–1B-dependent employers claim exemption from these attestation requirements,[47] showing how easily and frequently H–1B-dependent employers are able to bypass statutory requirements intended to protect U.S. workers. In addition, these purported U.S. worker protections only apply to employers who are H–1B-dependent employers or have been found by DOL to have committed a willful failure to meet their Labor Condition Application (LCA) obligations or material misrepresentation in its application.[48] However, employment discrimination in favor of H–1B visa holders over qualified U.S. workers may violate another part of the INA, at INA section 274B, 8 U.S.C. 1324b.[49]

Overall, these reports and studies expose significant gaps in the ability of the H–1B program, as currently structured, to serve its original intent to supplement the U.S. workforce with a limited number of highly skilled workers while protecting the economic interests of U.S. workers. The President's recent ''Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak'' notes that the entry of additional workers through the H–1B program ''presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID–19 outbreak.'' [50] The changes made in the interim final rule will extend beyond the duration of the proclamation, but the threats described in the proclamation highlight the urgent need for strengthening of the H–1B program to protect U.S. workers. The Department's responsibility to ensure the safety and security of our country includes the protection of American workers.[51] This responsibility includes ensuring, as much as possible, that American workers are not negatively affected by H–1B workers. Therefore, the Department believes it is imperative to issue this rule to strengthen the integrity of the H–1B program and make more certain that petitions are only approved for qualified beneficiaries and petitioners.

B. Implementation of This Interim Final Rule

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

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

A. Amending the Definition and Criteria for a ''Specialty Occupation''

1. Amending the Definition of a ''Specialty Occupation''

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

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

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

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[42] Costa and Hira, *supra* note 30 (explaining how the two lowest permissible H–1B prevailing wage levels are significantly lower than the local median salaries).

[43] *Id.* at 18.

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

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

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

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

[48] *See* INA section 212(n)(1)(E)(ii) and (G), 8 U.S.C. 1182(n)(1)(E)(ii) and (G).

[49] *See supra* note 36.

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

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

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

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

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

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

As such, a minimum entry requirement of a bachelor's or higher degree, or its equivalent, in multiple disparate fields of study would not automatically disqualify a position from being a specialty occupation. For example, a petitioner may be able to establish that a bachelor's degree in the specific specialties of either education or chemistry, each of which provide a body of highly specialized knowledge, is directly related to the duties and responsibilities of a chemistry teacher. In such a scenario, the ''body of highly specialized knowledge'' requirement of section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), and the ''degree in the specific specialty'' requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), would both be met and the chemistry teacher position listing multiple disparate fields of study would be in a specialty occupation.

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

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

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

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

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

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

[55] *See supra* note 54.

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

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

2. Amending the Criteria for Specialty Occupation Positions

As quoted above, under section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1), a ''specialty occupation'' requires attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. However, the current regulatory criteria at 8 CFR 214.2(h)(4)(iii)(A) states that a bachelor's degree be ''normally'' required, or ''common to the industry,'' or that the knowledge required for the position is ''usually associated'' with at least a bachelor's degree or equivalent. The words ''normally,'' ''common,'' and ''usually'' are not found in the statute, and therefore, should not appear in the regulation. To conform to the statutory definition of a ''specialty occupation'' and promote consistent adjudications, DHS is eliminating the terms ''normally,'' ''common,'' and ''usually'' from the regulatory criteria. *See* new 8 CFR 214.2(h)(4)(iii)(A). This change means that the petitioner will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that this is always the requirement for the occupation as a whole, the occupational requirement within the relevant industry, the petitioner's particularized requirement, or because the position is so specialized, complex, or unique that it is necessarily required to perform the duties of the specific position.

The wording of the current regulatory criteria creates ambiguity. For example, the dictionary definition of ''normally'' is ''usually, or in most cases,'' and ''usually'' is defined as ''in the way that most often happens.'' [58] ''Most'' is defined as ''the biggest number or amount (of), or more than anything or anyone else,'' [59] and is a synonym for ''normally'' or ''usually.'' These definitions could be read to encompass anything from 51 percent to 99 percent, and possibly a broader range depending on the interpretation, highlighting how ambiguous they are. Use of these terms, if interpreted to mean that a position is a specialty occupation if merely 51 percent of positions within a certain occupation require at least a certain bachelor's degree, is inconsistent with the most natural read of, and arguably runs directly contrary to the statutory definition of, a ''specialty occupation'' which imposes a minimum entry requirement of a bachelor's or higher degree in the specific specialty (or its equivalent). *See* section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1). Thus, DHS believes that it is imperative to align the regulatory language with the statutory language and clarify that a bachelor's (or higher) degree in a directly related specific specialty is required. It will no longer be sufficient to show that a degree is normally, commonly, or usually required. In FY 2018, USCIS frequently issued Requests for Evidence (RFEs) in H–1B cases, requesting more evidence or explanations to establish that proffered positions qualified as specialty occupations.[60] DHS believes that the revisions in this rule will clarify the requirements for establishing a specialty occupation and reduce the need for RFEs in future adjudications.

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

[56] The requirement of any engineering degree could include, for example, a chemical engineering degree, marine engineering degree, mining engineering degree, or any other engineering degree in a multitude of unrelated fields.

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

[58] Cambridge Dictionary, normally, *https://dictionary.cambridge.org/us/dictionary/english/normally* (last visited Sept. 9, 2020); Cambridge Dictionary, usually, *https://dictionary.cambridge.org/us/dictionary/english/usually* (last visited Sept. 9, 2020).

[59] Cambridge Dictionary, most, *https://dictionary.cambridge.org/us/dictionary/english/most* (last visited Sept. 9, 2020).

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

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

These changes will eliminate this source of confusion.

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

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

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

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

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

[62] DHS generally determines a position's occupation or occupational category by looking at the standard occupational classification (SOC) code designated on the LCA.

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

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

[65] *Defensor,* 201 F.3d at 388 (noting ''If only [the employer]'s requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six-year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H1–B [sic] visas to positions which require specialized experience and education to perform.'')

[66] First-time hirings are not precluded from qualifying under one of the other criteria.

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

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

Further, DHS recognizes the possibility that some petitions for H–1B nonimmigrant classification might have been approved in error under the current regulation even though the petitions indicated that an alien could qualify to perform the relevant position based on a general degree. USCIS has generally denied such petitions on the basis that such petitions do not meet the statutory and regulatory definition of specialty occupation under the current regulation, but recognizes that a small number might have been approved in error and that similar petitions will be denied as a result of this Rule's clarification of the definition of ''specialty occupation.'' For example, by adding the phrase ''A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position'' at new 8 CFR 214.2(h)(4)(ii), positions where a general degree may qualify someone to perform the job, and that may have been erroneously approved as specialty occupations because of confusion created by the ambiguous wording in the current regulations, may now be denied. But again, to the extent that the revised regulations would result in the denial of some petitions that were erroneously approved under the current regulatory scheme, the government's interests in better adhering to the statute and better ensuring consistent adjudication far outweigh any interests petitioners may have in receiving continued petition approvals in a small number of cases based on error resulting from imprecise regulatory text. DHS notes that each case is decided on its own merits, and simply because a petition was approved previously does not guarantee that a similar petition would be approved in the future as prior approvals are not binding on USCIS.[68] The burden of proof remains on the petitioner, even where an extension of stay in H–1B nonimmigrant status is sought.[69]

B. Defining ''Worksite'' and ''Third Party Worksite''

DHS will add definitions for ''worksite'' and ''third-party worksite'' to the existing list of definitions at 8 CFR 214.2(h)(4)(ii). *See* new 8 CFR 214.2(h)(4)(ii). First, DHS will define ''worksite'' similar to the DOL definition of ''place of employment'' in 20 CFR 655.715 as ''the physical location where the work is actually performed by the H–1B nonimmigrant.'' A ''worksite'' will not include any location that would not be considered a ''worksite'' for LCA purposes, meaning that DHS will apply the same exclusions and examples of ''non-worksite locations'' as set forth in DOL's regulations.[70] As H–1B petitioners and USCIS officers should already be familiar with the concept of ''worksite'' because it also applies in the LCA context, DHS believes that this definition does not represent a significant change. Second, DHS will define ''third-party worksite'' as ''a worksite, other than the beneficiary's residence in the United States, that is not owned or leased, and not operated, by the petitioner.'' *See* new 8 CFR 214.2(h)(4)(ii).[71] This definition is similar to the ''owned or operated'' test commonly used in the LCA context.[72] Again, as this concept should already be familiar to H–1B petitioners and USCIS officers, this definition should not be a significant change.

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

C. Clarifying the Definition of ''United States Employer''

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

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

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

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

[70] *See* 20 CFR 655.715 (definition of ''place of employment'').

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

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

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

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

1. Replacing ''contractor'' With ''company''

First, striking ''contractor'' will avoid potential confusion as the term ''contractor'' in the definition is misleading. The inclusion of ''contractors'' in the regulatory language could be read to suggest that contractors should generally qualify under the definition of a ''United States employer.'' While a contractor is certainly not excluded from qualifying as a ''United States employer'' for purposes of an H–1B petition, the contractor, like any petitioner, must establish the requisite ''employer-employee relationship'' with the H–1B beneficiary. This revision will also update the definition to include reference to ''company,'' as that term is commonly used to describe various types of business entities, such as limited liability companies.

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

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

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

2. Engaging the Beneficiary To Work

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

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

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

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

[76] Consistent with the existing rule, this language does not and will not prohibit H–1B nonimmigrants from travelling internationally.

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

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

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

3. Clarifying the ''Employer-Employee Relationship''

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

The term ''employer-employee relationship'' at 8 CFR 214.2(h)(4)(ii) is not adequately defined. The phrase in that provision which reads, ''as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee,'' does not give sufficient guidance. For example, it is unclear whether the five factors are entirely disjunctive, such that the test is met if any one factor is met, or whether the last factor (''or otherwise control'') is merely disjunctive of the fourth factor (''supervision''), such that the first three factors (''hire, pay, fire'') must always be met.[82] Although some courts have viewed this phrase as establishing that any single listed factor, such as pay, in and of itself is sufficient to establish the requisite control,[83] DHS agrees with the Fifth Circuit's statement in *Defensor* that the conjunctive interpretation, where ''hire, pay, fire, supervise'' are read together ''as one prong of the test and 'otherwise control the work' is . . . viewed as an independent prong of the test *accords better with the commonsense notion of employer.*'' [84] DHS firmly disagrees with the disjunctive interpretation because it leads to the illogical result of virtually any petitioner satisfying the definition, because H–1B petitioners are generally required to submit an LCA that includes an attestation that the petitioner will pay the beneficiary at least the required wage. If the regulation is read to set forth a five-factor disjunctive test, then arguably all petitioners who submit an LCA would satisfy the pay factor, such that reference to other factors would be superfluous in any case where the petitioner is required to submit an LCA.

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

[77] *Cf.* 8 CFR 103.2(b)(1) (eligibility must be established at the time of filing).

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

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

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

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

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

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

[84] *See Defensor,* 201 F.3d at 388 (emphasis added).

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

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

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

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

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

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

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

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

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

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

[89] *Darden,* 503 U.S. at 323–24.

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

[91] 503 U.S. at 324.

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

[93] *See supra* note 85.

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

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

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

DHS believes that this clarification of ''right to control'' as one factor rather than a determinative factor is not a clear departure from the way USCIS has generally applied the common law test over many years. While the rescinded 2010 memorandum indicated that the determination hinges on the right to control, the analysis has always required an evaluation of the totality of the facts involved, including, in part, the degree to which the petitioner exercises actual control over the beneficiary's work. Some officers have placed more weight on the relevance of the actual control exercised, or to be exercised, when making the determination. For example, various Administrative Appeals Office (AAO) non-precedent decisions, citing the rule established in *Darden,* have stated that we ''. . . must examine who has actual control, not just the right to control, the beneficiary's work.'' [97] Other officers may have placed less weight on the relevance of the actual control exercised, or to be exercised, and more weight on the petitioner's legal right to control the beneficiary's work. In 2018, USCIS provided further clarification on its website regarding the implementation of the 2010 policy memorandum interpreting the employment relationship regulatory requirement:

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

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

Therefore, DHS believes that this provision will not represent a clear change in longstanding past practice.[99] The revised provision, however, will clarify that the employer-employee relationship determination will be based on the totality of the circumstances. USCIS will analyze the applicability of the relevant factors listed in the definition based on the specific evidence provided by the petitioner when making the employment relationship determination, consistent with its historical past practice. USCIS will assess and weigh each factor as it exists or will exist ''in the reality of the actual working relationship.'' [100] Thus, even though the ''right to control the work of the beneficiary'' is listed as a relevant factor, it is one among many factors that will be weighed. USCIS will also consider other factors, as noted above, including the petitioner's ability to control the manner and means in which the work product of the beneficiary is accomplished. Similarly, when assessing whether the petitioner provides or will provide the tools or instrumentalities for the beneficiary, USCIS believes that the primary focus should not be on whether the petitioner has the right to provide such tools or instrumentalities, but whether the petitioner actually provides or will provide such items.[101] While another person or entity may have the right to provide tools or instrumentalities to the worker, the relevant point of focus is on who will actually provide the tools or instrumentalities. For example, if the tools or instrumentalities will be provided by the H–1B beneficiary or end-client, that fact may weigh against a finding that the petitioner will be the employer. If, however, the petitioner will provide the tools and instrumentalities for the beneficiary to perform the work, that fact would weigh in favor of a finding that the petitioner will be the employer. Overall, the petitioner will be required to demonstrate that it can actually take the claimed actions when it comes to these factors. It will not be enough for a petitioner to simply show that it retains the right to control.[102]

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[94] *Darden,* 503 U.S. at 323–24.

[95] *Clackamas,* 538 U.S. at 448.

[96] 538 U.S. at 451 (quoting *Darden* and *NLRB*).

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

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

[99] While USCIS rescinded the 2010 and 2018 policy guidance on June 17, 2020, and has abstained from applying the common law analysis in its adjudication of employer-employee relationship, this is merely a temporary change to allow for rulemaking to occur and avoid continued litigation of this issue. *See* USCIS Policy Memorandum PM–602–0114, Rescission of Policy Memoranda (June 17, 2020), available at *https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/PM-602-0114_ITServeMemo.pdf.* This interim practice, however, has only been for a short period of time and certainly not long enough to create any reliance interests based on this interim practice.

[100] *NLRB,* 390 U.S. at 259; *see Darden,* 503 U.S. at 323–24.

[101] *See Darden,* 503 U.S. at 323–324 (listing ''the source of the instrumentalities and tools,'' as opposed to *the right to* provide such instrumentalities and tools).

[102] DHS believes that this new regulation is not necessarily inconsistent with the DOL definition of ''Employed, employed by the employer, or employment relationship'' at 20 CFR 655.715.

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

DHS recognizes that, as a general principle of law, a corporation is a separate legal entity from its shareholders.[104] Nevertheless, DHS may look beyond the corporate entity to assess whether a valid employment relationship exists between the petitioner and the beneficiary such that the petitioner, rather than the beneficiary, truly qualifies as an ''employer'' pursuant to the statute. Absent unusual factual circumstances, a beneficiary who is the sole or majority shareholder of the petitioning entity, does not report to anyone higher within the organization, is not subject to the decisions made by a separate board of directors, and has veto power over decisions made by others on behalf of the organization, will likely not be considered an ''employee'' of that entity for H–1B purposes. On the other hand, if a beneficiary is bound by decisions (including the decision to terminate the beneficiary's position) made by a separate board of directors or similar managing authority, and does not have veto power (including negative veto power) over those decisions, then the mere fact of his or her ownership interest will not necessarily preclude the beneficiary from being considered an employee.

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

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

D. Corroborating Evidence of Work in a Specialty Occupation

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

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

[103] 538 U.S. at 448–449.

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

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

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

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

If submitting contracts, the petitioner should include both the master services agreement and the accompanying work order(s), statement(s) of work, or other similar legally-binding agreements under different titles. These contracts should be signed by an authorized official of the third-party entity that will use the beneficiary's services. In general, the master services agreement (also commonly called a supplier agreement) sets out the essential contract terms and provides the basic framework for the overall relationship between the parties.[107] The work order or statement of work provides more specific information, such as the scope of services to be performed, details about the services, and the allocation of responsibilities among the parties.[108] The petitioner may also submit a detailed letter signed by an authorized official of the ultimate end-client company or companies where the beneficiary will actually work. Other types of corroborating evidence may include technical documentation, milestone tables, marketing analyses, cost-benefit analyses, brochures, and funding documents, insofar as this evidence corroborates that the petitioner will have an employer-employee relationship with the beneficiary, and that the beneficiary will perform services in a specialty occupation at the third-party worksite(s). Overall, the totality of the evidence submitted by the petitioner must be detailed enough to provide a sufficiently comprehensive view of the work available and substantiate, by a preponderance of the evidence, the terms and conditions under which the work will be performed. Documentation that merely sets forth the general obligations of the parties to the agreement, or which do not provide specific information pertaining to the actual work to be performed, would generally be insufficient.[109]

Further, in cases where the beneficiary is staffed to a third-party, the submitted corroborating documents should generally demonstrate the requirements of the position as imposed by the third-party entity (commonly referred to as the ''end-client'') that will use the beneficiary's services. As noted in *Defensor* v. *Meissner,* if only the petitioner's requirements are considered, ''then any beneficiary with a bachelor's degree could be brought into the United States to perform work in a non-specialty occupation, so long as that person's employment was arranged through an employment agency that required all [staffed workers] to have bachelor's degrees.'' [110] This result would be completely opposite of the plain purpose of the statute and regulations, which is to limit H–1B visas to positions which require specialized education to perform duties that require theoretical and practical application of a body of highly specialized knowledge.[111] However, not all third-party placements would necessarily require such evidence. For example, where the beneficiary is placed at a third-party's worksite, but performs work as part of a team of the petitioner's employees, including an on-site supervisor employed by the petitioner and who manages the work of the petitioner's employees, the requirements of the position as established by the petitioner may be determinative. USCIS will make the determination as to whether the requirements of the petitioner or third-party entity are controlling on a case-by-case basis, taking into consideration the totality of the relevant circumstances, as described above.

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

E. Maximum Validity Period for Third-Party Placements

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

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

[107] *See* § 49:35. Contract scope—Master services agreement, 3 Successful Partnering Between Inside and Outside Counsel § 49:35.

[108] *See* § 49:37. Contract scope—Statements of work, 3 Successful Partnering Between Inside and Outside Counsel § 49:37.

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

[110] 201 F.3d at 387–88.

[111] *Id.*

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

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

DHS believes that the 1-year limit is reasonable given the nature of third-party placements. In general, the nature of contracting work leads to beneficiaries being more transient, as well as greater potential for changes to the terms and conditions of employment. Specifically, these are situations where the petitioner is not the end-user of the H–1B worker's services, and the beneficiary performs work for another entity at that other entity's worksite. DHS believes that enhanced monitoring of compliance is valuable and needed to ensure that the beneficiary is being employed consistent with the terms and conditions of the petition approval.[113] The fact that 6 to 12 month work orders are common in petitions involving third-party placements, based on USCIS' program experience and review of evidence in such cases,[114] supports DHS's belief that limiting the validity period to up to one year is reasonable as it more closely aligns with the length of time that a beneficiary would generally be assigned under a particular work order. It is also common based on USCIS' program experience that, despite the requirement that the petitioner must file an amended or new H–1B petition with the corresponding LCA when there is a material change in the terms and conditions of employment,[115] once a certain work order expires, a petitioner may obtain another work order under changed terms and conditions, including a different work location, or even assign the beneficiary to a different client, without timely filing the required amended or new petition. Such unaccounted changes increase the risk of violations of H–1B program requirements. DHS believes that continuing to approve third-party petitions for longer periods of time, including the maximum three-year validity period, would greatly diminish USCIS' ability to properly monitor program compliance in cases where fraud and abuse are more likely to occur.

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

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

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

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

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

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

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

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

DHS believes that fraud and abuse is more likely to occur in cases involving third-party placements, as evidenced by the higher rate of noncompliance in those cases. Noncompliance is determined when an immigration officer conducts a compliance review to ensure that the petitioner (employer) and beneficiary (job applicant or other potential employee) follow the terms and conditions of their petition.[120] This process includes reviewing the petition and supporting documents, researching information in public records and government systems, and, where possible, interviewing the petitioner and beneficiary through unannounced site visits.[121] DHS analyzed a sampling of H–1B petitions filed during FYs 16–19 (through March 27, 2019) and found that the noncompliance rate for petitioners who indicated the beneficiary works at an off-site or third-party location is much higher compared to worksites where the beneficiary does not work off-site (21.7 percent vs 9.9 percent).[122] DHS believes that limiting the maximum validity period for petitions where beneficiaries are placed at third-party worksites is reasonable given this significantly higher noncompliance rate, and so will also encourage compliance with the regulations and improve the program's overall integrity.

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

As with any petition requesting an extension of stay, a petition requesting a 1-year extension of stay for a beneficiary who will work at a third-party worksite may be accompanied by either a new, or a photocopy of the prior, LCA from DOL that the petitioner continues to have on file, provided that the LCA is still valid for the period of time requested and properly corresponds to the petition. *See* 8 CFR 214.2(h)(15)(ii)(B). In this sense, a prior LCA is still valid if the validity period does not expire before the end date of the extension petition's requested validity period.[124] However, note that a new LCA is required if there are any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. *See* 8 CFR 214.2(h)(2)(i)(E) (requiring that a petitioner file an amended or new petition to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition, and that ''this requirement includes a new labor condition application'').

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

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

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

[119] GAO–11–26, *supra.*

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

[121] *Id.*

[122] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Research Division (2019). Summary of H–1B Site Visits Data.

[123] Note, however, that a petitioner is not precluded from filing a motion or appeal.

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

[125] Consolidated Appropriations Act, 2016, Public Law 114–113, December 18, 2015, 129 Stat 2242.

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

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

F. Written Explanation for Certain H–1B Approvals

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

G. Revising the Itinerary Requirement for H–1B Petitions

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

H. Site Visits

Pursuant to its general authority under sections 103(a) and 287(b) of the INA, 8 U.S.C. 1103(a) and 1357(b), and 8 CFR 2.1, USCIS conducts inspections, evaluations,-verifications, and compliance reviews to ensure that an alien is eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. These inspections and other compliance reviews may be conducted telephonically or electronically, as well as through physical on-site inspections (site visits). The existing authority to conduct inspections is vital to the integrity of the immigration system as a whole, including the H–1B program specifically, and protecting American workers. In this rule, DHS is adding regulations specific to the H–1B program to codify its existing authority and clarify the scope of inspections—particularly on-site inspections—and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections.[129] *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*). The authority of USCIS to conduct on-site inspections or other compliance reviews to verify information does not relieve the petitioner of its burden of proof or responsibility to provide information in the petition (and evidence submitted in support of the petition) that is complete, true, and correct.

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

In addition, beginning in 2017, USCIS began taking a more targeted approach in conducting site visits related to the H–1B program. USCIS started focusing on H–1B-dependent employers (those who have a high ratio of H–1B workers as compared to U.S. workers, as defined in section 212(n) of the INA), cases in which USCIS cannot validate the employer's basic business information through commercially available data, and employers petitioning for H–1B workers who work off-site at another company or organization's location.

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

Site visits are important to maintaining the integrity of the H–1B program and in detecting and deterring fraud and noncompliance with H–1B program requirements.[135] By better

[127] 85 FR at 46867.

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

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

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

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

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

[133] Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Research Division (PRD) (2019). Summary of H–1B Site Visits Data.

[134] *Id.*

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

Continued

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

The new regulation also states that, if USCIS is unable to verify facts related to an H–1B petition or to compliance with H–1B petition requirements due to the failure or refusal of the petitioner or third-party to cooperate with a site visit,[136] then such failure or refusal may be grounds for denial or revocation of any H–1B petition for H–1B workers performing services at the location or locations which are a subject of inspection, including any third-party worksites. *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*iii*). This new provision will put petitioners on notice of the specific consequences for noncompliance, whether by them or by a contractual third-party. It has long been established that, in H–1B visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought.[137] If USCIS conducts a site visit in order to verify facts related to the H–1B petition or to verify that the beneficiary is being employed consistent with the terms of the petition approval, and is unable to verify relevant facts and otherwise confirm compliance, then DHS believes that it would be reasonable to conclude that the petitioner will not have met its burden of proof and the petition may be properly denied or revoked. This would be true whether the unverified facts relate to a petitioner worksite or a third-party worksite at which a beneficiary has been or will be placed by the petitioner. It would also be true whether the failure or refusal to cooperate is by the petitioner or a third-party.

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

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

I. Severability

Finally, DHS has added a clause to clarify its intent with respect to the provisions being amended or added by this rule; DHS intends that all the provisions covered by this rule function separately from one another and be implemented as such. Therefore, in the event of litigation or other legal action preventing the implementation of some aspect of this rule, DHS intends to implement all others to the greatest extent possible.

VI. Statutory and Regulatory Requirements

A. Administrative Procedure Act

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

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

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

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

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

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

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

[138] Ben Casselman et al., *New Data Shows Staggering Toll of Outbreak,* N.Y. Times, Mar. 27, 2020, at A1.

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

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

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

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act in response to COVID–19.[141] On March 13, 2020, President Trump declared a National Emergency concerning the COVID–19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the United States.[142] On June 4, the President issued the E.O. 13927 Accelerating the Nation's Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities, which among other things urges agencies to ''take all appropriate steps to use their lawful emergency authorities and other authorities to respond to the national emergency and to facilitate the Nation's economic recovery . . . [including] other actions . . . that will strengthen the economy and return Americans to work.'' [143] On June 22, 2020, the President issued a *Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak.*[144] On June 29, 2020, the President issued further clarification in a *Proclamation on Amendment to Proclamation 10052.*[145] Subject to certain exceptions, the proclamation, as amended, restricts the entry of certain immigrants and nonimmigrants, including certain H–1B nonimmigrants, into the United States through December 31, 2020 as their entry would be detrimental to the interests of the United States. The proclamation notes that ''between February and April of 2020 . . . more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H–1B and L workers to fill positions.'' While the proclamation only restricts new entries (with certain exceptions) by aliens who do not have H–1B visas or other listed travel documents on the effective date of the proclamation, Section 5 of the proclamation directs the Secretary of Homeland Security to ''as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action regarding . . . ensuring that the presence in the United States of H–1B nonimmigrants does not disadvantage United States workers.'' The issuance of this interim final rule to strengthen the integrity of the H–1B nonimmigrant visa program is thus also consistent with the aims of the new proclamation.

H–1B workers comprise a much larger share of the U.S. labor market than the 65,000 annual numerical limitations and therefore have the potential to impact the availability of job opportunities for similarly situated U.S. workers who may be competing for jobs with H–1B workers as well as their wages and working conditions, particularly in industries where H–1B workers are predominantly employed. In recent years, the overwhelming majority of H–1B petitions have been filed for positions in the one industry, the IT industry—the share of H–1B workers in computer-related occupations grew from 32 percent in FY 2003 to 56 percent in FY2019.[146] The 5-year average annual number of H–1B petitions approved outside the numerical limitations established by Congress, which includes petitions for continuing H–1B workers who were previously counted toward an annual numerical allocation and who have time remaining on their 6-year period of authorized admission, *see* INA section 214(g)(7), 8 U.S.C. 1184(g)(7), was approximately 214,371 based on DHS data.[147] As of September 30, 2019, the total H–1B authorized-to-work population was approximately 583,420.[148] The total H–1B authorized-to-work population, rather than the yearly cap, is more indicative of the scope of the H–1B program and the urgent need to strengthen it to protect the economic interests of U.S. workers. This is particularly urgent given the exceptionally high unemployment rate in the United States—10.2 percent as of August 7, 2020.[149] In addition to high unemployment generally, there has been a significant jump in unemployment due to COVID–19 between August 2019 and August 2020 in two industry sectors where a large number of H–1B workers are employed, from 4.7 percent to 8.6 percent in the Information sector, and from 3.2 to 7.2 percent in the Professional and Business Services sector.[150]

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

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

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

[143] *See* Executive Order 13927, *Accelerating the Nation's Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities,* 85 FR 35165, sec. 2 (Jun. 9, 2020).

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

[145] Proclamation 10054 of June 29, 2020, Amendment to Proclamation 10052, 85 FR 40085 (Jul. 2, 2020).

[146] *See supra* note 1.

[147] Office of Policy and Strategy, Policy Research Division (PRD) Claims 3 and USCIS analysis. July 29, 2020.

[148] *See supra* note 11.

[149] U.S. Dep't of Labor, Bureau of Labor Statistics, Economic News Release, *Employment Situation News Release* (Aug. 7, 2020), available at *https://www.bls.gov/news.release/archives/empsit_08072020.htm* (last visited Aug. 11, 2020).

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

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

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

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

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

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

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

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

1. Summary of Economic Impacts

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

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

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

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

accurate to specifically refer to the Form I–129H1 that will take effect if the Fee Schedule Final Rule takes effect, DHS uses the term ''Form I–129H1.'' [153]

For the 10-year implementation period of the rule (FY2021 to FY2030), DHS estimates the annual net societal costs to be $51,406,937 (undiscounted) in FY2021, $416,212,496 (undiscounted) in FY2022, $541,795,976 (undiscounted) from FY2023 to FY2027 each year, $388,592,536 (undiscounted) from FY2028 to FY2030 each year. DHS estimates the annualized net societal costs of the rule to be $430,797,915, annualized at 3-percent and $425,277,621, annualized at 7-percent discount rates.

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

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

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

[153] DHS estimates the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this rule may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I–129.

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

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

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

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

In addition to the impacts summarized above, Table 2 presents the accounting statement and as required by Circular A–4.[154]

TABLE 2—OMB A–4 ACCOUNTING STATEMENT

[$, 2019 for FY2021–FY2030]

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

[154] White House, Office of Management and Budget, *Circular A–4 (Sept. 17, 2003),* available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf* (last visited Aug. 11, 2020).

2. Provisions of the Interim Final Rule With Economic Impacts

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

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

DHS is amending its regulations governing H–1B specialty occupation workers by providing revisions and clarifications that will better align the regulations with Congressional intent and will strengthen the integrity of the H–1B program. DHS is making the following amendments to the H–1B regulations through this interim final rule:

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

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

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

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

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

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

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

3. Population

In order to estimate the economic effects of this interim final rule, DHS forecasts the affected population for the ten-year period from the beginning of fiscal year (FY) 2021. The affected population is defined as the annual population of Form I–129H1 [156] petitions for specialty occupation workers. DHS assumes that there are three primary components that determine the population forecast: The historical number of H–1B petitions, the expected change in the number of petitions due to macroeconomic changes, and the expected changes in the number of petitions due to provisions in this interim final rule.

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

[155] *See* INA 214(i)(l), 8 U.S.C. 1184(i)(l).

[156] *See supra* notes 9 and 153.

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

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

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

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

Finally, the number of H–1B petitions may also change due to behavioral responses to provisions in the interim final rule. For example, provisions that increase filing costs may discourage potential petitioners from filing, and provisions that decrease the term of the H–1B validity period may result in increased filings by the same petitioners. DHS examined each of the provisions and determined that one provision would materially change the filing behavior of potential petitioners: This interim final rule will reduce the maximum validity period for third-party placement to one year compared to the three-year current maximum validity period. This provision will result in more petitions from petitioners with beneficiaries who work at third-party worksites. DHS incorporates this increase in its FY2021–2030 forecasts of the affected population. A detailed discussion of this provision's effect on the forecasted population of petition is provided in the corresponding cost analysis subsection.

DHS acknowledges that changes to the H–1B program may impact dependent H–4 nonimmigrants. DHS is unable to quantify the number of H–1B workers that will be ineligible or no longer apply for a visa due to this interim final rule and is therefore unable to quantify the costs to the dependent H–4 nonimmigrants. H–1B nonimmigrant workers who are the beneficiaries of petitions that are denied as a result of the petitioner's failure to establish eligibility or noncompliance with the changes made by this rule would be required to seek eligible employment to avoid additional impacts to their dependents.

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

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

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

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

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

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

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

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

[a] The number of petitions received includes all initial petitions and petitions for extension.

[b] The sum of petitions approved or denied does not equal the number of petitions received because some petitions are revoked, withdrawn, or still pending.

To determine the cost of preparing and filing a petition, DHS assumes that petitioners may use human resources (HR) specialists (or others that provide equivalent services) (hereafter HR specialist) or use lawyers or accredited representatives [159] to complete and file Form I–129 H–1B petitions. A lawyer or accredited representative appearing before DHS must file Notice of Entry of Appearance as Attorney or Accredited Representative (Form G–28) to establish the eligibility and authorization of a lawyer or accredited representative to represent a client (applicant, petitioner, requestor, beneficiary or derivative, or respondent) in an immigration matter before DHS. Table 5 presents the total number of Form G–28 filings by petitioners who filed Form I–129 H–1B. DHS estimates that about 74 percent (73.5 percent rounded up) of Form I–129 H–1B petitions were completed and filed by a lawyer or other accredited representative (hereafter lawyer). DHS assumes the remaining 26 percent of Form I–129 H–1B petitions were completed and filed by HR specialists.

TABLE 5—TOTAL NUMBER OF FORMS G–28 [a] FILED WITH FORM I–129 H–1B PETITIONS, FY 2015 TO FY 2019

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

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

[a] Form G–28 has no filing fee.

[159] Accredited representatives are defined in 8 CFR 292.1(a)(4) as a person representing an organization described in 8 CFR 292.2 who has been accredited by the Board. USCIS limited its analysis to HR specialists, in-house lawyers, and outsourced lawyers to present estimate cost. However, USCIS understands that not all occupations employ individuals with these occupations and; therefore, recognizes equivalent occupations may also prepare and file these petitions.

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

ii. Population Affected by the Rule

DHS uses the estimates derived from the historical data shown in tables 4 and 5 to estimate the baseline population. Accordingly, the baseline population consists of 401,856 Form I–129 H–1B petitions received annually, which is disaggregated into the percent of Form I–129 H–1B petitions filed by HR specialists (26 percent), in-house lawyers (24 percent), or outsourced lawyer (50 percent). Additionally, DHS uses these percentage shares to disaggregate the 306,898 H–1B petitions approved annually. For each provision, DHS further estimates the subpopulation that is affected by that particular provision using the same proportion of HR specialist, in-house lawyer, and outsourced lawyer. These estimates are detailed in the separate provision discussed in the cost analysis of this interim final rule.

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

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

Source: USCIS analysis.

As discussed above, DHS forecasts an increase in the affected population due to the new interim final rule. Table 7 below summarizes this increase for FY2021–FY2030. The forecasted increase is discussed in detail in section ''Limiting maximum validity period for third-party placements.''

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

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

Source: USCIS analysis.
[a] Historical Baseline is the 5-year averages of received H–1B petitions for FY2015–2019 from Table 4.

[160] DHS uses the terms ''in-house lawyer'' and ''outsourced lawyer'' to differentiate between the types of lawyers that may file Form I–129H1 on behalf of an employer petitioning for an H–1B beneficiary.

[161] DHS uses data from the longitudinal study conducted in 2003 and 2007 on legal career and placement of lawyers, which found that 18.6, 55, and 26.2 percent of lawyers practice law at government (federal and local) institutions, private law firms, and private businesses (as inside counsel), respectively. *See* Dinovitzer et al (2009). *After the JD II: Second Results from a National Study of Legal Careers,* The American Bar Foundation and the National Association for Law Placemen (NALP) Foundation for Law Career Research and Education, Table 3.1, p. 27. *https://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf.*

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

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

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

4. Costs and Cost Savings of Regulatory Changes to Petitioners

i. Estimated Wage by Type of Filers

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

For petitioners filing Form I–129 H1, DHS calculates the average total rate of compensation as $47.57 per hour for an HR specialist, where the average hourly wage is $32.58 per hour worked and average benefits are $14.99 per hour.[165] Additionally, DHS calculates the average total rate of compensation as $102.00 per hour for an in-house lawyer, where the average hourly wage is $69.86 per hour worked and average benefits are $32.14 per hour.[166] Moreover, DHS recognizes that a petitioner may choose, but is not required, to hire an outsourced lawyer to prepare and file the H–1B petition. Therefore, DHS calculates the average total rate of compensation as $174.65 per hour for an outsourced lawyer, where the average hourly wage is $69.86 per hour worked and the average benefits are $104.79 per hour.[167] Table 6 shows the compensation rates used in this analysis.

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

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

Source: USCIS analysis.

ii. Baseline Estimate of Current Costs

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

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

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

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

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

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

[165] Calculation of the weighted mean hourly wage for HR specialists: $32.58 per hour × 1.46 = $47.566 = $47.57 (rounded) per hour.

[166] Calculation of weighted mean hourly wage for in-house lawyers: $102.00 average hourly total rate of compensation for in-house lawyer = $69.86 average hourly wage rate for lawyer (in-house) × 1.46 benefits-to-wage multiplier.

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

[168] *See supra* notes 9 and 153.

[169] Although petitioners may choose other means of shipping, for the purposes of this analysis, DHS uses the shipping prices of United States Postal Service (USPS) Domestic Priority Mail Express Flat Rate Envelopes, which is currently priced at $27.55 per package, as a proxy estimate for the postage cost of mailing a package containing completed Form I–129H1. DHS also assumes that the package on average weighs three pounds and ships locally or in zone 1 or 2. *See* U.S. Postal Service, Price List, Notice 123, Effective January 26, 2020, available at *https://pe.usps.com/text/dmm300/Notice123.htm#_c011* (last visited Aug. 11, 2020).

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

[171] *See supra* note 126.

[172] *See* section 214(c)(12)(A) of the INA, 8 U.S.C. 1184(c)(12)(A).

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

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

Source: Report on H–1B Petitions, Fiscal Year 2018 Annual Report to Congress, March 18, 2019 (Table 2 and Table 4).
* 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) is from Table 4.
[a] Total without unknown (356,305) = Total Petitions Filed FY2018 (418,799) − Number of employees unknown (62,494).
[b] Percentage of Total Petitions filed with Fraud Fee FY2018 (52%) = Total petitions filed with Fee FY2018/Total petitions filed FY2018 = 218,333/418,799.
[c] Percentage of Total petitions filed without any ACWIA fee exemptions FY2018 (66%) = Total petitions filed without any ACWIA fee exemption FY2018/Total petitions filed FY2018 = 277,979/418,799.
[d] Percentage of Total petitions filed with at least one ACWIA fee exemptions FY2018 (34%) = Total petitions filed with at least one ACWIA fee exemption FY2018/Total petitions filed FY2018 = 140,820/418,799.
[e] Percentage of Full-time employees <26 FY2018 (11%) = Full time employees <26 FY2018/Total without unknown FY2018 = 39,333/356,305.
[f] Percentage of Full-time employees >25 FY2018 (89%) = Full time employees >25 FY2018/Total without unknown FY2018 = 316,972/356,305.
[g] Total estimated petitions filed with Fraud Fee (208,965) = 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) * Percentage of Total Petitions filed with Fraud Fee FY2018 (52%).
[h] Total estimated petitions filed without any ACWIA fee exemptions (265,225) = 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) * Percentage of Total petitions filed without any ACWIA fee exemptions FY2018 (66%).
[i] Total estimated petitions filed with at least one ACWIA fee exemptions FY2019 (136,631) = 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) * Percentage of Total petitions filed with at least ACWIA fee exemptions FY2018 (34%).
[j] Estimated Full-time employees <26 (29,175) = Total estimated petitions filed without any ACWIA fee exemptions (265,225) * Percentage of Full-time employees <26 FY2018 (11%).
[k] Estimated Full-time employees >25 (235,946) = Total estimated petitions filed without any ACWIA fee exemptions (265,225) * Percentage of Full-time employees >25 FY2018 (89%).

DHS also applies the American Competitiveness and Workforce Improvement Act (ACWIA) fee.[173] Certain petitions are exempt from the ACWIA fee and, when required, the amount of the fee depends on the size of the entity. It is $750 for employers with 25 or fewer full-time employees or $1,500 for employers with 26 or more full-time employees. In order to estimate the number of petitions that will be filed with the ACWIA fee, DHS uses the percentage of H–1B petitions filed with the ACWIA fee in FY2018 (66 percent) and the 5-year average of the annual number of H–1B petitions received (401,856) from Table 9 above. Total estimated petitions filed with the ACWIA fee is 265,225 as described in Table 9. Among the estimated petitions filed with the ACWIA fee (265,225) using the percentage of H–1B petitions filed with the ACWIA fee in FY2018 there are 29,175 (11 percent) employers with 25 or fewer full-time employees and 235,946 (89 percent) employers with 26 or more full-time employees also as described in Table 9. Based on these estimated annual number of petitions, DHS estimates that 29,175 petitions would require an ACWIA fee of $750 and 235,946 petitions would require an ACWIA fee of $1,500 for each fiscal year for FY2021 to FY2030.

Table 10 shows the total annual cost of filing Form I–129 H–1B using the historical data on petitions received for FY2015 to FY2019. The baseline population is estimated using the 5-year average of the annual number of H–1B petitions received from FY2015 to FY2019 (401,856) in Table 4. Various fees are applied to the proportion of the baseline population as described in Table 9. DHS estimates the total annual cost under current regulation is $1,331,915,275, or an average of $3,314 per petition received. This baseline cost per petition received is applied to the baseline population for FY2021 to FY2027.[174] Since the Public Law 114–113 Fee of $4,000 is currently set to expire at the end of FY2027, DHS removes this fee from its baseline per petition cost in fiscal years FY2028 to FY2030. For those years, the baseline cost per petition received is estimated to be $2,274 per petition received.[175]

[173] *See* INA 214(c)(9), 8 U.S.C. 1184(c)(9).

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

[175] Average per petition received cost without Public Law 114–113 Fee of $4,000 ($2,274, rounded) = Total annual cost without Public Law 114–113 Fee of $4,000 ($913,983,275)/5-year average petition received annually (401,856) for FY2015 to FY2019; Total annual cost without Public Law 114–113 Fee of $4,000 ($913,983,275) = Total annual cost ($1,331,915,275)—Public Law 114–113 fee ($417,932,000) from Table 10.

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

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

Source: USCIS analysis.

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

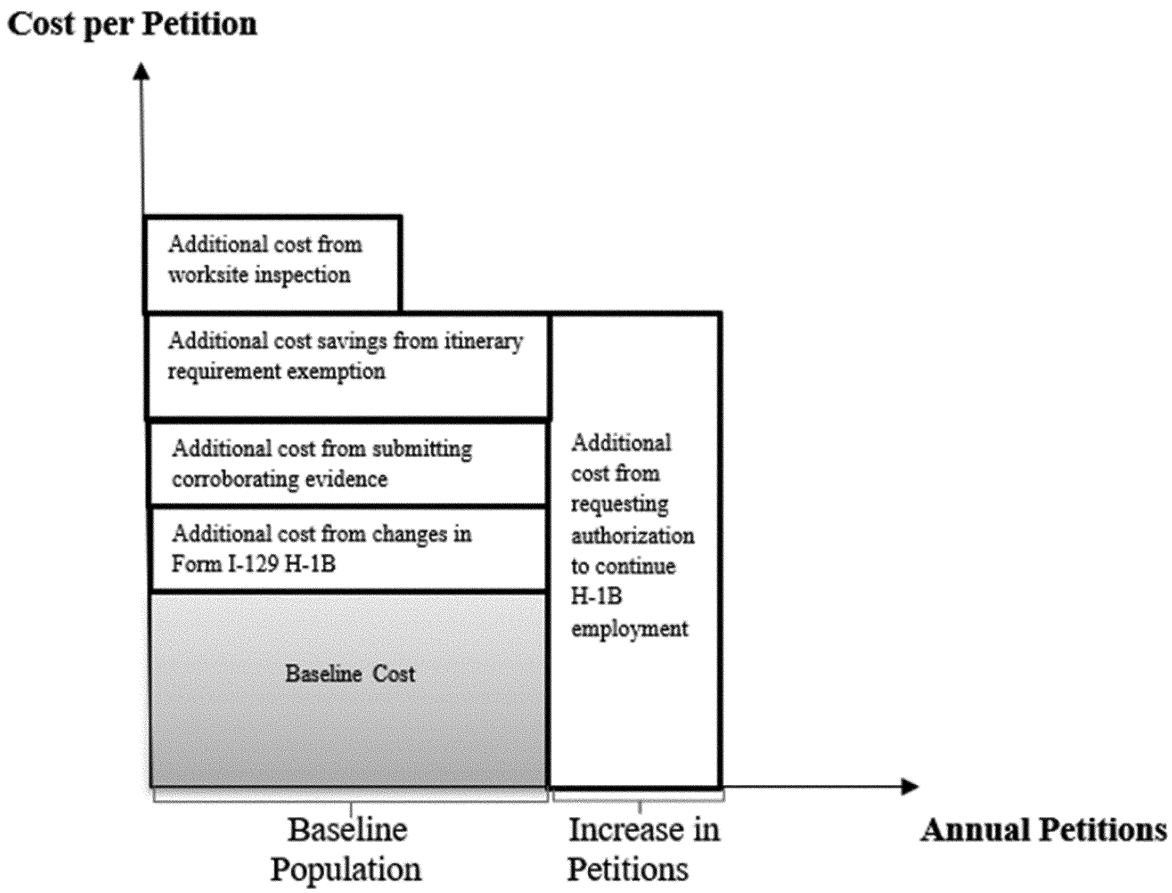
iii. Detailed Economic Effects of Each Provision in the Interim Final Rule

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

The additional cost and cost savings discussed above reflect changes to per petition costs. In addition, the interim final rule will also increase the affected population. To better illustrate the effects of each provision, DHS disentangles the effects of changes in per-petition costs from the effects of changes in the affected population. This is illustrated in the Diagram 1 below.[176] In Diagram 1, the vertical axis denotes per-petition costs and the horizontal axis denotes the affected population. The area of the shaded rectangle thus represents the current, baseline cost of preparing and filing H–1B petitions to petitioners. The provisions that affect the per-petition cost, including additional costs changes in Form I–129 H–1B, submitting corroborating evidence, and additional cost savings from itinerary requirement exemption, are represented as rectangles above the baseline population, denoting that the additional costs are calculated based on the baseline population. Separately, DHS adds a rectangle to the right of the baseline cost rectangle to represent the additional costs resulting from population changes due to the provision to limit the maximum validity period for third-party worksites. As the rectangle illustrates, DHS incorporates the per-petition cost increases into the cost calculation of the population increase. Finally, DHS separately estimates the cost of worksite inspections, which is represented by the small rectangle on the top. The number of worksite inspections does not depend on the number of H–1B petitions received and is not expected to be affected by the provision that limits the validity period.

[176] Diagram 1 excludes a one-time familiarization cost.

Diagram 1. Breakdown of the Total Cost of the IFR



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

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

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

As discussed, the current estimated time burden to complete and file Form I–129H1 takes a total of 4.0 hours per petition.[177] As a result of the changes in this interim final rule, DHS estimates the total time burden to complete and file Form I–129H1 will be 4.5 hours per petition, to account for the additional time petitioners will spend on reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request. DHS estimates the time burden will increase by a total of 30 minutes (0.5 hours) per petition.[178]

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

The total affected population for this provision is the number of petitions, including both initial and continuing petitions, for FY2021–2030. The total affected population for FY2021–2030 is estimated using the 5-year average of the annual number of H–1B petitions received for FY2015–FY2019, as listed in Table 4. Although the provision's increase in time burden may affect the total affected population, DHS believes that any effect would be de minimis: The estimated cost of the additional 30 minutes of time burden per petition is $62,[179] which is less than 0.06 percent of $107,000,[180] the average annual

[177] *See supra* note 9.

[178] 0.5 hours additional time to complete and file new Form I–129H1 = (4.5 hours to complete and file new Form I–129 H1)—(4.0 hours to complete and file current Form I–129H1).

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

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

Continued

earnings of all H–1B nonimmigrant workers. DHS believes that this cost increase may lead to *de minimis* changes on the margin to the set of petitioners.

As shown in Table 11, DHS estimates the total additional annual cost to petitioners of completing and filing Form I–129H1 petitions will be approximately $24,949,861, or an average of $62 per petition received.[181]

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

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

Source: USCIS analysis.

b. Requiring Corroborating Evidence of Work in a Specialty Occupation

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

Petitioners who regularly place their workers at third-party worksites often submit uncorroborated statements describing the role the H–1B beneficiary will perform at the third-party worksite. Such statements by the petitioner, without additional corroborating evidence, are generally insufficient to establish by a preponderance of the evidence that the H–1B beneficiary will actually perform specialty occupation work, and that the petitioner will have an employer-employee relationship with the beneficiary. Therefore, where a beneficiary will be placed at one or more third-party worksites, DHS will require the petitioner to submit evidence such as contracts, work orders, or other similar evidence to establish that the beneficiary will perform services in a specialty occupation at the third-party worksite(s), and that the petitioner will have an employer-employee relationship with the beneficiary.[182]

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

Since the terms ''worksite'' and ''third-party worksite'' are referenced in the new regulations, this interim final rule defines these terms. For example, the new regulation defining an employer-employee relationship refers to the ''worksite'' where the beneficiary will be employed as a relevant factor. The term ''off-site'' used on the Form I–129 H–1B has the same meaning as ''third-party worksite.'' [184] Therefore, DHS uses the data on off-site locations to forecast the number of petitions involving a third-party worksite. To estimate the population impacted by the requirements for third-party worksites, DHS uses data on approved Form I–129 H–1B petitions. DHS uses available data for FY 2018 and FY 2019 to estimate the percentage of petitions that are approved for third-party worksites. Accordingly, Table 12 shows the average number of Form I–129 H–1B petitions approved in FY 2018 and FY 2019 for workers placed at off-site location. Nearly 36 percent of petitions were approved for workers placed at off-site locations.[185] DHS uses the estimated 36 percent as the proportion of both the population of received petitions and the population of approved petitions that are third-party worksite.

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

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

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

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

[182] *See* new 8 CFR 214.2(h)(4)(iv)(C).

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

[184] *See supra* note 27.

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

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

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

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

Based on DHS' previous estimate of the average annual total number of receipts of Form I–129 H–1B petitions (401,856), we estimate that approximately 144,668 petitions would be filed requesting workers to be placed at third-party worksites.[186] To estimate the total cost of submitting documentary evidence as per the requirements of this provision, DHS multiplies the rate of compensation according to who would file the petition (an HR specialist, in-house lawyer, or outsourced lawyer, respectively) among the affected population by the estimated time burden to submit the documents. As shown in Table 13, DHS estimates that the total annual cost of submitting corroborating evidence (such as contracts, work orders or similar documents) required by this rule is $17,963,871 for the population of 144,668 petitions of workers placed at third-party worksites.

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

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

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

Source: USCIS Analysis.
[a] 37,614 petitions filed by HR specialist annually = 144,668 petitions request workers to be placed at third-party worksite annually × 26 percent.
[b] 34,720 petitions filed by in-house lawyers annually = 144,668 petitions request workers to be placed at third-party worksites annually × 24 percent.
[c] 72,334 petitions filed by outsourced lawyer annually = 144,668 petitions request workers to be place at third-party worksites annually × 50 percent.

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

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

1. Cost of Worksite Inspections

Using its general authority, USCIS may conduct audits, on-site inspections, compliance reviews, or investigations to help verify a petitioner's and beneficiary's H–1B eligibility and better ensure that all laws have been complied with before and after approval of such benefits.[190] The existing authority to

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

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

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

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

[190] *See* Section 103 of the INA and 8 CFR part 2.1. As stated in subsection V.A.5.ii(d) of this analysis,

Continued

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

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

In July 2009, USCIS started the Administrative Site Visit and Verification Program (ASVVP) [192] as an additional method to verify information in certain visa petitions under scrutiny. Under this program, Fraud Detection and National Security (FDNS) officers were authorized to make unannounced site visits to collect information as part of a compliance review, which verifies whether petitioners and beneficiaries are following the immigration laws and regulations that are applicable in a particular case. This process includes researching information in government databases, reviewing public records and evidence accompanying the petition, interviewing the petitioner and/or beneficiary, and conducting site visits. Once the site visit is completed, the FDNS officers write a Compliance Review Report, identifying any indicators of fraud or noncompliance to assist USCIS in subsequent final adjudicative decisions (for example, a notice of intent to revoke the petition approval).

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

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

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

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

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

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

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

[191] *See* 8 CFR 214.2(h)(11)(iii)(A).

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

[193] *See supra* note 132.

[194] USCIS, Office of Policy and Strategy, Policy Research Division (OP&S PRD), Summary of H–1B Site Visits Data.

[195] *Id.*

[196] *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*i*).

[197] *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*iii*).

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

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

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

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

DHS assumes that a supervisor or manager would be present on behalf of a petitioner while a USCIS immigration officer conducts the worksite inspection in addition to the beneficiary. The beneficiary would be interviewed to verify the date employment started, work location, hours, salary, or other terms of employment, to corroborate the information provided in an approved petition. The supervisor or manager would be the most qualified employee at the location who could answer all questions pertinent to the petitioning organization and its H–1B nonimmigrant workers. They would also be able to gather and provide the proper records considered pertinent to USCIS immigration officers. Consequently, for the purposes of this economic analysis, DHS assumes that on average two individuals will be interviewed during each worksite inspection: The beneficiary and the supervisor or manager. DHS uses their respective compensation rates in the estimation of the worksite inspection costs.[198] However, if any other worker or on-site manager is interviewed, the same compensation rates would apply.

DHS uses hourly compensation rates to estimate the opportunity cost of time a beneficiary and supervisor or manager would incur during worksite inspections. Based on data obtained from a USCIS report for Fiscal Year 2019, DHS estimates that an H–1B worker earned an average of $107,000 per year, or $51.44 hourly wage in FY 2019.[199] The annual salary does not include non-cash compensation and benefits, such as health insurance and transportation. DHS adjusts the average hourly wage rate using a benefits-to-wage multiplier to estimate the average hourly compensation of $75.11 for an H–1B nonimmigrant worker.[200] DHS uses an average compensation rate of $85.96 for a supervisor or manager in the estimation of the opportunity cost of time he or she would incur during worksite inspections.[201] Of the 1.23 hours of worksite inspection time (see Table 14), DHS has no information on how long a USCIS immigration officer would take to interview a beneficiary, or supervisor, or manager. In this analysis, DHS assumes that it would take 0.49 hours to interview a beneficiary and 0.74 hours to interview a supervisor or manager.[202]

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

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

[199] This is the annual average earning of all H–1B nonimmigrant workers in all industries with known occupations (excluding industries with unknown occupations) for FY 2019. It is what employers agreed to pay the nonimmigrant workers at the time the applications were filed and estimated based on full-time employment for 12 months, even if the nonimmigrant worker worked fewer than 12 months. *See* Characteristics of H–1B Specialty Occupation Workers, Fiscal Year 2019, p.16, Table 10, at *supra* note 21. $51.44 hourly wage = $107,000 annual pay ÷ 2,080 annual work hours. According to U.S. Department of Labor (DOL) that certifies the Labor Condition Application of the H–1B worker, a full-time H–1B employee works 40 hours per week for 52 weeks for a total of 2,080 hours in a year. DOL, Wage and hour Division: Fact Sheet #68—What Constitutes a Full-Time Employee Under H–1B Visa Program? July 2009. *See https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs68.pdf* (last visited Aug. 11, 2020).

[200] Hourly compensation of $75.11 = $51.44 average hourly wage rate for H–1B worker × 1.46 benefits-to-wage multiplier. *See* section V.A.5. for estimation of the benefits-to-wage multiplier.

[201] Hourly compensation of $85.96 = $58.88 average hourly wage rate for Management Occupations (national) × 1.46 benefits-to-wage multiplier. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2019 National Occupational Employment and Wage Estimates National, SOC 11–0000—Management Occupations, available at *https://www.bls.gov/oes/current/oes110000.htm* (last visited Aug. 11, 2020).

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

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

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

Source: USCIS analysis.

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

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

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

1. Cost Savings of Itinerary Requirement Exemption

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

DHS calculates economic impacts of this provision relative to the current regulation. Relative to the current regulation this provision reduces the cost for the petitioners who file on behalf of beneficiaries performing services in more than one location and submitting itineraries. However, due to the absence of detailed data on the number of petitioners who file on behalf of beneficiaries performing services in more than one location, DHS uses the number of petitions filed annually for workers placed at off-site locations as a proxy for petitioners with beneficiaries performing services in multiple locations. DHS assumes the petitions filed for workers placed at off-site locations are likely to indicate that beneficiaries will be performing services at multiple locations and, therefore, petitioners are likely to submit itineraries. DHS estimates that the number of petitions filed annually for workers placed at off-site locations who may submit itineraries using average number of petitions received annually from FY2015 to FY2019 and the proportion of off-site workers approved petitions. The estimated number of petitions filed annually for workers placed at off-site location is 144,668.[206] DHS estimates the cost savings based on the opportunity cost of time of preparing and submitting an itinerary by multiplying the estimated time burden to gather itinerary information (0.25 hours) [207] by the compensation rate of an HR specialist, in-house lawyer or outsourced lawyer, respectively. Table 16 shows that the estimated annual cost savings due to the elimination of the itinerary requirement, $4,490,968. Since the itinerary is normally submitted with the Form I–129 H–1B package, there would be no additional postage savings.

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

[203] *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*ii*) and (*iii*).

[204] *See* current 8 CFR 214.2(h)(2)(i)(B).

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

[206] DHS uses the proportion of workers placed at off-site location (36 percent from Table 12) as an approximate measure to estimate the number of petitions received annually for workers performing services in multiple locations from the total number of petitions filed. 144,528 petitions filed for workers performing services in multiple locations = 401,468 total petitions filed annually × 36 percent.

[207] DHS assumes that it would not take more than 0.25 hours (or 15 minutes) because this itinerary information should be readily available from the petitioners' records during the time of filing the petitions.

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

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

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

Source: USCIS analysis.
[a] The estimated number of petitions filed annually for workers placed at off-site location 144,668.
HR specialist (37,614) = 144,668 × Percent of petitions filed by HR specialist (26%).
In-house lawyer (34,720) = 144,668 × Percent of petitions filed by in-house lawyer (24%).
Outsourced lawyer (72,334) = 144,668 × Percent of petitions filed by outsourced lawyer (50%).

e. Limiting Maximum Validity Period for Third-Party Placement

1. Costs of Requesting Authorization To Continue H–1B Employment

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

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

To determine the number of petitions under the current regulations, DHS uses the historical 5-year average number of petitions approved for FY2015 to FY2019 (306,898) [211] and the proportion of workers approved for off-site locations petitions (36 percent) as an approximate measure to estimate the number of workers to be placed at third-party worksites.[212] DHS estimates the number of petitions approved annually for workers placed at third-party worksite as 110,483 [213] under the 28 month average validity period. DHS assumes that 110,483 petitions are approved uniformly across 12 months, or 9,207 [214] petitions per month.

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

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

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

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

[209] *See* new 8 CFR 214.2(h)(9)(iii)(A)(*1*).

[210] *See supra* note 11.

[211] Table 4. Total Receipts, Approvals, and Denials of Form I–129 Petitions with an H–1B Classification, FY 2015 to FY 2019.

[212] Table 12. Form I–129 H–1B petitions for Workers placed at Off-site Locations.

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

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

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

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

filing Form I–129H1 petitions, additional annual cost per petition received for submitting corroborating evidence for H–1B petitions, and the annual cost savings per petition received for itinerary requirement exemption for H–1B petitions. Arithmetically, this is obtained by adding $3,314, $62, $45, and ($11) to equal $3,410 for FY2021 to FY2027. Due to the expiration of the Public Law 114–113 Fee at the end of FY2027, the cost for FY2028 to FY2030 is obtained by adding $2,274, $62, $45, and ($11) to equal $2,370.[217]

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

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

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

Source: USCIS Analysis.

f. Familiarization Cost

Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule in order to fully comply with the new regulation(s). To the extent that an individual or entity directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule. The entities directly regulated by this rule are the employers who file H–1B petitions. There were 48,084 unique employers who filed H–1B petitions in FY2019.[218] DHS assumes that the petitioners require approximately two hours to familiarize themselves with the rule. Using the average total rate of compensation of HR specialists, In-house lawyer, and Outsourced lawyer from Table 8 and assuming one person at each entity familiarizes his or herself with the rule, DHS estimates a one-time total familiarization cost of $11,941,471 in FY2021.

TABLE 18—FAMILIARIZATION COSTS TO THE PETITIONERS

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

Source: USCIS analysis.

[217] Additional annual cost per petition received for each provision is calculated in the relevant section. Sum of cost per petition received for each provision ($3,410) = Additional annual cost per petition received for completing and filing Form I–129 H–1B petitions ($62) + Additional annual cost per petition received for submitting corroborating evidence for H–1B petitions ($45) − Additional annual cost savings per petition received for itinerary requirement exemption for H–1B petitions ($11) + Baseline cost per petition received ($3,314) for FY2021 to FY2027. Sum of cost per petition received for each provision ($2,370) = Additional annual cost per petition received for completing and filing Form I–129 H–1B petitions ($62) + Additional annual cost per petition received for submitting corroborating evidence for H–1B petitions ($45) − Additional annual cost savings per petition received for itinerary requirement exemption for H–1B petitions ($11) + Baseline cost per petition received ($2,274) for FY2028 to FY2030.

[218] Source: Office of Policy and Strategy, Policy Research Division (PRD), Claims 3 and USCIS analysis, August 18, 2020.

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

DHS presents the total annual estimated costs and cost savings annualized over a 10-year implementation period resulting from regulatory changes in this interim final rule. Table 19 shows the total annual cost of the rule to be $55,897,905 in FY2021, $420,703,464 in FY2022, $546,286,944 in each of FY2023 to FY2027, and $393,083,504 in each of FY2028 to FY2030 to the petitioners. DHS also estimates the total annual savings of the rule to petitioners to be $4,490,968. Therefore, the estimated total annual net costs to petitioners to be $51,406,937 in FY2021, $416,212,496 in FY2022, $541,795,976 in each of FY2023 to FY2027, and $388,592,536 in each of FY2028 to FY2030.

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

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

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

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

TABLE 20—TOTAL ESTIMATED NET COSTS OF THIS INTERIM FINAL RULE

[FY 2021–FY 2030]

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

Source: USCIS analysis.

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

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

6. Costs to the Federal Government

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

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

7. Benefits of the Regulatory Changes

This rule specifies the conditions under which DHS intends to implement the changes in the current rule regarding petitions for H–1B specialty occupation workers filed using Form I–129H1. Although the H–1B program was intended to allow employers to fill gaps in their workforce and remain competitive in the global economy, it has in fact expanded far beyond that, often to the detriment of U.S. workers. As discussed above, the H–1B program has been used to displace U.S. workers, and has led to reduced wages in a number of industries in the U.S. labor market. In this interim final rule, DHS is implementing revisions and clarifications to ensure that each H–1B nonimmigrant beneficiary is working for a qualified petitioner and in a job meeting the statutory requirements of a specialty occupation. The benefits of each provision in the interim final rule is discussed in detail below.

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

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

Based on the noncompliance uncovered by USCIS site visits,[220] DHS is adding additional requirements specific to the H–1B program to set forth the scope of on-site inspections and the consequences of a petitioner's or third-party's refusal or failure to fully cooperate with these inspections. DHS believes that site visits are important to maintain the integrity of the H–1B program by detecting and deterring fraud and noncompliance. As a result, USCIS can ensure that the H–1B program is used appropriately and the economic interests of U.S. workers are protected. The ability to detect and deter fraud and noncompliance will strengthen the H–1B program and hence outweigh any overall adjudication delays resulting from the worksite visits. Under this rule, such failure or refusal to cooperate and allow USCIS to verify facts may be grounds for denial or revocation of any H–1B petition for workers performing services at the location or locations which are subjects of inspection, including any third-party worksites. DHS is clarifying that failure or refusal to cooperate with a site visit or other compliance review may be grounds for denial or revocation of a petition.

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

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

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. ''Small entities'' are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. A regulatory flexibility analysis is not required when a rule is exempt from notice and comment rulemaking. This IFR is exempt from the notice and comment rulemaking, as stated in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* of the preamble.

[219] *See* INA section 286(m), 8 U.S.C. 1356(m).

[220] *See supra* note 132.

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

D. Unfunded Mandates Reform Act

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

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

E. Congressional Review Act

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

F. Executive Order 13132 (Federalism)

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

G. Executive Order 12988 (Civil Justice Reform)

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

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

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

I. National Environmental Policy Act

DHS analyzes actions to determine whether the National Environmental Policy Act, Public Law 91–190, 42 U.S.C. 4321 through 4347 (NEPA), applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01, *Implementation of the National Environmental Policy Act* (Instruction Manual) establish the policies and procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

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

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

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

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

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

[222] *See* 2 U.S.C. 658(6).

[223] *See* 2 U.S.C. 658(7)(A)(ii).

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

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

J. Paperwork Reduction Act

1. USCIS Form I–129 [224]

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

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

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

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

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

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

Overview of Information Collection

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

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

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

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

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

[224] As indicated elsewhere in this rule, DHS estimated the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and related form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). While DHS intends to vigorously defend this lawsuit and is not changing the economic baseline for this rule as a result of the litigation, it is using the currently approved Form I–129, and not the form version associated with the enjoined Fee Schedule Final Rule for the purpose of seeking OMB approval of form changes associated with this rule. Should DHS prevail in the Fee Schedule Final Rule litigation and is able to implement the form changes associated with that rule, DHS will comply with the Paperwork Reduction Act and seek approval of the information collection changes associated with this rule, based on the version of the Form I–129 that is in effect at that time.

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

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

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

2. USCIS H–1B Registration Tool

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

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

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

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

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

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

Overview of Information Collection

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

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

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

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

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

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

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

K. Signature

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

List of Subjects in 8 CFR Part 214

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

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

PART 214—NONIMMIGRANT CLASSES

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

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

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

The revisions and additions read as follows:

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

* * * * *

(h) * * *

(2) * * *

(i) * * *

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

* * * * *

(4) * * *

(i) * * *

(B) * * *

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

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

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

* * * * *

(ii) * * *

Employer-employee relationship means the conventional master-servant relationship consistent with the common law. The petitioner must establish that its offer of employment as stated in the petition is based on a valid employer-employee relationship that exists or will exist. In considering whether the petitioner has established that a valid ''employer-employee relationship'' exists or will exist, USCIS will assess and weigh all relevant aspects of the relationship with no one factor being determinative.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

Specialty occupation means an occupation that requires:

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

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

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

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

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

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

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

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

(iii) * * *

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

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

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

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

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

* * * * *

(iv) * * *

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

* * * * *

(9) * * *

(i) * * *

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

* * * * *

(iii) * * *

(A)(*1*) *H–1B petition in a specialty occupation.* The maximum validity period for an approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation is 3 years. However, where the beneficiary will be working at a third-party worksite, the maximum validity period for an approved petition is 1 year. In all instances, the approved petition may not exceed the validity period of the labor condition application.

* * * * *

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

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

* * * * *

Chad R. Mizelle,

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

[FR Doc. 2020–22347 Filed 10–6–20; 4:15 pm]

BILLING CODE 9111–97–P

EXHIBIT 2

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

[DOL Docket No. ETA–2020–0006]

RIN 1205–AC00

Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of Labor (DOL or the Department) is amending Employment and Training Administration (ETA) regulations governing the prevailing wages for employment opportunities that United States (U.S.) employers seek to fill with foreign workers on a permanent or temporary basis through certain employment-based immigrant visas or through H–1B, H–1B1, or E–3 nonimmigrant visas. Specifically, DOL is amending its regulations governing permanent labor certifications and Labor Condition Applications (LCAs) to incorporate changes to the computation of wage levels under the Department's four-tiered wage structure based on the Occupational Employment Statistics (OES) wage survey administered by the Bureau of Labor Statistics (BLS). The primary purpose of these changes is to update the computation of prevailing wage levels under the existing four-tier wage structure to better reflect the actual wages earned by U.S. workers similarly employed to foreign workers. This update will allow DOL to more effectively ensure that the employment of immigrant and nonimmigrant workers admitted or otherwise provided status through the above-referenced programs does not adversely affect the wages and job opportunities of U.S. workers.

DATES: This interim final rule is effective on October 8, 2020. Written comments and related material must be received on or before November 9, 2020.

ADDRESSES: You must submit comments, identified as DOL Docket No. ETA–2020–0006, via *https://beta.regulations.gov*, a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type ''1205–AC00'' (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

Docket: For access to the docket and to read background documents or comments received, go to the Federal e-Rulemaking Portal at *https://beta.regulations.gov*, referencing DOL Docket No. ETA–2020–0006. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR parts 655 and 656, contact Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, Box #12–200, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 513–7350 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legal Framework

The Immigration and Nationality Act (INA or Act), as amended, assigns responsibilities to the Secretary of Labor (Secretary) relating to the entry and employment of certain categories of immigrants and nonimmigrants.[1] This rule deals with the prevailing wage levels used with respect to the labor certifications that the Secretary issues for certain employment-based immigrants and the labor condition applications (LCA) that the Secretary certifies in connection with the temporary employment of foreign workers under the H–1B, H–1B1, and E–3 visa classifications.[2]

1. Permanent Labor Certifications

The INA prohibits the admission of certain employment-based immigrants unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (I) there are not sufficient workers who are able, willing, qualified and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.[3]

This ''labor certification'' requirement does not apply to all employment-based immigrants. The INA provides for five ''preference'' categories or immigrant visa classes, only two of which—the second and third preference employment categories (commonly called the EB–2 and EB–3 immigrant visa classifications)—require a labor certification.[4] An employer seeking to sponsor a foreign worker for an immigrant visa under the EB–2 or EB–3 immigrant visa classifications generally must file a visa petition with the Department of Homeland Security (DHS) on the worker's behalf, which must include a labor certification from the Secretary of Labor.[5] Further, the Department of State (DOS) may not issue a visa unless the Secretary of Labor has issued a labor certification in conformity with the relevant provisions of the INA.[6] If the Secretary determines both that there are not sufficient able, willing, qualified, and available U.S. workers and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers, the Secretary so certifies to DHS and DOS by issuing a permanent labor

[1] There are two general categories of U.S. visas: immigrant and nonimmigrant. Immigrant visas are issued to foreign nationals who intend to live permanently in the U.S. Nonimmigrant visas are for foreign nationals who enter the U.S. on a temporary basis—for tourism, medical treatment, business, temporary work, study, or other reasons.

[2] 8 U.S.C. 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), (a)(15)(H)(i)(b1).

[3] 8 U.S.C. 1182(a)(5)(A). Although this provision references the Attorney General, the authority to adjudicate immigrant visa petitions was transferred to the Director of the Bureau of Citizenship and Immigration Services (an agency within the Department of Homeland Security) by the Homeland Security Act of 2002, Public Law 107–296, 451(b) (codified at 6 U.S.C.271(b)). Under 6 U.S.C. 557, references in federal law to any agency or officer whose functions have been transferred to the Department of Homeland Security shall be deemed to refer to the Secretary of Homeland Security or other official or component to which the functions were transferred.

[4] *See* 8 U.S.C. 1153(b)(2), (3), 1182(a)(5)(D). Section 1153(b)(2) governs the EB–2 classification of immigrant work visas granted to foreign workers who are either professionals holding advanced degrees (master's degree or above) or foreign equivalents of such degrees, or persons of ''exceptional ability'' in the sciences, arts, or business. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, unless the work he or she is seeking admission to perform is in the ''national interest,'' such as to qualify for a waiver of the job offer (and hence, the labor certification) requirement under 8 U.S.C. 1153(b)(2)(B). Section 1153(b)(3), governs the EB–3 classification of immigrant work visas granted to foreign workers who are either ''skilled workers,'' ''professionals,'' or ''other'' (unskilled) workers, as defined by the statute. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, without exception.

[5] 8 U.S.C. 1154(a)(1)(F), 1182(a)(5)(A) and (D).

[6] 8 U.S.C. 1153(b)(3)(C), 1153(b)(2), 1201(g).

certification. If the Secretary cannot make one or both of the above findings, the application for permanent employment certification is denied.

2. Labor Condition Applications

The H–1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations. ''Specialty occupation'' is defined by statute as an occupation that requires 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, as a minimum for entry into the occupation in the U.S.[7] Similar to the H–1B visa classification, the H–1B1 and E–3 nonimmigrant visa classifications also allow U.S. employers to temporarily employ foreign workers in specialty occupations, except that these classifications specifically apply to the nationals of certain countries: The H–1B1 visa classification applies to foreign workers in specialty occupations from Chile and Singapore,[8] and the E–3 visa classification applies to foreign workers in specialty occupations from Australia.[9] The Secretary must certify an LCA filed by the foreign worker's prospective U.S. employer before the prospective employer may file a petition with DHS on behalf of a foreign worker for H–1B, H–1B1, or E–3 nonimmigrant classification.[10] The LCA contains various attestations from the employer about the wages and working conditions that it will provide for the foreign worker.[11]

B. Description of the Permanent Labor Certification Process

The Department's regulations at 20 CFR part 656 govern the labor certification process and set forth the responsibilities of employers who desire to employ, on a permanent basis, foreign nationals covered by the INA's labor certification requirement.[12]

Prior to filing a labor certification application, the employer must obtain a Prevailing Wage Determination (PWD) for its job opportunity from OFLC's National Prevailing Wage Center (NPWC).[13] The standards and procedures governing the PWD process in connection with the permanent labor certification program are set forth in the Department's regulations at 20 CFR 656.40 and 656.41. If the job opportunity is covered by a Collective Bargaining Agreement (CBA) that was negotiated at arms-length between a union and the employer, the wage rate set forth in the CBA agreement is considered the prevailing wage for labor certification purposes.[14] In the absence of a prevailing wage rate derived from an applicable CBA, the employer may elect to use an applicable wage determination under the Davis-Bacon Act (DBA) or McNamara-O'Hara Service Contract Act (SCA), or provide a wage survey that complies with the Department's standards governing employer-provided wage data.[15] In the absence of any of the above sources, the NPWC will use the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) survey to determine the prevailing wage for the employer's job opportunity.[16] After reviewing the employer's application, the NPWC will determine the prevailing wage and specify the validity period, which may be no less than 90 days and no more than one year from the determination date. Employers must either file the labor certification application or begin the recruitment process, required by the regulation, within the validity period of the PWD issued by the NPWC.[17]

Once the U.S. employer has received a PWD, the process for obtaining a permanent labor certification generally begins with the U.S. employer filing an *Application for Permanent Employment Certification,* Form ETA–9089, with OFLC.[18] As part of the standard application process, the employer must describe, among other things, the labor or services it needs performed; the wage it is offering to pay for such labor or services and the actual minimum requirements of the job opportunity; the geographic location(s) where the work is expected to be performed; and the efforts it made to recruit qualified and available U.S. workers. Additionally, the employer must attest to the conditions listed in its labor certification application, including that ''[t]he offered wage equals or exceeds the prevailing wage determined pursuant to [20 CFR 656.40 and 656.41] and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment.'' [19]

Through the requisite test of the labor market, the employer also attests, at the time of filing the Form ETA–9089, that the job opportunity has been and is clearly open to any U.S. worker and that all U.S. workers who applied for the job opportunity were rejected for lawful, job-related reasons. OFLC performs a review of the Form ETA–9089 and may either grant or deny a permanent labor certification. Where OFLC grants a permanent labor certification, the employer must submit the certified Form ETA–9089 along with an *Immigrant Petition for Alien Worker,* Form I–140 (Form I–140 petition) to DHS. A permanent labor certification is valid only for the job opportunity, employer, foreign worker, and area of intended employment named on the Form ETA–9089, and must be filed in support of a Form I–140 petition within 180 calendar days of the date on which OFLC granted the certification.[20]

C. Description of the Temporary Labor Condition Application Process

The Department's regulations at 20 CFR part 655, subpart H, govern the process for obtaining a certified LCA and set forth the responsibilities of employers who desire to temporarily employ foreign nationals in H–1B, H–1B1, and E–3 nonimmigrant classifications.

A prospective employer must attest on the LCA that (1) it is offering to and will pay the nonimmigrant, during the period of authorized employment, wages that are at least the actual wage level paid by the employer to all other employees with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of intended employment, whichever is

[7] *See* 8 U.S.C 1101(a)(15)(H)(i)(b), 1184(i).

[8] 8 U.S.C. 1101(a)(15)(H)(i)(b1).

[9] 8 U.S.C. 1101(a)(15)(E)(iii).

[10] 8 U.S.C. 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), (a)(15)(H)(i)(b1); 8 CFR 214.2(h)(2)(i)(E).

[11] *See generally* 8 U.S.C. 1182(n), (t); 20 CFR part 655, subpart H.

[12] The current regulations were issued through a final rule implementing the streamlined permanent labor certification program through revisions to 20 CFR part 656 was published on December 27, 2004, and took effect on March 28, 2005. *See Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* 69 FR 77326 (Dec. 27, 2004). The Department published a final rule on May 17, 2007 to enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to permanent labor certification, commonly known as ''the fraud rule.'' *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,* 72 FR 27904 (May 17, 2007).

[13] 20 CFR 656.15(b)(1), 656.40(a).

[14] *See* 20 CFR 656.40(b)(1).

[15] *See* 20 CFR 656.40(b), (g).

[16] *See* 20 CFR 656.40(b)(2).

[17] 20 CFR 656.40(c).

[18] Applications for Schedule A occupations are eligible to receive pre-certification and bypass the standard applications review process. In those cases, employers file the appropriate documentation directly with DHS. *See* 20 CFR 656.5, 656.15.

[19] 20 CFR 656.10(c)(1).

[20] 20 CFR 656.30(b)(1).

greater (based on the best information available at the time of filing the attestation); (2) it will provide working conditions for the nonimmigrant worker that will not adversely affect working conditions for similarly employed U.S. workers; (3) there is no strike or lockout in the course of a labor dispute in the occupational classification at the worksite; and (4) it has provided notice of its filing of an LCA to its employee's bargaining representative for the occupational classification affected or, if there is no bargaining representative, it has provided notice to its employees in the affected occupational classification by posting the notice in a conspicuous location at the worksite or through other means such as electronic notification.[21]

As relevant here, the prevailing wage must be determined as of the time of the filing of the LCA.[22] In contrast to the permanent labor certification process, an employer is not required to obtain a PWD from the NPWC.[23] However, like the permanent labor certification process, if there is an applicable CBA that was negotiated at arms-length between a union and the employer that contains a wage rate applicable to the occupation, the CBA must be used to determine the prevailing wage.[24] In the absence of an applicable CBA, an employer may base the prevailing wage on one of several sources: a PWD from the NPWC; an independent authoritative source that satisfies the requirements in 20 CFR 655.731(b)(3)(iii)(B); or another legitimate source of wage data that satisfies the requirements in 20 CFR 655.731(b)(3)(iii)(C).[25]

An employer may not file an LCA more than six months prior to the beginning date of the period of intended employment.[26] Unless the LCA is incomplete or obviously inaccurate, the Secretary must certify it within seven working days of filing.[27] Once an employer receives a certified LCA, it must file the *Petition for Nonimmigrant Worker,* Form I–129 (''Form I–129 Petition'') with DHS if seeking classification of the alien as an H–1B worker.[28] Upon petition, DHS then determines, among other things, whether the employer's position qualifies as a specialty occupation and, if so, whether the nonimmigrant worker is qualified for the position.

D. History and Current Use of the Four-Tiered OES Prevailing Wage Structure

Historically, the Department relied on State Workforce Agencies (SWAs) to determine prevailing wages for purposes of its nonagricultural labor certification programs.[29] To determine the prevailing wage for a particular job opportunity, SWAs relied on wage rates that were determined to be prevailing for the occupation and locality under other Federal laws—*e.g.,* wages issued for purposes of the DBA or SCA—or when applicable, wages negotiated in a CBA.[30] In the absence of such wage determinations, SWAs determined prevailing wages based on wage information obtained ''by purchasing available published surveys or by conducting ad hoc surveys of employers in the area of intended employment.'' [31]

Beginning at least as early as the 1990s, users of the H–1B program and permanent program users urged the Department to ''create a multi-tiered wage structure to reflect the largely self-evident proposition that workers in occupations that require sophisticated skills and training receive higher wages based on those skills.'' [32]

The Department first adopted a multi-tiered system to determine prevailing wages for the nonagricultural labor certification programs in 1995, when it issued General Administration Letter No. 4–95 (GAL 4–95).[33] As relevant here, GAL 4–95 directed SWAs to provide two wage levels—entry and experienced—when they conducted prevailing wage surveys for nonagricultural positions.[34] Specifically, under this guidance, wage rates issued under the DBA, SCA, or a collective bargaining agreement continued to be controlling, if applicable, and, when they were not, SWAs continued to conduct their own prevailing wage surveys or use published wage surveys.[35] However, under GAL 4–95, when SWAs conducted such surveys, they had to distinguish between entry-level positions and positions requiring several years of experience, taking into account factors like the level of education and experience required, complexity of the tasks performed, and level of supervision and autonomy.[36]

In October 1997, the Department amended its prevailing wage guidance to incorporate the wage component of the recently-expanded OES survey.[37] Specifically, pursuant to General Administration Letter No. 2–98 (GAL 2–98), SWAs continued to assign prevailing wage determinations using wage rates issued under the DBA, SCA, or a CBA, where applicable. But in the absence of such wages, the Department now directed SWAs to use the OES survey (rather than conduct their own prevailing wage survey or use other public or private wage surveys).[38] As described below, the Department divided OES wage data into two skill levels: a Level I wage for ''beginning level employees'' and a Level II wage for ''fully competent employees.[39] To determine the prevailing wage level applicable to a particular position, SWAs considered the level of skill required by the employer, identified the appropriate occupation, and selected the appropriate wage level.[40]

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[21] 8 U.S.C. 1182(n)(1)(A)–(C), (t)(1)(A)–(C); 20 CFR 655.705(c)(1), 655.730(d).

[22] 20 CFR 655.731(a)(2).

[23] *Id.*

[24] *Id.*

[25] 20 CFR 655.731(a)(2)(ii)(A) through (C).

[26] 20 CFR 655.730.

[27] 8 U.S.C. 1182(n)(1), (t)(2)(C); 20 CFR 655.740(a)(1).

[28] For aliens seeking H–1B1 or E–3 classification, the alien may apply directly to the State Department for a visa once the LCA has been certified.

[29] *See, e.g., Miscellaneous Amendments,* 32 FR 10932 (July 26, 1967).

[30] *See, e.g., id.*

[31] *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* 67 FR 30466, 30479 (May 6, 2002).

[32] *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,* 76 FR 3452, 3453 (Jan. 19, 2011).

[33] General Administration Letter No. 4–95 (May 18, 1995), *available at https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=485.*

[34] *See id.* at 5 (''The job related education, training and experience requirements of an occupation are factors to be considered in making prevailing wage determinations. A prevailing wage survey and/or determination should distinguish between entry level positions and those requiring several years of experience. At a minimum, a distinction should be made based on whether or not the occupation involved in the employer's job offer is entry level or at the experienced level.''). As the Department later explained, adoption of tiered wages was necessary for the H–1B and permanent labor certification programs because job opportunities in these programs ''reflect[] a wide range of experience, skills, and knowledge which appropriately correspond to stratified wage levels.'' *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3461 (Jan. 19, 2011).

[35] GAL 4–95 at 1–2.

[36] *Id.* at 5–6.

[37] *Prevailing Wage Policy for Nonagricultural Immigration Programs,* General Administration Letter No. 2–98 (GAL 2–98) (Oct. 31, 1997), *available at https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=942.*

[38] GAL 2–98 at 1. Under this guidance, employers could still make specific requests for prevailing wages based on different (non-OES) wage data, provided it met certain requirements. *Id.* at 8. But where an employer provided data that met applicable requirements, that data was used only to determine the prevailing wage for purposes of that employer's job opportunity, and not for subsequent prevailing wage requests in that occupation. *See id.* at 9.

[39] GAL 2–98 at 5.

[40] *Id.* GAL 2–98 did not change the definition of the skill levels that were first announced in GAL 4–95, but it did direct SWAs to issue a level II wage in several additional contexts, including cases in which state licensure was required for independent performance of all of the duties encompassed by the

GAL 2–98 was accompanied by a Memorandum of Understanding (MOU) between ETA and BLS, wherein BLS agreed to provide, through its cooperative agreements with the SWAs, two wage levels for each occupational classification in areas of intended employment, where available.[41] Because the OES survey does not provide data about skill differentials within Standard Occupational Classification (SOC) codes, ETA established the entry and experienced skill levels mathematically. Specifically, under the MOU, BLS computed a Level I wage calculated as the mean of the lowest paid one-third of workers in a given occupation (approximately the 17th percentile of the OES wage distribution) and a Level II wage calculated as the mean wage of the highest paid upper two-thirds of workers (approximately the 67th percentile). This two-tier wage structure was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage, but the Department did not conduct any meaningful economic analysis to test its validity.'' [42] Rather, as the Department explained at the time, it adopted this structure to ''insure the use of a consistent methodology by all States'' in making prevailing wage determinations.[43] The wage structure adopted in 1998, which was developed without notice and comment, has never been codified in the Department's regulations.

In 2002, the Department issued additional guidance to SWAs regarding the assignment of prevailing wage levels.[44] In this guidance, the Department stressed that skill levels should not be assigned solely on the basis of the occupational classification because ''[a]ll OES/SOC codes encompass both level I and level II positions . . . including managerial and professional jobs at the high end, and assistant or helper codes at the low end.'' [45] Rather, as the guidance emphasized throughout, the employer's job description and the nature of the work were the primary determinants of a wage level determination. The Department directed SWAs to consider relevant factors, such as ''the complexity of the job duties, the level of judgment, the amount [and nature] of supervision, and the level of understanding required to perform the job duties,'' and to a lesser extent, factors like licensure requirements or the position's location in the employer's hierarchy.[46] Job duties alone could necessitate a level II determination where, for example, they indicated the employee would ''operate with little supervision, perform advanced [] procedures, and exercise great latitude of independent judgment.'' [47] The Department also directed states to consider whether the job opportunity required education or experience exceeding entry-level occupational requirements and, reiterating GAL 2–98, explained that ''the wage rate for a job offer that requires an advanced degree (Master's or Ph.D.)'' was to be considered level II if a lesser degree was ''normally required for entry into the occupation.'' [48]

That same year, in response to a proposed rule amending the permanent labor certification process, the Department received comments criticizing it ''for arbitrarily dividing salary data into two wage levels'' and ''suggest[ing] existing OES wage data would be more useful if the number of wage levels were expanded to appropriately differentiate among various occupational groupings.'' [49] For example, one commenter believed adoption of ''[m]ulti-tiered wage levels . . . set for each occupation [would] better reflect 'real world' experience'' and stated that ''[a] two-tier wage level is unrealistic where an entry level job by its nature requires considerable independence (*e.g.,* a teacher) or the salary for the second level is markedly higher, *e.g.,* post-doctoral research fellow, medical resident, college instructor, marketing manager.'' [50] Similarly, another commenter expressed concern that use of just one upper-bound, level II wage for ''all experienced workers create[d] gross inaccuracies at both ends of the spectrum,'' and asserted that ''[m]ultiple levels allow for a reasoned wage based upon years of experience and levels of responsibility that reflect real world patterns.''

The Department adopted the four-tier prevailing wage level structure that is currently in effect in response to the H–1B Visa Reform Act of 2004.[51] As relevant here, the H–1B Visa Reform Act of 2004 amended section 212(p) of the INA to provide where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.[52]

To implement this provision, the Department published comprehensive Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (''2005 Guidance''), which expanded the two-tier OES wage level system to provide four ''skill levels'': Level I ''entry level,'' Level II ''qualified,'' Level III ''experienced,'' and Level IV ''fully competent.'' [53] The Department applied the formula in the statute to its two existing wage levels to set Levels I through IV, respectively, at approximately the 17th percentile, the 34th percentile, the 50th percentile, and the 67th percentile.[54]

occupation and the job opportunity required such a worker. *Id.*

[41] Intra-Agency Memorandum of Understanding executed by Mr. John R. Beverly, III, Director, U.S. Employment Service, ETA, and Ms. Katharine Newman, Chief, Division of Financial Planning and Management, Office of Administration, BLS (Sept. 30, 1998).

[42] GAL 2–98, *available at https://oui.doleta.gov/dmstree/gal/gal98/gal_02–98.htm. See also Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76FR 3452, 3453 (Jan. 19, 2011); *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013).

[43] GAL 2–98; *see also Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3464 (Jan. 19, 2011) (explaining that the Department moved to the OES in part due to the ''inconsistencies that resulted from State to State in the treatment of the same job opportunity, reflecting not the local conditions but the quality of the surveyors and the collection instruments used'' and because the Department determined that ''the OES provides a more reliable and cost-effective means for producing prevailing wage rates on a consistent basis across the country.'').

[44] Training and Employment Guidance Letter No. 5–02 (TEGL 5–02): Clarification of Level I and Level II Skill Levels for the Purposes of Prevailing Wage Determinations (Aug. 7, 2002), *available at https://oui.doleta.gov/dmstree/tegl/tegl2k2/tegl_05–02.htm.*

[45] *Id.* at 2.

[46] *Id.*

[47] *Id.* at 5 (referring to job opportunities for medical residents that might otherwise be considered entry level).

[48] *Id.* at 4.

[49] *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* 69 FR 77326, 77367 (Dec. 27, 2004).

[50] *Id.* at 77370.

[51] *Consolidated Appropriations Act,* 2005, Public Law 108–447, div. J, tit. IV, 423; 118 Stat. 2809 (Dec. 8, 2004).

[52] 8 U.S.C. 1182(p)(4).

[53] ETA Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs 7 (May 2005), *available at https://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf.*

[54] *See id.* at 1.

In 2010, the Department centralized the prevailing wage determination process for nonagricultural labor certification programs within OFLC's NPWC, eliminating SWAs' involvement in the process.[55] In preparation for this transition, the Department issued new Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (2009 Guidance).[56] This guidance currently governs OFLC's PWD process for the PERM, H–1B, H–1B1, and E–3 visa programs and will continue to govern OFLC's PWD process for these programs.

When assigning a prevailing wage using BLS OES data, the NPWC examines the nature of the job offer, the area of intended employment, and job duties for workers that are similarly employed.[57] In particular, the NPWC uses the SOC taxonomy to classify the employer's job opportunity into an occupation by comparing the employer's job description, title, and requirements to occupational information provided in sources like the Department's Occupational Information Network (O*Net).[58] Once the NPWC identifies the applicable SOC code, it determines the appropriate wage level for the job opportunity by comparing the employer's job description, title, and requirements to those normally required for the occupation, as reported in sources like O*Net. This determination involves a step-by-step process in which each job opportunity begins at Level I (entry level) and may progress to Level II (experienced), Level III (qualified), or Level IV (fully competent) based on the NPWC's comparison of the job opportunity to occupational requirements, including the education, training, experience, skills, knowledge, and tasks required in the occupation.[59] After determining the prevailing wage level, the NPWC issues a PWD to the employer using the OES wage for that level in the occupation and area of intended employment.

II. Amendments To Adjust the Prevailing Wage Levels

A. Reasons for Adjusting the Prevailing Wage Levels

A primary purpose of the restrictions on immigration created by the INA, both numerical and otherwise, is ''to preserve jobs for American workers.'' [60] Safeguards for American labor, and the Department's role in administering them, have been a foundational element of the statutory scheme since the INA was enacted in 1952.[61] For the reasons set forth below, the Department has determined that the way it currently regulates the wages of certain immigrant and nonimmigrant workers in the H–1B, H–1B1, E–3, and PERM programs is inconsistent with the text of the INA. A substantial body of evidence examined by the Department also suggests that the existing prevailing wage rates used by the Department in these foreign labor programs are causing adverse effects on the wages and job opportunities of U.S. workers, and are therefore at odds with the purpose of the INA's labor safeguards. The current wage levels were also promulgated through guidance and without any meaningful economic justification. Accordingly, the Department is acting to adjust the wage levels to ensure they are codified and consistent with the factors the INA dictates must govern the calculation of foreign workers' wages. In so doing, the Department expects to reduce the dangers posed by the existing levels to U.S. workers' wages and job opportunities, and thereby advance a primary purpose of the statute.

The modern H–1B program was created by the enactment of the Immigration Act of 1990 (IMMACT 90). Among other reforms, IMMACT 90 established ''various labor protections for domestic workers'' in the program.[62] These protections were primarily designed ''to prevent displacement of the American workforce'' by foreign labor.[63] In general, the purpose of the H–1B program is to ''allow[] an employer to reach outside of the U.S. to fill a temporary position because of a special need, presumably one that cannot be easily fulfilled within the U.S.'' [64] Using a foreign worker as a substitute for a U.S. worker who is already working in or could work in a given job is therefore inconsistent with the broad aims of the program. Congress has recognized that repeatedly, both in the enactment of IMMACT 90 and when making subsequent changes to the H–1B program.[65]

Wage requirements are central to the H–1B program's protections for U.S. workers.[66] Under the INA, employers must pay H–1B workers the greater of ''the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question,'' or the ''the prevailing wage level for the occupational classification in the area of employment.'' [67] By ensuring that H–1B workers are offered and paid wages that are no less than what U.S. workers similarly employed in the occupation are being paid, the wage requirements are meant to guard against both wage suppression and the replacement of U.S. workers by lower-cost foreign labor.[68]

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[55] *See Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes,* 73 FR 78020 (Dec. 19, 2008); *Prevailing Wage Determinations for Use in the H–1B, H–1B1 (Chile/Singapore), H–1C, H–2B, E–3 (Australia), and Permanent Labor Certification Programs; Prevailing Wage Determinations for Use in the Commonwealth of the Northern Mariana Islands,* 74 FR 63796 (Dec. 4, 2009).

[56] Employment and Training Administration; Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (Revised Nov. 2009) (*hereinafter* 2009 Guidance), *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

[57] *Id.* at 1.

[58] *Id.* at 1–7; *see also* Occupational Information Network, *available at http://online.onetcenter.org.* O*Net provides information on skills, abilities, knowledge, tasks, work activities, and specific vocational preparation levels associated with occupations and stratifies occupations based on shared skill, education, and training indicators.

[59] 2009 Guidance at 6.

[60] *Sure-Tan, Inc.* v. *N.L.R.B.,* 467 U.S. 883, 893 (1984).

[61] H.R. Rep. No. 1365, 82d Cong., 2d Sess., 50–51 (1952) (discussing the INA's ''safeguards for American labor'').

[62] *Washington All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.,* 156 F. Supp. 3d 123, 142 (D.D.C. 2015), judgment vacated, appeal dismissed sub nom. *Washington All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.,* 650 F. App'x 13 (D.C. Cir. 2016).

[63] *Cyberworld Enter. Techs., Inc.* v. *Napolitano,* 602 F.3d 189, 199 (3d Cir. 2010).

[64] *Caremax Inc* v. *Holder,* 40 F. Supp. 3d 1182, 1187 (N.D. Cal. 2014).

[65] *See, e.g.,* Public Law 105–277 § § 412–13, 112 Stat. 2681, 2981–642 to –650 (1998). *See also* H.R. Rep. No. 101–723(I), 101st Cong., 2d Sess. 44, 66–67 (1990) (''[IMMACT 90] recognizes that certain entry-level workers with highly specialized knowledge are needed in the United States and that sufficient U.S. workers are sometimes not available. At the same time, heavy use and abuse of the H–1 category has produced undue reliance on alien workers.''); 144 Cong. Rec. S12741, S12749 (daily ed. October 21, 1998) (statement of Sen. Abraham) (describing the purpose of the H–1B provisions of the American Competiveness and Workforce Improvement Act as being to ensure ''that companies will not replace American workers with foreign born professionals, including increased penalties and oversight, as well as measures eliminating any economic incentive to hire a foreign born worker if there is an American available with the skills needed to fill the job.'').

[66] *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models,* 59 FR 65646, 65655 (December 20, 1994) (describing the ''Congressional purposes of protecting the wages of U.S. workers'' in the H–1B program); H.R. REP. 106–692, 12 (*quoting* Office of Inspector General, U.S. Department of Labor, Final Report: The Department of Labor's Foreign Labor Certification Programs: The System is Broken and Needs to Be Fixed 21 (May 22, 1996) (''The employer's attestation to . . . pay the prevailing wage is the only safeguard against the erosion of U.S. worker's [sic.] wages.'').

[67] 8 U.S.C. 1182(n)(1)(A).

[68] *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as*

The OES prevailing wage levels that the Department uses in the H–1B program—as well as the related H–1B1 and E–3 ''specialty occupation'' programs for foreign workers from Chile, Singapore, and Australia—are the same as those it uses in its PERM programs. Through the PERM programs, the Department processes labor certification applications for employers seeking to sponsor foreign workers for permanent employment under the EB–2 and EB–3 immigrant visa preference categories. Aliens seeking admission or adjustment of status under the EB–2 or EB–3 preference categories are inadmissible ''unless the Secretary of Labor has determined and certified . . . that—(I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' [69]

The Secretary makes this determination in the PERM programs by, among other things, requiring the foreign worker's sponsoring employer to recruit U.S. workers by offering a wage that equals or exceeds the prevailing wage, and to assure that the employer will pay the foreign worker a wage equal to or exceeding the prevailing wage.[70] In this way, similar to its role in the H–1B program, the prevailing wage requirement in the PERM programs furthers the statute's purpose of protecting the interests of, and preserving job opportunities for American workers.[71] Effectuating this purpose is the principle objective of the Department's regulatory scheme in the PERM programs.[72]

While the prevailing wage levels the Department sets in the H–1B, H–1B1, E–3, and PERM programs are meant to protect against the adverse effects the entry of immigrant and nonimmigrant workers can have on U.S. workers, they do not accomplish that goal—and have not for some time. For starters, the Department has never offered a full explanation or economic justification for the way it currently calculates the prevailing wage levels it uses in these foreign labor programs.[73] The INA requires that a government survey employed to determine the prevailing wage provide wage levels commensurate with experience, education, and level of supervision. However, it is clear that the Department's current wage levels are not sufficiently set in accordance with the relevant statutory factors. Further, the Department's analysis of the likely effects of H–1B and PERM workers on U.S. workers' wages and job opportunities shows that the existing wage levels are not advancing the purposes of the INA's wage provisions. As explained below, under the existing wage levels, artificially low prevailing wages provide an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts—meaning U.S. workers in the same labor market, performing similar jobs, and possessing similar levels of education, experience, and responsibility—make, creating an incentive—entirely at odds with the statutory scheme—to prefer foreign workers to U.S. workers, and causing downward pressure on the wages of the domestic workforce. The need to fix this problem and ensure the wage levels are set in a manner consistent with the INA is especially pressing now, given the elevated unemployment and economic dislocation for U.S. workers caused by the COVID–19 pandemic. The Department is therefore acting to adjust the existing wage levels to ensure the levels reflect the wages paid to U.S. workers with levels of experience, education, and responsibility comparable to those possessed by similarly employed foreign workers.

1. The Relationship Between the Prevailing Wage Levels, the OES Survey, and the Statutory Framework Governing the Department's Foreign Labor Programs

As noted, the INA requires employers to pay H–1B workers the greater of ''the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question,'' or ''the prevailing wage level for the occupational classification in the area of employment.'' [74] The statute further provides that, when a government survey is used to establish the wage levels, ''such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.'' [75] If an existing government survey produces only two levels, the statute provides a formula to calculate two intermediate levels.[76] Thus, like the statute's actual wage clause, the prevailing wage requirement, when calculated based on a government survey, makes the qualifications possessed by workers, namely education, experience, and responsibility, an important part of the wage calculation. Put slightly differently, both clauses yield wage calculations that in similar fashions are designed to approximate the rate at which workers in the U.S. are being compensated, taking into account the area in which they work, the types of work they perform, and the qualifications they possess; and the statute requires employers to pay the rate of whichever calculation yields the higher wage. In this way, the statutory scheme is meant to ''protect U.S. workers' wages and eliminate any economic incentive or advantage in

Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 FR 80110, 80110 (Dec. 20, 2000) (''The [INA], among other things, requires that an employer pay an H–1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.''); *Panwar* v. *Access Therapies, Inc.,* 975 F. Supp. 2d 948, 952 (S.D. Ind. 2013) (''The wage requirements are designed to prevent . . . the influx of inexpensive foreign labor for professional services.'').

[69] 8 U.S.C. 1182(a)(5)(A)(i).

[70] 20 CFR 656.10(c)(1).

[71] *Pai* v. *U.S. Citizenship & Immigration Servs.,* 810 F. Supp. 2d 102, 110 (D.D.C. 2011) (''The plain language of [8 U.S.C. 1182(a)(5)(A) and 1153(b)(3)] reflects a concern to protect the interests of workers in the United States.''); *Fed'n for Am. Immigration Reform, Inc.* v. *Reno,* 93 F.3d 897, 903 (D.C. Cir. 1996) (explaining that the INA's various limits on immigration, such as in the allocation of visas in the EB–2 and EB–3 preference categories, ''reflect a clear concern about protecting the job opportunities of United States citizens.''). *See generally Texas* v. *United States,* 809 F.3d 134, 181 (5th Cir. 2015) (quoting *I.N.S.* v. *Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 194 (1991) (''The INA's careful employment-authorization scheme 'protect[s] against the displacement of workers in the United States,' and a 'primary purpose in restricting immigration is to preserve jobs for American workers.' '').

[72] *See, e.g., Durable Mfg. Co.* v. *U.S. Dep't of Labor,* 578 F.3d 497, 502 (7th Cir. 2009) (''The point remains that the new § 656.30(b) advances, to some degree, the congressional purpose of protecting American workers.''); *Rizvi* v. *Dep't of Homeland Sec. ex rel. Johnson,* 627 F. App'x 292, 294–95 (5th Cir. 2015) (unpublished) (''Viewed in the proper context, the challenged regulation serves purposes in accord with the statutory duty to grant immigrant status only where the interests of American workers will not be harmed; showing the employer's ongoing ability to pay the prevailing wage is one reasonable way to fulfill this goal.'').

[73] *See Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013) (''Since the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, the two-tier wage structure introduced in 1998 was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a reasonable proxy for the entry-level wage. DOL did not conduct any meaningful economic analysis to test the validity of that assumption . . .'').

[74] 8 U.S.C. 1182(n)(1)(A).

[75] 8 U.S.C. 1182(p)(4).

[76] *Id.*

hiring temporary foreign workers.'' [77] If employers are required to pay H–1B workers approximately the same wage paid to U.S. workers doing the same type of work in the same geographic area and with similar levels of education, experience, and responsibility as the H–1B workers, employers will have significantly diminished incentives to prefer H–1B workers over U.S. workers, and U.S. workers' wages will not be suppressed by the presence of foreign workers in the relevant labor market.

To set an appropriate prevailing wage for an H–1B worker in a given occupation, it is therefore appropriate to identify what types of U.S. workers in the occupation have comparable levels of education, experience, and responsibility to H–1B workers. To answer this question, the place to start is the INA itself, which sets the minimum qualifications an alien must have to obtain an H–1B visa. While the INA makes clear that the prevailing wage levels must be set commensurate with education, experience, and level of supervision, it leaves assessment of those factors to the Department's discretion. How the Department exercises that discretion is informed by the legislative context in which the four-tier wage structure was enacted, which indicates that the wage levels are primarily designed for use in the Department's high-skilled and PERM foreign labor programs.[78] Other provisions in the INA relating to the education and experience requirements of those programs—and in particular the statutory definition of ''specialty occupation''—therefore serve as critical guides for how wage levels based on experience, education, and level of supervision should be formulated.

A review of this statutory framework and its interplay with the BLS OES survey data that the Department uses to calculate prevailing wages demonstrates that, while the OES survey is the best source of wage data available for use in the Department's foreign labor certification programs, it is not specifically designed for such programs, and therefore does not account for the requirement that workers in the H–1B program possess highly specialized knowledge in how it gathers data about U.S. workers' wages. This fact necessarily shapes how the Department integrates the OES survey into its foreign labor programs and also demonstrates the existing wage levels' inconsistency with the INA.

At the outset, the Department notes that much of its assessment of how best to adjust the prevailing wage levels gives special attention to the H–1B program. The H–1B program accounts, by order of magnitude, for the largest share of foreign workers covered by the Department's four-tier wage structure. Upwards of 80 percent of all workers admitted or otherwise authorized to work under the programs covered by the wage structure are H–1B workers.[79] This, in combination with the fact that, as explained below, the risk of adverse effects to U.S. workers posed by the presence of foreign workers is most acute where there are high concentrations of such workers, supports the Department's determination to focus on the H–1B program. Because the wage structure governs, and, for reasons explained below, will continue to govern wages for hundreds of thousands of workers across five different foreign labor programs and hundreds of different occupations, no wage methodology will be perfectly tailored to the unique circumstances of every job opportunity.[80] Advancing the INA's purpose of guarding against displacement and adverse wage effects against this statutory backdrop therefore means, in the Department's judgment, that particular weight should be given in the Department's analysis to those aspects of the problem this rule is meant to address where there is the greatest danger to U.S. workers' wages—hence the added focus on the H–1B program. For the same reasons, and as elaborated on below, the Department's analysis focuses on those occupations in which the vast majority of H–1B workers are employed.

Relatedly, the Department notes that the H–1B program is closely linked to the PERM programs that are also covered by the Department's wage structure. A very substantial majority of workers covered by PERM labor certification applications are already working in the U.S. as H–1B nonimmigrants, and there is significant overlap in the types of occupations in which H–1B and PERM workers are employed.[81] It is also clear that H–1B status often serves as a pathway to employment-based green card status for many foreign workers.[82] The programs have thus long been regulated in connection with one another.[83] For these reasons, giving particular attention to the H–1B program in determining how to adjust the wage levels is entirely consistent with also ensuring that how the wage levels are applied in the PERM programs is properly accounted for in the Department's analysis.

Under the INA, H–1B visas can, in most cases, only be granted to aliens entering the U.S. to perform services ''in a specialty occupation.'' [84] The statute defines ''specialty occupation'' as an occupation that requires theoretical and practical application of a body of ''highly specialized knowledge'' and the ''attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.'' [85] An alien may be classified as an H–1B specialty occupation worker if the alien possesses ''full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,'' ''completion of [a bachelor's or higher degree in the specific specialty (or its equivalent)],'' or ''(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively

[77] *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States,* 65 FR 80110, 80110 (Dec. 20, 2000).

[78] *See Consolidated Appropriations Act,* 2005, Public Law 108–447, div. J, tit. IV, § 423; 118 Stat. 2809 (Dec. 8, 2004).

[79] *See* Department of Homeland Security, 2017 Yearbook of Immigration Statistics, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017, available at *https://www.dhs.gov/immigration-statistics/yearbook/2017/table7*; United States Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2017 Annual Report to Congress October 1, 2016—September 30, 2017, (2020), *available at https://www.uscis.gov/sites/default/files/document/foia/Characteristics_of_H–1B_Specialty_Occupation_Workers_FY17.pdf.*

[80] *Cf. Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3461 (Jan. 19, 2011) (justifying wage methodology designed for lower-skilled workers that was adopted in the H–2B program on grounds that the program ''is overwhelmingly used for work requiring lesser skilled workers,'' while also acknowledging that ''not all positions requested through the H–2B program are for low-skilled labor.'').

[81] In FY2019, 68.2 percent of all PERM labor certification applications filed were for H–1B workers already working in the United States. Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

[82] *See* Sadikshya Nepal, *The Convoluted Pathway from H–1B to Permanent Residency: A Primer,* Bipartisan Policy Center (2020).

[83] *See* 144 Cong. Rec. S12741, S12756 (explaining that 8 U.S.C. 1182(p)''spells out how [the prevailing] wage is to be calculated in the context of both the H–1B program and the permanent employment program in two circumstances.''); *Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 81 FR 82398 (November 18, 2016).

[84] 8 U.S.C. 1101(a)(15)(H)(i)(b).

[85] 8 U.S.C. 1184(i)(1).

responsible positions relating to the specialty.'' [86] DHS regulations further clarify the requirements for establishing that the position is a specialty occupation and that the beneficiary of an H–1B petition must be qualified for a specialty occupation.[87] The Department's regulations restate the statute's definition of specialty occupation essentially verbatim.[88]

A few features of the definition bear emphasizing. First, the statute sets the attainment of a bachelor's degree in a specific specialty, or experience that would give an individual expertise equivalent to that associated with a bachelor's degree in the specific specialty, as the baseline, minimum requirement for an alien to qualify for the classification. Of even greater importance, having any bachelor's degree as a job requirement is not sufficient to qualify a job as a specialty occupation position—the bachelor's degree or equivalent experience required to perform the job must be ''in the specific specialty.'' In other words, the bachelor's degree required, or equivalent experience, must be specialized to the particular needs of the job, and impart a level of expertise greater than that associated with a general bachelor's degree, meaning a bachelor's degree not in some way tailored to a given field.[89] These aspects of the definition play an important role in how the Department will use data from the BLS OES survey to set appropriate prevailing wage levels.

The Department has long relied on OES data to establish prevailing wage levels. That is because it is a comprehensive, statistically valid survey that, in many respects, is the best source of wage data available for satisfying the Department's purposes in setting wages in most immigrant and nonimmigrant programs. As the Department has previously noted the OES wage survey is among the largest continuous statistical survey programs of the Federal Government. BLS produces the survey materials and selects the nonfarm establishments to be surveyed using the list of establishments maintained by State Workforce Agencies (SWAs) for unemployment insurance purposes. The OES collects data from over 1 million establishments. Salary levels based on geographic areas are available at the national and State levels and for certain territories in which statistical validity can be ascertained, including the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Salary information is also made available at the metropolitan and nonmetropolitan area levels within a State. Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. The features described above are unique to the OES survey, which is a comprehensive, statistically valid, and useable wage reference.[90]

Put simply, the OES survey's quality and characteristics have made it, and continue to make it, a useful tool for setting prevailing wage levels in the Department's foreign labor programs. There are no alternative surveys or sources of wage data that would provide DOL with wage information at the same level of granularity needed to properly administer the H–1B and PERM programs.

That said, the OES survey is not specifically designed to serve these programs. For one thing, ''the OES survey captures no information about differences within the [occupational] groupings based on skills, training, experience or responsibility levels of the workers whose wages are being reported'' [91]—the factors the INA requires the Department to rely on in setting prevailing wage levels.[92] Relatedly, ''there are factors in addition to skill level that can account for OES wage variation for the same occupation and location.'' [93] Further, the geographic areas used by BLS to calculate local wages do not always match up exactly with the ''area of employment'' for which wage rates are set, as that term is defined by the INA for purposes of the H–1B program.[94] So while the OES survey is the best available source of wage data for the Department's purposes, it is not a perfect tool for providing wages in the H–1B, H–1B1, E–3, and PERM programs—a fact that the Department must take into consideration in how it uses the OES data.

Similarly, the INA's definition of ''specialty occupation'' should be accounted for in how the Department fits the OES survey into its foreign labor programs. The survey categorizes workers into occupational groups defined by the SOC system, a federal statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.[95] An informative source on the duties and educational requirements of a wide variety of occupations, including those in the SOC system, is the Department's Occupational Outlook Handbook (OOH), which, among other things, details for various occupations the baseline qualifications needed to work in each occupation. A review of the OOH shows that only a portion of the workers covered by many of the occupational classifications used in the OES survey likely have levels of education and experience similar to those of H–1B workers in the same occupation. Some share of workers in these classifications likely do not have the education or experience qualifications necessary to be considered similarly employed to specialty occupation workers. Because the INA requires the prevailing wage levels for H–1B workers to be set based on the wages of U.S. workers with levels of experience and education similar to those of H–1B workers, the Department must take this into account when using OES data to determine prevailing wages.

For example, a common occupational classification in which H–1B nonimmigrants work is Computer Programmers.[96] The OOH's entry for Computer Programmers describes the educational requirements for the occupation as follows: ''Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree.'' [97] In other words, while common, a bachelor's degree-level education, or its equivalent,

[86] 8 U.S.C. 1184(i)(2).

[87] 8 CFR 214.2(h)(4)(iii)(()(()((A) and C).

[88] *See* 20 CFR 655.715.

[89] *See Chung Song Ja Corp.* v. *U.S. Citizenship & Immigration Servs.,* 96 F. Supp. 3d 1191, 1197–98 (W.D. Wash. 2015) (''Permitting an occupation to qualify simply by requiring a generalized bachelor degree would run contrary to congressional intent to provide a visa program for specialized, as opposed to merely educated, workers.''); *Caremax Inc* v. *Holder,* 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014) (''A position that requires applicants to have any bachelor's degree, or a bachelor's degree in a large subset of fields, can hardly be considered specialized.'').

[90] *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3463 (Jan. 19, 2011).

[91] *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,* 80 FR 24146, 24155 (Apr. 29, 2015).

[92] 8 U.S.C. 1182(p)(4).

[93] *Id.* at 24159.

[94] 8 U.S.C. 1182(n)(4)(A).

[95] U.S. Bureau of Labor Statistics, Standard Occupational Classification, *https://www.bls.gov/soc/.*

[96] Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf.*

[97] Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Programmers, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm.*

is not a prerequisite for working in the occupation. United States Citizenship and Immigration Services (USCIS) and at least one court have reasoned from this that the mere fact that an individual is working as a Computer Programmer does not establish that the individual is working in a ''specialty occupation.'' [98] Because a person without a specialized bachelor's degree can still be classified as a Computer Programmer, some portion of Computer Programmers captured by the OES survey are not similarly employed to H–1B workers because the baseline qualifications to enter the occupation do not match the statutory requirements.[99]

The same is true for other occupational classifications in which H–1B workers are often employed. For example, the Medical and Health Services Manager occupation, as described by the OOH, does not in all cases require a bachelor's degree as a minimum requirement for entry.[100] USCIS has therefore concluded that the fact that an individual works in that occupational classification does not necessarily mean that he is working in a ''specialty occupation.'' [101] USCIS and its predecessor agency, the Immigration and Naturalization Service, have long emphasized that the term ''specialty occupation'' does not ''include those occupations which [do] not *require* a bachelor's degree in the specific specialty.'' [102] In other words, if an occupation does not require a specialized bachelor's degree or equivalent experience, under the INA other evidence is needed to show that a worker will be performing duties in a specialty occupation beyond whether the job opportunity falls within a particular SOC classification.[103]

A review of the OOH entries for the occupations in which H–1B nonimmigrants most commonly work demonstrates that most H–1B workers fall within SOC classifications that include some number of workers who would not qualify for employment in a specialty occupation. For instance, the OOH entries for Software Developers—an occupation accounting for over 40 percent of all certified LCAs [104]—provides that such workers ''*usually* have a bachelor's degree in computer science and strong computer programming skills.'' [105] For Computer Systems Analysts, which make up approximately 8.8 percent of all certified LCAs,[106] ''a bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.'' [107] Similarly, the O*Net database, which surveys employers on the types of qualifications they seek in workers for various occupations, shows that, on average, over 13 percent of all jobs in the occupations that H–1B workers are most likely to work in do not require workers to have even a bachelor's degree.[108] Moreover, the O*Net does not differentiate between jobs that require bachelor's degrees in specific specialties and job for which a general bachelor's degree will suffice. It is therefore a reasonable inference that the percentage of jobs in these occupations that would not qualify as specialty occupation positions for purposes of the INA is almost certainly even higher.

Simply put, the universe of workers surveyed by the OES for some of the most common occupational classifications in which H–1B workers are employed is larger than the pool of workers who can be said to have levels of education and experience comparable to those of even the least skilled H–1B

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[98] *See Innova Sols., Inc.* v. *Baran,* 399 F. Supp. 3d 1004, 1015 (N.D. Cal. 2019).

[99] As noted throughout, under the INA a bachelor's degree is not an absolute prerequisite for obtaining an H–1B visa. Work experience imparting comparable levels of expertise will also suffice. Indeed, as the President has noted in other contexts, focusing on possession of a degree to the exclusion of work experience ignores important considerations about how merit and qualifications should be assessed. *See* Exec. Order No. 13932, 85 FR 39457 (2020). The Department's focus on the OOH's description of degree requirements here is not meant to suggest otherwise, but rather simply accounts for the fact that, within the H–1B program, nearly all nonimmigrants hold a degree. *See* U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.* Further, under the INA, EB–2 and EB–3 immigrants are, in many cases, required to possess a degree. And, in any event, the Department's assessment of the OOH's descriptions of education requirements and how they demonstrate that, for the most common H–1B occupations, there is some portion of workers who would not qualify as working in a specialty occupation holds true for the OOH's description of various occupations' experience requirements. The mere fact that OOH describes many workers in an occupation as having several years of experience in or skills relevant to their respective fields does not necessarily mean that they possess ''highly specialized knowledge,'' or that all workers in the occupation have such experience. *See Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007). *See also* Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Systems Analysts, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm;* Bureau of Labor Statistics, Occupational Outlook Handbook, Food Service Managers, *available at https://www.bls.gov/ooh/management/food-service-managers.htm.* Whether discussing education or experience requirements, the fact remains that OOH's description of the occupational classifications used in the BLS OES are, in most cases, not limited to workers who would qualify as working in a specialty occupation.

[100] *See Ajit Healthcare Inc.* v. *U.S. Dep't of Homeland Sec.,* 2014 WL 11412671, at 4 (C.D. Cal. Feb. 7, 2014); *see also* Bureau of Labor Statistics, Occupational Outlook Handbook, Medical and Health Services Managers, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm.* The Department notes that some courts and USCIS have concluded that the fact that an occupation does not in all cases require a bachelor's degree as a minimum qualification does not necessarily preclude the occupational classification from serving as evidence that a particular job qualifies as a ''specialty occupation.'' *See, e.g., Taylor Made Software, Inc.* v. *Cuccinelli,* 2020 WL 1536306, at 6 (D.D.C. Mar. 31, 2020; *see also* 8 CFR 214.2(h)(4)(iii). That said the INA ultimately does not admit of any exceptions to the rule that a job must require a bachelor's degree in a specific specialty, or its equivalent, to qualify as a specialty occupation, meaning, whatever its relevance to determining whether a particular job is in a ''specialty occupation,'' the fact that many SOC classifications contain workers that would not meet the statutory definition is highly relevant to how OES data for an entire occupational classification is used in setting prevailing wage levels. Put another way, as the court in *Taylor Made* acknowledged, the fact that a bachelor's degree is not required in all cases for a given occupation means that some number of workers within the occupation are not performing work in a specialty occupation. *Id.* Because such workers are almost certainly captured within OES data, and the Department calculates prevailing wages by taking into account the actual wages reported for broad swaths of workers in the OES data, the presence of these workers in the survey data directly relates to how prevailing wage levels are set, even if it does not have a great deal of significance for how a single, specific job in an occupation is determined to be or not to be in a ''specialty occupation.''

[101] *See Ajit Healthcare,* 2014 WL 11412671, at 4.

[102] *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,* 56 FR 61111, 61113 (December 2, 1991) (emphasis added).

[103] 8 U.S.C. 1184(i); *see Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007).

[104] Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf.*

[105] Bureau of Labor Statistics, Occupational Outlook Handbook, Software Developers, *available at https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm.*

[106] Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf.*

[107] Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Systems Analysts, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm.*

[108] *See* Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf;* O*NET Online, *https://www.onetonline.org/.*

workers performing work in a specialty occupation. Because the statutory scheme requires the Department to set the prevailing wage levels based on what workers similarly employed to foreign workers make, taking into account workers' qualifications and, as noted, the large majority of foreign workers are H–1B workers, it would be inappropriate to consider the wages of the least educated and experienced workers in these occupational classifications in setting the prevailing wage levels. To conclude otherwise would place the Department at odds with one of the purposes of the INA's wage protections—to ensure that foreign workers earn wages comparable to the wages of their U.S. counterparts.

This consideration also demonstrates the inconsistency of the existing wage levels with the statutory and regulatory framework. As noted above, the Department's first wage level is currently set by calculating the mean of the bottom third of the OES wage distribution. That means the wages for many H–1B workers are set based on a calculation that takes into account wages paid to workers who almost certainly would not qualify to work in a ''specialty occupation,'' as defined by the INA. The Department has noted previously that ''workers in occupations that require sophisticated skills and training receive higher wages based on those skills.'' [109] As a worker's education and skills increase, his wages are expected to as well.[110] For that reason, it is likely that workers at the lowest end of an occupation's wage distribution generally have the lowest levels of education, experience, and responsibility in the occupation. In consequence, if the occupation by definition includes workers who do not have the level of specialized knowledge required of H–1B workers, the very bottom of the wage distribution should be discounted in determining the appropriate baseline along the OES wage distribution to establish the entry-level wage under the four-tiered wage structure. Yet the existing wage structure makes such workers a central component of the prevailing wage calculation.[111]

Similarly, the current Level IV wage is set by calculating the mean of the upper two-thirds of the wage distribution. That means that the wage level provided for the most experienced and highly educated H–1B workers is determined, in part, by taking into account a sizeable number of workers who do not even make more than the median wage of the occupation. Given the correlation between wages and skills, this calculation also would appear inconsistent with the statutory and regulatory framework. Common sense dictates that workers making less than the median wage of the occupation cannot be regarded as being similarly qualified to the most competent and experienced members of that occupation.

The same reasons for discounting a portion of the workers at the bottom of the OES wage distribution in order to compute appropriate entry-level wages—because such workers are not similarly employed to even the least skilled H–1B workers—also apply to the wages for the EB–2 immigrant visa preference classification and the E–3 and H–1B1 nonimmigrant programs, for which the Department also uses the four-tier prevailing wage structure.

The E–3 and H–1B1 visa classifications, like the H–1B classification, have as a prerequisite for obtaining a visa that the alien work in a specialty occupation.[112] Thus those programs' relation to the OES wage data is essentially identical to that of the H–1B program.

As for the EB–2 classification, the reasons for discounting the lower end of the OES wage distribution for setting the baseline to establish an entry-level wage for the classification are even more apparent than they are for the specialty occupation programs. Under the INA, the EB–2 classification applies to individuals who are ''members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.'' [113] USCIS regulations, in turn, define an ''advanced degree'' means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.[114]

The regulation goes on to define ''exceptional ability'' to mean ''a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.'' [115]

As is the case for H–1B nonimmigrants, the baseline, minimum qualifications that an EB–2 immigrant must possess exceed the educational and experiential requirements the OOH describes as generally necessary to enter some of the most common SOC occupational classifications in which EB–2 immigrants work. For example, the most common occupation in which PERM labor certifications—of which applications for EB–2 immigrants represent a substantial share—are sought is Software Developers, which accounts for nearly 40 percent of all approved PERM applications. As already noted, according to the OOH, Software Developers ''*usually* have a bachelor's degree in computer science and strong computer programming skills.'' [116] A master's degree, generally a prerequisite for receiving an EB–2 visa, is therefore substantially above the typical, baseline qualifications needed to work as a Software Developer. Similarly, a Software Developer who satisfies the regulatory definition of ''exceptional ability'' would be, *ipso facto,* more highly skilled than the typical entry-level-worker in that occupation. This pattern holds for most of the top occupations into which PERM applications fall.[117]

In sum, the eligibility criteria established by the INA for most of the immigrant and nonimmigrant programs

[109] *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013).

[110] *See* Bureau of Labor Statistics, Learn more, earn more: Education leads to higher wages, lower unemployment, *available at https://www.bls.gov/careeroutlook/2020/data-on-display/education-pays.htm.*

[111] For example, the occupation of Software Developers, which accounts for a large number of H–1B workers, does not, as explained above, require the same degree of specialized knowledge as a baseline entry requirement as does the INA's definition of ''specialty occupation.'' Yet approximately 10 percent of all LCAs filed with the Department for software developer positions classify those positions as entry-level, meaning that under the current wage levels the wages paid to such specialty occupation workers are calculated based, at least in part, on the wages paid to some workers who do not have comparable specialized knowledge and expertise. This outcome directly contravenes the INA's requirement that H–1B workers be paid wages commensurate with the wages paid to U.S. workers with similar levels of education, experience, and responsibility.

[112] *See* 8 U.S.C. 1184(i).

[113] 8 U.S.C. 1153(b)(2)(A).

[114] 8 CFR 204.5(k)(2).

[115] *Id.*

[116] Bureau of Labor Statistics, Occupational Outlook Handbook, Software Developers, *available at https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm.*

[117] *See* Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf;* Bureau of Labor Statistics, Occupational Outlook Handbook, *https://www.bls.gov/ooh/.*

to which the Department's prevailing wage levels apply set a higher baseline for the minimum qualifications an alien must possess than the minimum qualification requirements that exist for workers generally in the most of the occupations in which these aliens most commonly work. The H–1B, H–1B1, E–3, and EB–2 classifications are for workers with specialized knowledge and skills and/or advanced degrees.[118] Because the INA requires that these workers be paid at least as much as U.S. workers similarly employed—taking into account the experience, education, and level of supervision of such workers—the prevailing wage rates should be formulated based on the wages paid to U.S. workers who similarly possess specialized knowledge and skills in their occupations. Given that not every worker in a given OES occupation is likely to meet that standard, and that workers at the lower end of the wage distribution are also likely to be the workers with the lowest levels of education and experience, the Department has determined it is appropriate to discount the lower portion of the OES distribution in setting the wage levels. The Department should instead identify where within the distribution workers are to be found who possess the same kinds of specialized education and experience possessed by aliens working in the H–1B, H–1B1, E–3, and EB–2 classifications. The wages paid to those U.S. workers can serve as the basis for appropriately adjusting the prevailing wage levels to ensure the employment of foreign workers does not adversely affect the wages and job opportunities of U.S. workers.

2. Adverse Effects of Current Prevailing Wage Levels

Beyond their inconsistency with the statutory scheme, the Department has also evaluated evidence on how the existing prevailing wage levels affect U.S. workers, and has concluded that the current levels are harming the wages and job opportunities of U.S. workers, and thus failing to serve the purposes of the INA's wage protections. This is a separate and independent reason justifying the Department's decision to adjust the existing levels. It also demonstrates that whatever assumptions or analyses, left unarticulated, that may have underlay the manner in which the current levels are set were seriously flawed.

First, a number of studies indicate that many H–1B workers are likely paid less than similarly employed U.S. workers in fields with high H–1B utilization. Where the wages of foreign workers are lower than those of U.S. workers, at least two harmful consequences to U.S. workers are likely to follow. In particular, employers will, in some instances, use H–1B workers to displace U.S. workers, and U.S. workers will experience wage suppression. Anecdotal evidence and academic research suggests that both consequences are being experienced by U.S. workers because of the H–1B program, which further substantiates the conclusion that wages for H–1B workers are, in some cases, materially lower than they would be if the prevailing wage levels actually resulted in H–1B wages commensurate with the wages paid to similarly employed U.S. workers with comparable levels of education, experience, and responsibility. Further demonstrating that the current prevailing wage levels do not in many cases reflect market wage rates, data on the actual wages paid by H–1B employers show that some firms do in fact pay H–1B workers wages well above the prevailing wage rates generated through application of the Department's four-tier wage structure. If the prevailing wage levels were correctly approximating the wages commanded by workers in the relevant labor markets, such significant disparities between actual wages and the prevailing wage levels would likely be less common. Such disparities also suggest that firms to which the statute's actual wage clause does not apply can pay wages well below what U.S. workers in the same labor market are paid. The Department also considered various studies that suggest the employment of H–1B workers has positive effects on the wages and job opportunities of U.S. workers. While the Department agrees that this is true in some instances, it is also clear that the current prevailing wage levels often result in adverse effects, and that adjustments to the wage levels are needed to ensure that the positive effects of the program will be enjoyed more widely. Finally, the Department notes that the evidence of the adverse effects of the existing prevailing wage levels in the H–1B program also likely applies to the PERM programs.

To begin, a variety of studies and analyses demonstrate that the current wage levels allow employers to pay H–1B workers wages far below what their U.S. counterparts are paid.[119] Most of these studies compare median H–1B worker earnings in an occupation to median U.S. worker earnings in the same occupation, without directly comparing workers with the same levels of education, experience, and responsibility. To some extent this limits the conclusions that can be drawn from the comparison. That being said, if H–1B workers were truly being used as a supplement to the U.S. workforce, then the wages H–1B workers typically earn would likely not be significantly lower than the wages of U.S. workers in these occupations. Indeed, because H–1B workers are required to possess specialized knowledge and expertise that often exceeds the level of education and experience necessary to enter a given occupation generally, and greater skills are associated with higher earnings, the median H–1B workers should earn a wage that is at least the same, if not more, than the median wage paid to U.S. workers in the occupation. But a variety of studies show that the opposite is occurring.

Studies on the subject often focus on the wages paid to H–1B workers in computer-related occupations, in which nearly two-thirds of all H–1B workers are employed.[120] According to some estimates, H–1B employees in information technology (IT) occupations earn wages that are about 25 percent to 33 percent less than U.S. workers' wages, a gap that appears to have persisted for more than two decades.[121]

[118] The Department notes that its assessment of the appropriateness of adjusting the prevailing wage levels in the manner described by this rule with respect to the EB–3 classification is governed by distinct considerations, which are described more fully below.

[119] *See, e.g.,* Atlantic Council, Reforming US' High-Skilled Guestworker Program, (2019), *available at https://www.atlanticcouncil.org/in-depth-research-reports/report/reforming-us-high-skilled-immigration-program/; The Impact of High-Skilled Immigration on U.S. Workers: Hearing before the Senate Committee on the Judiciary* (February 25, 2016) (testimony of John Miano, representing Washington Alliance of Technology Workers, Local 37083 of the Communications Workers of America, the AFL–CIO); Norman Matloff, *On the Need for Reform of the H–1B Non-Immigrant Work Visa in Computer-Related Occupations,* 36 U. Mich. J.L. Reform 815 (2003).

[120] *See* U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf,* (showing 66 percent of H–1B petitions approved in FY2019 were for computer-related occupations).

[121] Sean McLain & Dhanya Ann Thoppil, Bulging Staff Cost, Shrinking Margins, CRISIL Research, (2019), *available at https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html;* Sean McLain & Dhanya Ann Thoppil, *U.S. Visa Bill 'Very Tough' for Indian IT, The Wall Street Journal*, April 18, 2013, available at *https://blogs.wsj.com/indiarealtime/2013/04/18/u-s-visa-bill-very-tough-for-indian-it/?mod=wsj_streaming_latest-headlines;* The State of Asian Pacific America,'' Paul Ong (ed.),

Another analysis estimates that H–1B employees in computer science occupations earn 9 percent less than U.S. workers.[122] Although the precise findings of wage differences are not uniform, the results generally show meaningful wage differences in fields with high proportions of H–1B workers. Notably, as would be expected, the same phenomenon of markedly lower wages for H–1B workers are generally not found in fields with lower proportions of H–1B workers.[123]

One negative consequence that would be expected to occur if H–1B workers could be paid less than their U.S. counterparts is that some employers would use H–1B workers as a low-cost labor alternative to displace U.S. workers—a result at odds with the purpose of the statutory scheme. A significant body of research on how H–1B workers are used by some firms suggests that is exactly what is occurring.[124] Anecdotal evidence also demonstrates that H–1B workers are used as a low-cost alternative to U.S. workers doing similar jobs. Media accounts of U.S. workers being required to train their H–1B replacements abound.[125] In these cases, evidence that U.S. workers were required to train their foreign replacements calls into question the rationale for bringing in H–1B workers to fill the respective skilled positions given that the positions were already filled. One likely motivation for the replacement of U.S. workers with H–1B workers in these cases is cost savings, as detailed in the reporting on the topic. When that is the case, the displacement of U.S. workers by H–1B workers provides further evidence that the current prevailing wage levels are set materially below what similarly employed U.S. workers earn. If prevailing wages were placed at the appropriate levels, the incentive to prefer H–1B workers over U.S. workers would be significantly diminished, and the practice of replacing U.S. workers with H–1B workers would likely not be as prevalent as the reporting suggests it is.

Another likely harmful consequence for U.S. workers in cases where H–1B workers can be paid below what comparable workers in the same labor market are paid is wage suppression. Academic research indicates that the influx of low-cost foreign labor into a labor market suppresses wages, and this effect increases significantly as the number of foreign workers increases.[126] In particular, some research suggests that a substantial increase in the labor supply due to the presence of foreign workers reduces the wages of the average U.S. worker by 3.2 percent, a rate that grew to 4.9 percent for college graduates.[127] More generally, though the economics literature is mixed on the effects of higher-skilled foreign workers on overall job creation, economic theory dictates that increasing the supply of something above similar demand growth lowers prices. As a result, while employing foreign workers at wages lower than their U.S. counterparts may increase firms' profitability, a result that is not surprising if current prevailing wage levels allow firms to replace domestic workers with lower-cost foreign workers, such a practice also results in lower overall wages, particularly in occupations where there are high concentrations of foreign workers. A significant body of research demonstrates that this phenomenon is likely occurring in the H–1B program.

For starters, H–1B workers make up about 10 percent of the IT labor force in the U.S.[128] In certain fields, including Software Developers, Applications (approximately 22 percent); Statisticians (approximately 22 percent); Computer Occupations, all other (approximately 18 percent); and Computer Systems Analysts (approximately 12 percent), H–1B workers likely make up an even higher percentage of the overall workforce.[129] This high prevalence of H–1B workers in these fields far exceeds the supply increase in the research described above that found substantial increases in the labor supply lower U.S. workers' earnings.[130]

One study compared winning and losing firms in the FY2006 and FY2007 lotteries for H–1B visas by matching administrative data on these lotteries to

LEAP Asian Pacific American Public Policy Institute and UCLA Asian American Studies Center, 1994, pp. 179–180; Carnegie Endowment for International Peace, Balancing Interests: Rethinking U.S. Selection of Skilled Immigrants, (1996).

[122] Youyou Zhou, *Most H–1B workers are paid less, but it depends on the job,* Associated Press, April 18, 2017, *available at https://apnews.com/afs:Content:873580003/Most-H-1B-workers-are-paid-less,-but-it-depends-on-the-type-of-job.*

[123] *See, e.g.,* American Immigration Council, The H–1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy (2020), *available at https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_a_primer_on_the_program_and_its_impact_on_jobs_wages_and_the_economy.pdf;* National Foundation for American Policy, H–1B Visas by the Numbers: 2017–18, (2018), *available at https://nfap.com/wp-content/uploads/2018/04/H-1B-Visas-By-The-Number-FY-2017.NFAP-Policy-Brief.April-2018.pdf.*

[124] *See, e.g.,* John Miano, Studies, Wages and Skill Levels for H–1B Computer Workers, 2005 Low Salaries for Low Skills, Center for Immigration Studies, (2007), *available at https://cis.org/Report/Wages-and-Skill-Levels-H1B-Computer-Workers-2005;* Patrick Thibodeau & Sharon Machlis, *U.S. law allows low H–1B wages; just look at Apple,* Computerworld, May 15, 2017, *available at https://www.computerworld.com/article/3195957/us-law-allows-low-h-1b-wages-just-look-at-apple.html;* Park, Haeyoun, ''How Outsourcing Companies Are Gaming the Visa System,'' The New York Times, November 10, 2015, *https://www.nytimes.com/interactive/2015/11/06/us/outsourcing-companies-dominate-h1b-visas.html;* National Research Council, Building a Workforce for the Information Economy, (2001), *available at https://www.nap.edu/catalog/9830/building-a-workforce-for-the-information-economy.*

[125] ''Visa Abuses Harm American Workers,'' *The New York Times,* June 16, 2016, *available at http://www.nytimes.com/interactive/opinion/editorialboard.html;* Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements,* The New York Times, June 3, 2015, *available at https://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html;* Julia Preston, *Toys 'R' Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas,* The New York Times, September 29, 2015, *available at https://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html;* Michael Hiltzik, *A loophole in immigration law is costing thousands of American jobs,* Los Angeles Times, February 20, 2015, *available at https://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150222-column.html;* Daisuke Wakabayashi & Nelson Schwarts, *Not Everyone in Tech Cheers Visa Program for Foreign Workers,* The New York Times, February 5, 2017, *available at https://www.nytimes.com/2017/02/05/business/h-1b-visa-tech-cheers-for-foreign-workers.html.*

[126] George Borjas, Immigration Economics (2014). Borjas's research generally focuses on low-skilled immigrant labor, but the basic economic conclusions his research draws, principally that increases in labor supply lower wages, are applicable outside of the context of low skilled immigration.

[127] George Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market,* The Quarterly Journal of Economics Vol. 118, No. 4 (Nov., 2003), pp. 1335–1374, *available at https://www.jstor.org/stable/25053941?seq=1.*

[128] The Department estimated the share of H–1B workers in the IT sector by tallying the total number of computer occupation workers in the U.S., subtracting those workers that fill positions for which H–1B workers are ineligible, and dividing the total by the total number of H–1B workers likely working in computer occupations, based on data and reports issued by USCIS. *See* Bureau of Labor Statistics, Employment by detailed occupation, *https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm;* United States Citizenship and Immigration Services, H–1B Authorized-to-Work Population Estimate, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf;* United States Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.*

[129] These findings come from an analysis of data on H–1B beneficiaries in FY19 from the United States Citizenship and Immigration Services and the 2017 Occupational Employment Statistics survey from the Bureau of Labor Statistics.

[130] George Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market,* The Quarterly Journal of Economics Vol. 118, No. 4 (2003), pp. 1335–1374, *available at https://www.jstor.org/stable/25053941?seq=1.*

administrative tax data on U.S. firms.[131] The study found that winning additional H–1B visas causes at most a moderate increase in firms' overall employment that does not usually exceed the number of H–1B workers hired, meaning that H–1Bs workers essentially crowd out firms' employment of other workers. It also found evidence that additional H–1B workers lead to lower average employee earnings and higher firm profits.[132] On the whole, the study concluded that the current results of the H–1B program run counter to the program's purpose, which is to allow for a limited number of workers with specialized skills to work in the U.S. while ensuring that U.S. workers' wages are not adversely affected.

Similarly, other studies have found that an influx of foreign computer science workers suppresses wages for computer science workers across the board.[133] These lower wages crowd out U.S. workers into non-computer science-based fields. In particular, the findings of these studies ''imply that for every 100 foreign [computer science] workers that enter the US, between 33 to 61 native [computer science] workers are crowded out from computer science to other college graduate occupations.'' [134]

Other sources dispute the conclusion that existing prevailing wage levels disadvantage U.S. workers.[135] The Department acknowledges that H–1B workers can and do, in many instances, earn the same or more than similarly employed U.S. workers. However, the evidence described above appears to contradict that this claim is universal across firms and industries. The Department in its expertise views the studies, data, testimony, and anecdotal evidence showing displacement and lowered wages for U.S. workers in many cases as sufficient to demonstrate that the H–1B prevailing-wage levels are in need of reform, even if in other instances some firms do in fact pay H–1B workers wages comparable to those of U.S. workers.

Relatedly, some sources suggest that attracting foreign workers with specific, in-demand skills helps firms innovate and expand, driving growth and higher overall job creation, which in turn leads to more work opportunities for U.S. workers.[136] The Department does not dispute that allowing firms to access skilled foreign workers can lead to overall increases in innovation and economic activity, which can, in turn, benefit U.S. workers. However, H–1B workers' earnings data and other research indicate that, in many cases, the existing wage levels do not lead to these outcomes.[137] Even though some employers pay H–1B workers at rates comparable to what their U.S. counterparts are paid, that does not change the conclusion that the existing prevailing wage levels set a wage floor substantially below what similarly employed U.S. workers make in many instances, which allows some firms to use H–1B workers as a low-cost alternative to U.S. workers. And regardless, while the Department is certainly in favor of measures that increase economic growth and job creation, such outcomes are not the immediate objectives of the INA's wage protections, and, in any event, must be achieved in a manner consistent with the statute, which here requires the Department to focus on ensuring that the H–1B program does not impair wages and job opportunities of U.S. workers similarly employed. In short, the fact that some firms use the program as intended and pay H–1B workers the same or higher rates than similarly employed U.S. workers does not reduce the Department's need to act to ensure that this practice becomes more common, lessening the harms to U.S. workers caused by the existing prevailing wage levels.

Furthermore, given the annual numerical cap on some H–1B workers, a level that is frequently exceeded by the number of petitions each year, raising the prevailing wage levels to more accurately reflect what U.S. workers with levels of education, experience, and responsibility comparable to H–1B workers are paid should lead to more highly skilled H–1B nonimmigrants entering the U.S. labor market, and thus enhance the benefits of the program for U.S. workers identified by some studies. This is because, if firms are required to pay H–1B workers wages that accurately reflect what their U.S. counterparts earn, the firms would be more likely to sponsor foreign workers whose value exceeds this increased compensation. Given that workers' compensation tends to reflect the value provided from skills demanded by a firm, higher compensation should lead to workers with more specialized knowledge and expertise receiving the limited number of H–1B visas. Because this change in H–1B worker composition would limit applications to those with the skills necessary to command higher compensation, it would likely increase innovation and economic growth.

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[131] Kirk Doran et al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries,* (2016), *available at https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf.*

[132] Supporting the argument that H–1B dependence increases firms' profit margins is evidence showing that firms that rely on H–1Bs can generate net profit margins of 20 percent to 25 percent in a sector. Normal expected margins are 6 percent to 8 percent. *See Immigration Reforms Needed to Protect Skilled American Workers: Hearing before the Senate Committee on the Judiciary* (March 17, 2015) (testimony of Ronil Hira, Associate Professor of Public Policy Rochester Institute of Technology, Rochester, NY), *available at https://www.judiciary.senate.gov/imo/media/doc/Hira%20Testimony.pdf.*

[133] John Bound et al., *Understanding the Economic Impact of the H–1B Program on the U.S.,* NBER Working Paper No. 23153 (2017), *available at https://www.nber.org/papers/w23153.pdf.* Additionally, some argue that H–1B visas are in such high demand because it is often cheaper to hire an H–1B employee than an American worker. *The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary* (April 22, 2013) (testimony of Neeraj Gupta, CEO of Systems in Motion, to the Senate Judiciary Committee), *available at https://www.judiciary.senate.gov/imo/media/doc/04-22-13GuptaTestimony.pdf.* Furthermore some studies show that heavy users of H–1Bs workers pay their workers less than the median wages for the jobs they fill. Daniel Costa and Ronil Hira, *H–1B Visas and Prevailing Wage Levels,* Economic Policy Institute, (2020), *available at https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/.*

[134] John Bound et al., *Understanding the Economic Impact of the H–1B Program on the U.S.,* NBER Working Paper No. 23153 (2017), *available at https://www.nber.org/papers/w23153.pdf.* The authors find that, in the absence of high-skilled immigrants (mostly H–1B workers), wages for U.S. computer scientists would have been 2.6 percent to 5.1 percent higher and employment in computer science for U.S. workers would have been 6.1 percent to 10.8 percent higher in 2001.

[135] *See, e.g.,* David Bier, *100% of H–1B Employers Offer Average Market Wages—78% Offer More,* Cato Institute, (2020), *available at https://www.cato.org/blog/100-h-1b-employers-offer-average-market-wages-78-offer-more#:~:text=2020%209%3A37AM-,100%25%20of%20H%2D1B%20Employers%20Offer%20Average,Market%20Wages%E2%80%9478%25%20Offer%20More&text=The%20Economic%20Policy%20Institute%20(EPI,foreign%20workers%20in%20specialty%20occupations;Robert Atkinson, H–1B Visa Workers: Lower-Wage Substitute, or Higher-Wage Complement?,* Information Technology & Innovation Foundation, (2010), *available at https://itif.org/publications/2010/06/10/h-1b-visa-workers-lower-wage-substitute-or-higher-wage-complement.*

[136] *See* American Immigration Council, The H–1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy, (2020), *available at https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_a_primer_on_the_program_and_its_impact_on_jobs_wages_and_the_economy.pdf;* National Foundation for American Policy, H–1B Visas by the Numbers: 2017–18, (2018), *available at https://nfap.com/wp-content/uploads/2018/04/H-1B-Visas-By-The-Number-FY-2017.NFAP-Policy-Brief.April-2018.pdf.*

[137] *See, e.g.,* Sarah Pierce and Julia Gelatt, *Evolution of the H–1B: Latest Trends in a Program on the Brink of Reform,* Migration Policy Institute, (2018), *available at https://www.migrationpolicy.org/research/evolution-h-1b-latest-trends-program-brink-reform;* Center for Immigration Studies, H–1Bs: Still Not the Best and Brightest, (2008), *available at https://cis.org/Report/H1Bs-Still-Not-Best-and-Brightest.*

Some also argue that the presence of H–1B workers, even those with wages lower than similarly employed U.S. workers, raises income for U.S. workers because in some fields there is an apparent shortage of U.S. Science, Technology, Engineering, and Math (STEM) workers.[138] If there are no available U.S. workers to fill a position, then a firm's labor need goes unmet without substantial investment in worker recruitment and training. Accordingly, importing needed workers allows companies to innovate and grow, creating more work opportunities and higher-paying jobs for U.S. workers.

While there are usually fewer U.S. graduates in STEM fields than there are open positions in the fields, this simple observation tends to ignore key characteristics of STEM workers, especially those in IT. As some researchers have noted, in recent years, for every two students who graduate from a U.S. university with a STEM degree, only one is hired into a STEM job.[139] This finding, along with other research on U.S. workers' skills,[140] calls into question, in some cases, the scarcity of U.S. STEM workers that some claim drive employers' use of H–1B workers.[141]

As noted above, there are high concentrations of H–1B workers in many STEM-related fields. The high number of H–1B workers in fields for which U.S. workers study but in which they either choose not to work or cannot find jobs suggests that H–1B workers are not being used where no domestic workers can be found for the market rate, but rather are being used to fill jobs with workers paid below the market rate.[142] Further, while the wage effects from a lower cost labor alternative may be minimal where the alternative only makes up a very small share of the labor pool, the effects can become negative and more pronounced as concentrations of foreign workers increase.[143] Thus, the fact that 10 percent of the IT workforce consists of H–1B workers, in combination with the fact that many U.S. IT graduates do not work in IT jobs, supports the notion that firms use H–1B workers as low-cost labor, and that this practice likely has a substantial harmful effect on U.S. workers. Moreover, insofar as the H–1B program suppresses wages for U.S. IT workers, it discourages U.S. students from entering the IT field in the first place, thus perpetuating the ''skills gap.'' Basic economic theory dictates that more U.S. students would likely enter the IT field if IT jobs paid more.

In short, contrary to the H–1B program's goals, prevailing wage levels that in many instances do not accurately reflect earning levels of comparable U.S. workers have permitted some firms to displace rather than supplement U.S. workers with H–1B workers. While allowing firms to access high-skilled workers to fill specialized positions can help U.S. workers' job opportunities in some instances, the benefits of this policy diminish significantly when the prevailing wage levels do not accurately reflect the wages of similarly employed workers in the U.S. labor market. The resulting distortions from a poor calculation of the prevailing wage allow some firms to replace qualified U.S. workers with lower-cost foreign workers, which is counter to the purpose of the INA's wage protections, and also lead to wage suppression for those U.S. workers who remain employed.

That the existing prevailing wage levels likely do not reflect actual market wage rates in many cases is further demonstrated by the fact that some firms already pay wages to their H–1B workers that are well above the applicable prevailing wage level. For example, Microsoft's General Counsel testified before the Senate Judiciary Committee in 2013 that at the company's headquarters, software development engineers had a starting salary that was typically more than 36 percent above the Level I wage, meaning they were being paid wages slightly above the Department's Level III wage at that time.[144] More recently, in Q3:2020, the Department's data show that many of the largest users of the H–1B program pay in many cases wages well over 20 percent in excess of the prevailing wage rate set by the Department for the workers in question.[145] Table 2 below shows this trend with respect to top H–1B employers.

TABLE 1—TOP 20 H–1B EMPLOYERS BY LCAS FILED: AVERAGE RATE AT WHICH THE WAGE OFFERED EXCEEDS THE PREVAILING WAGE

Top employers	Total LCAs filed/worker positions requested	Average rate at which the wage offered exceeds prevailing wage (percent)	Percentage of worker positions where wage offered exceeds prevailing wage by over 20 percent
Qualcomm Technologies, Inc	701/38,533	5.74	9.70

[138] *See, e.g., The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary* (April 22, 2013) (testimony of Brad Smith, General Counsel of Microsoft), *available at https://www.judiciary.senate.gov/imo/media/doc/04-22-13BradSmithTestimony.pdf.*

[139] Questions for the Record submitted by Ronil Hira, Associate Professor of Public Policy Rochester Institute of Technology, Rochester, NY, to the Senate Judiciary Committee, April 2013, *https://www.judiciary.senate.gov/imo/media/doc/042213QFRs-Hira.pdf.*

[140] The Bureau of Labor Statistics studied the STEM skills gap and found varied results depending on geography, field, and other factors. Though some fields clearly face a shortage of qualified workers, this shortage is far from universal. *See* Yi Xue & Richard C. Larson, *STEM crisis or STEM surplus? Yes and yes,* Monthly Labor Review, U.S. Bureau of Labor Statistics, (2015), *available at https://doi.org/10.21916/mlr.2015.14.*

[141] Benedikt Herz & Thijs van Rens, *Accounting for Mismatch Unemployment,* IZA, Discussion Paper No. 8884 (2015), *available at http://ftp.iza.org/dp8884.pdf;* Thijs van Rens, The Skills Gap: Is it a myth? Social Market Foundation and Competitive Advantage in the Global Economy, (2015), *available at http://www.smf.co.uk/wp-content/uploads/2015/12/SMF-CAGE-Policy-Briefing-Skills-Gap-Myth-Final.pdf.*

[142] Benedikt Herz & Thijs van Rens, *Accounting for Mismatch Unemployment,* IZA, Discussion Paper No. 8884 (2015), *available at http://ftp.iza.org/dp8884.pdf;* Thijs van Rens, *The Skills Gap: Is it a myth?,* Social Market Foundation and Competitive Advantage in the Global Economy, (2015), *available at http://www.smf.co.uk/wp-content/uploads/2015/12/SMF-CAGE-Policy-Briefing-Skills-Gap-Myth-Final.pdf.*

[143] George Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market,* The Quarterly Journal of Economics Vol. 118, No. 4 (2003), pp. 1335–1374, *available at https://www.jstor.org/stable/25053941?seq=1.*

[144] *See, e.g., The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary* (April 22, 2013) (testimony of Brad Smith, General Counsel of Microsoft), *available at https://www.judiciary.senate.gov/imo/media/doc/04-22-13BradSmithTestimony.pdf.*

[145] ''Top 20 LCA/H–1B Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020.

TABLE 1—TOP 20 H–1B EMPLOYERS BY LCAS FILED: AVERAGE RATE AT WHICH THE WAGE OFFERED EXCEEDS THE PREVAILING WAGE—Continued

Top employers	Total LCAs filed/worker positions requested	Average rate at which the wage offered exceeds prevailing wage (percent)	Percentage of worker positions where wage offered exceeds prevailing wage by over 20 percent
Infosys Limited	7,615/21,627	6.53	11.08
Cognizant Technology Solutions US Corp	20,192/20,192	0.24	0.32
Deloitte Consulting, LLP	7,316/16,567	61.62	44.16
Amazon.com Services, LLC	9,175/12,560	93.93	68.38
Oracle America, Inc	543/12,269	0.48	0.55
Tata Consultancy Services Limited	8,595/9,388	2.95	4.90
Zensar Technologies, Inc	130/9,207	1.03	0.77
NVIDIA Corporation	396/8,977	4.69	8.33
Google, LLC	8,669/8,669	71.73	58.60
Ernst & Young U.S., LLP	8,170/8,170	88.59	71.79
Facebook, Inc	3,583/7,674	24.71	47.92
Cisco Systems, Inc	925/7,121	8.88	16.65
Qualcomm Atheros, Inc	115/7,110	6.05	15.65
Apple, Inc	2,983/6,889	117.89	61.25
Microsoft Corporation	6,544/6,631	31.48	68.61
Western Digital Technologies, Inc	267/6,621	12.30	21.72
ServiceNow, Inc	359/6,383	0.00	0.00
Computer Sciences Corporation	231/6,034	0.44	1.30
Kforce, Inc	584/5,786	1.16	1.71
Percent of National LCA/H–1B Totals	19.2%/31.6%	.....	.....
Simple Average for the Top 20	.....	27.02	25.67

Source: ''Top 20 LCA/H–1B Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020.

If the Department's current prevailing wage levels accurately reflected earnings for similarly employed U.S. workers, then these major differences between actual wages paid to some H–1B workers and the otherwise applicable prevailing wage levels would not be as common. As noted previously, the INA takes a belt-and-suspenders approach to protecting U.S. workers' wages. Employers must pay the higher of the actual wage they pay to similarly employed workers or the prevailing wage rate set by the Department. Both possible wage rates generally should approximate the going wage for workers with similar qualifications and performing the same types of job duties in a given labor market as H–1B workers. It is therefore a reasonable assumption that, if both of the INA's wage safeguards were working properly, the wage rates they produce would, at least in many cases, be similar. Where the Department's otherwise applicable wage rate is significantly below the rates actually being paid by employers in a given labor market, it gives rise to an inference that the Department's current wage rates, based on statistical data and assumptions about the skill levels of U.S. workers, are not reflective of the types of wages that workers similarly employed to H–1B workers can and likely do command in a given labor market. There is a mismatch between what the Department's prevailing wage structure says the relevant cohort of U.S. workers are or should be making and what employers are likely actually paying such workers, as demonstrated by the actual wage they are paying H–1B workers. Put another way, when many of the heaviest users of the H–1B program pay wages well above the prevailing wage, it suggests that the prevailing wages are too low, and thus can be abused by other firms to replace U.S. workers with lower-wage foreign workers in cases where those firms do not have similarly employed workers on their jobsites whose actual wages would be used to set the wage for H–1B workers.

In the PERM programs, recent Employment and Training Administration data shows that the heaviest users of the programs also typically pay wages well above the prevailing wage levels. Whereas the simple average of the top 20 employers' wage offers over the prevailing wage is 27.02 percent for H–1B, it is 16.77 percent for PERM. And while the simple average of cases with wages more than 20 percent above the prevailing wage is 25.67 percent for H–1B, it is 30.59 percent for PERM, as shown in Table 3.[146]

[146] ''Top 20 LCA/H–1B Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020; ''Top 20 PERM Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020.

TABLE 2—TOP 20 PERM EMPLOYERS AVERAGE OF WAGE OFFERED OVER PREVAILING WAGE

PERM employers			
Top twenty employers	Total applications certified	Average rate at which the wage offered exceeds prevailing wage (percent)	Percentage of certified cases where wage offered exceeds prevailing wage by over 20 percent
Amazon.com Services, Inc	2,389	3.27	6.86
Google LLC	2,167	19.50	34.06
Facebook, Inc	1,204	40.57	68.11
Microsoft Corporation	1,114	27.71	48.56
Intel Corporation	939	2.08	2.88
Tata Consultancy Services Limited	923	0.00	0.00
Cognizant Technology Solutions US Corporation	808	0.00	0.00
Apple, Inc	697	37.85	69.30
HCL America, Inc	557	0.01	0.00
Capgemini America, Inc	502	6.12	7.97
Ernst Young U.S. LLP	426	13.71	27.00
Cisco Systems	325	9.95	19.69
Amazon Web Services, Inc	316	2.81	5.70
Deloitte Consulting LLP	303	39.29	67.99
LinkedIn Corporation	282	40.74	72.34
Nvidia Corporation	276	26.53	56.16
Salesforce.com	265	32.72	67.17
Oracle America, Inc	263	14.96	28.52
VMWare, Inc	258	12.43	21.71
Qualcomm Technologies	254	5.18	7.87
Percent of National PERM Totals	21.6%	.....	.....
Simple Average for the Top 20	.....	16.77	30.59

Source: ''Top 20 PERM Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020.

Beyond the similarities between wages offered above the prevailing wage levels in the H–1B and PERM programs, the Department notes that the volume of research and literature on the wage effects of the PERM programs is scant compared to that on the wage effects of the H–1B program. That said, there are reasonable grounds to conclude that adverse wage effects similar to those found in the H–1B program are also caused in some instances by the employment of EB–2 and EB–3 immigrants.

Critically, the PERM programs and the H–1B program are closely linked in both how they are regulated and used by employers. Unlike most nonimmigrant visas, H–1B visas are unusual in that they are ''dual intent'' visas, meaning under the INA H–1B workers can enter the U.S. on a temporary status while also seeking to adjust status to that of lawful permanent residents.[147] One of the most common pathways by which H–1B visa holders obtain lawful permanent resident status is through employment-based green cards, and in particular EB–2 and EB–3 visas.[148] USCIS has estimated that over 80 percent of all H–1B visa holders who adjust to lawful permanent resident status do so through an employment-based green card.[149] This is reflected in data on the PERM programs. In recent years, more than 80 percent of all individuals granted lawful permanent residence in the EB–2 and EB–3 classifications have been aliens adjusting status, meaning they were already present in the U.S. on some kind of nonimmigrant status.[150] Given that the H–1B program is the largest temporary visa program in the U.S. and is one of the few that allows for dual intent, it is a reasonable assumption that the vast majority of the EB–2 and EB–3 adjustment of status cases are for H–1B workers. This is corroborated by the Department's own data, which shows that, in recent years, approximately 70 percent of all PERM labor certification applications filed with the Department have been for H–1B nonimmigrants.[151]

Because of how many H–1B visa holders apply for EB–2 and EB–3 classifications, Congress has repeatedly adapted the INA to account for the close connection between the programs. For example, while H–1B nonimmigrants are generally required to depart the U.S. after a maximum of six years of temporary employment, Congress has created an exception that allows H–1B nonimmigrants who are beneficiaries of PERM labor certification applications with the Department, or who are beneficiaries of petitions for an employment-based immigrant visa with DHS that have been pending for longer than a year, be exempt from the 6-year period of authorized admission limitation if certain requirements are

[147] *dePape* v. *Trinity Health Sys., Inc.,* 242 F. Supp. 2d 585, 593 (N.D. Iowa 2003).

[148] *See* Sadikshya Nepal, *The Convoluted Pathway from H–1B to Permanent Residency: A Primer,* Bipartisan Policy Center (2020); Congressional Research Service, The Employment-Based Immigration Backlog (2020) (''A primary pathway to acquire an employment-based green card is by working in the United States on an H–1B visa for specialty occupation workers, getting sponsored for a green card by a U.S. employer, and then adjusting status when a green card becomes available.'').

[149] U.S. Citizenship and Immigration Services, H–1B Authorized-to-Work Population Estimate (2020).

[150] *See* Department of Homeland Security, 2017 Yearbook of Immigration Statistics, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017, available at *https://www.dhs.gov/immigration-statistics/yearbook/2017/table7.*

[151] Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

met.[152] Similarly, as noted above, Congress established the INA's prevailing wage requirements in section 212(p) with specific reference to the fact that they would apply in both the H–1B and PERM programs.[153]

The various features of the statutory framework governing the programs, working in combination, have further tightened the relationship between them. In particular, because H–1B workers can have dual intent and, if they have a pending petition for an employment-based green card, can remain in the U.S. beyond the 6-year period of authorized stay limitation, many workers for whom an employer has filed a PERM labor certification application are already working for that same employer on in H–1B status.[154] And because the method by which employment-based green cards are allocated can result in significant delays between when an alien is approved for a green card and when the green card is actually issued, the period during which a worker can, in some sense, have one foot in each program, is often protracted.[155]

This system results in an immense demographic overlap between the H–1B and PERM programs. For instance, 71.7 percent of all H–1B petitions approved in FY2019 were for individuals born in India.[156] Similarly, the vast majority of individuals waiting for adjudication of EB–2- and EB–3-based adjustment of status applications are Indian nationals.[157] Relatedly, LCAs and applications for PERM labor certifications often are for job opportunities in the same occupations. Data from the Department's OFLC shows that of the ten most common occupations in which H–1B workers are employed, seven are also among the ten most common occupations in which PERM workers are employed.

The upshot is that the H–1B and PERM programs are, in a variety of ways, inextricably conjoined. The rules governing them and how employers use them mean that, in many instances, workers in the PERM programs and workers in the H–1B program are often the exact same workers doing the same jobs in the same occupations for the same employers. And their wages are set based on the same methodology. It is therefore a reasonable inference that evidence that the Department's current wage levels under the four-tier structure result in inappropriately low wage rates in some instances for H–1B workers also holds true for the PERM programs.

3. Identifying the Appropriate Entry Level Wage

Having determined that the existing wage levels are not set based on the wages paid to U.S. workers with the education, experience, and levels of supervision comparable to those of similarly employed foreign workers and are likely harming the wages and job opportunities of U.S. workers, the Department must assess how the wage levels should be adjusted. While the INA provides the relevant factors and general framework by which the wage levels are to be set, it leaves the precise manner in which this is accomplished, including the types of data and evidence to be used and how such data and evidence is weighed, to the Department's discretion and expert judgment. In exercising that discretion, the Department's decision on how to adjust the wage levels is informed by the statute's purpose of protecting the wages and job opportunities of U.S. workers. This means the Department has focused its analysis on those areas where the risk to U.S workers is most acute, taken into account how the foreign labor programs are actually used by employers, and, where appropriate, resolved doubts in favor of refining the wage calculations so as to eliminate to the greatest extent reasonably possible adverse effects on U.S. workers caused by the employment of foreign workers.

For the reasons explained above, the Department has determined BLS's OES survey remains the best source of wage data to determine prevailing wages in the H–1B, H–1B1, E–3, and PERM programs. However, because the OES survey does not capture the actual skills or responsibilities of the workers whose wages are being reported, it is appropriate for the Department to rely on data outside the OES survey to establish the wage levels applicable to these immigrant and nonimmigrant visa programs, which encompass varying populations working in hundreds of different occupational classifications. The Department has therefore undertaken a comprehensive analysis concerning the types of U.S. workers in the most common occupations in the programs that have comparable levels of education, experience, and responsibility to the foreign workers in these programs, and estimated how much those U.S. workers earn. To identify the proper comparators, the Department looked not only to the INA itself, which sets the minimum qualifications foreign workers in the H–1B, H–1B1, and E–3 programs must have to qualify for these visas, but, in order to draw a more accurate comparison, demographic data about the types of workers who actually work in the programs as well.

The Department has concluded, in its discretion, that the Level I wage should be established based on the wages paid to workers in those occupations that make up a substantial majority of the applications filed in the H–1B, H–1B1, E–3, and PERM programs. This ensures that the Department appropriately takes into account the size and breadth of the programs covered by the four-tier wage structure by giving special attention to those areas where the risk to U.S. workers' wages and job opportunities is most acute. To make this determination, the Department has identified what it considers to be an analytically appropriate proxy for approved entry-level workers for the specialty occupation and EB–2 programs; consulted various, authoritative sources to determine what similarly qualified workers in the U.S. who fit this profile are paid; and identified where within the OES wage distribution these U.S. workers' wages fall. That point in the distribution, which the Department has estimated to be at approximately the 45th percentile, serves as the appropriate entry-level wage for purposes of the Department's four-tier wage structure.

In order to reach this estimate, the Department first identified an analytically usable definition of the prototypical entry-level H–1B and EB–2 workers. More specifically, the Department identified the education and experience typically possessed by such workers, which, in turn, was used to identify the wages paid to U.S. workers with similar levels of

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[152] *See* Public Law 107–273, 11030A(a), 116 Stat. 1836 (2002).

[153] *See* 144 Cong. Rec. S12741, S12756 (explaining that 8 U.S.C. 1182(p) ''spells out how [the prevailing] wage is to be calculated in the context of both the H–1B program and the permanent employment program in two circumstances.'').

[154] *See* Congressional Research Service, The Employment-Based Immigration Backlog (2020).

[155] *See* 8 U.S.C. 1152(a)(2); Abigail Hauslohner, *The employment green card backlog tops 800,000, most of them Indian. A solution is elusive,* Washington Post (December 17, 2019), *available at https://www.washingtonpost.com/immigration/the-employment-green-card-backlog-tops-800000-most-of-them-indian-a-solution-is-elusive/2019/12/17/55def1da-072f-11ea-8292-c46ee8cb3dce_story.html*; U.S. Department of State, Visa Bulletin For September 2020, *https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-september-2020.html.*

[156] U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf*, (showing 66 percent of H–1B petitions approved in FY2019 were for computer-related occupations).

[157] Congressional Research Service, The Employment-Based Immigration Backlog (2020).

experience and education. Looking to the wages of such U.S. workers to adjust the entry-level wage paid to foreign workers is highly consistent with the statutory scheme.

After consulting the statutory criteria for who qualifies for the relevant visa classifications, as well as the demographic characteristics of actual H–1B nonimmigrants, the Department has determined that an individual with a master's degree and little-to-no work experience is the appropriate comparator for entry-level workers in the Department's PERM and specialty occupation programs for purposes of estimating the percentile at which such workers' wages fall within the OES wage distribution.

To begin with, the statutory criteria for who can qualify as an EB–2 worker provides a clear, analytically useable definition of the minimum qualifications workers within that classification must possess. Even the least experienced individuals within the EB–2 classification are likely to have at least a master's degree or its equivalent.[158] Possession of an advanced degree is thus a meaningful baseline with which to describe entry-level workers in the EB–2 classification.

As noted above, the baseline qualifications needed to obtain entry as an H–1B worker are different. An individual with a bachelor's degree in a specific specialty, or its equivalent, may qualify for an H–1B visa; a master's degree is not a prerequisite.[159] However, the bachelor's degree or equivalent must be in a specific specialty. A generalized bachelor's degree is insufficient to satisfy the requirement that H–1B workers possess highly specialized knowledge.[160] Further, the statute requires that the individual be working in a job that requires that application of ''highly specialized knowledge.'' [161] Again, this means that for the H–1B program the possession of a bachelor's degree is not the baseline qualification criterion for admission. Something more is needed. The ultimate inquiry rests also on whether the individual can and will be performing work requiring highly specialized knowledge.

As with aliens in the EB–2 classification, looking to the earnings of individuals with a master's degree provides an appropriate and analytically useable proxy for purposes of analyzing the wages of typical, entry-level workers within the H–1B program. For one thing, master's degree programs are, generally speaking, more specialized courses of study than bachelor's degree programs. Thus, while the fact that an individual possesses a bachelor's degree does not necessarily suggest one way or another whether the individual possesses the kind of specialized knowledge required of H–1B workers, the possession of a master's degree is significantly more likely to indicate some form of specialization. Although a master's degree alone does not automatically mean an individual will qualify for an H–1B visa, possession of a master's degree—something that is surveyed for in a variety of wage surveys—is thus a better proxy for specialized knowledge than is possession of a bachelor's degree for purposes of the Department's analysis. This is because, while possession of a bachelor's degree is also commonly surveyed for, mere possession of a bachelor's degree is not nearly as reliable an indicator that the degree holder possesses specialized knowledge.

Further, the demographic characteristics of H–1B workers suggests that many entry-level workers in the program are master's degree holders with limited work experience. A review of data from USCIS about the characteristics of individuals granted H–1B visas in fiscal years 2017, 2018, and 2019 indicates that H–1B workers with master's degrees tend to be younger and less highly compensated than H–1B workers with bachelor's degrees. On average, individuals with master's degrees in the program are approximately 30 years old, whereas bachelor's degree holders are, on average, 32 years old. This suggests that, while possessing a more advanced degree, master's degree holders in the program are likely to have less relevant work experience than their bachelor's degree counterparts.[162] Relatedly, H–1B master's degree holders make, based on a simple average, $86,927, whereas bachelor's degree holders make on average $88,565.[163] Given that differences in skills and experience often explain differences in wages, this gap in average earnings and age suggests that, while possessing a more advanced degree, master's degree holders in the H–1B program tend to be less skilled and experienced—and are therefore more likely to enter the program as entry-level workers—than are bachelor's degree holders.[164]

This conclusion is further bolstered by the fact that master's degree holders have, in recent years, been the largest educational cohort within the program. In FY2019, for instance, 54 percent of the beneficiaries of approved H–1B petitions had a master's degree—whereas only 36 percent of beneficiaries had only a bachelor's degree.[165] These facts, in combination with the age and earnings profiles of master's degree holders in the program, strongly suggest that a significant number of entry-level H–1B workers are individuals with a master's degree and very limited work experience.

The Department notes that its description of individuals with master's degrees and little-to-no work experience as appropriate comparators for entry-level workers in the Department's foreign labor programs for purposes of setting the proper Level I wage is not inconsistent with how the Department makes prevailing wage determinations under its 2009 Guidance. Many job opportunities that result in a Level I wage determination of course do not require a master's degree as the minimum qualification for the position. The Department is not changing that aspect of its guidance. Rather, the Department has decided, for the reasons given above, to rely on master's degree holders as an analytically useable proxy for the types of workers who actually fill many entry-level positions in the H–1B and PERM programs and who likely satisfy the key, baseline statutory qualification requirements for entry into the programs—namely the possession of specialized knowledge or an advanced degree—in order to identify where the first of four levels should fall along the OES wage distribution. This reflects how employers actually fill jobs for which workers are sought, not necessarily how job descriptions are used to assign wage levels for each individual job opportunity to provide a prevailing wage determination at the

[158] *See* 8 U.S.C. 1153(b)(2)(A) (''Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . .'').

[159] 8 U.S.C. 1184(i).

[160] *See Chung Song Ja Corp.* v. *U.S. Citizenship & Immigration Servs.,* 96 F. Supp. 3d 1191, 1197–98 (W.D. Wash. 2015).

[161] 8 U.S.C. 1184(i).

[162] Age is a common proxy for potential work experience. *See, e.g.,* Rebecca Chenevert & Danial Litwok, *Acquiring Work Experience with age*, United States Census Bureau, (2013) *available at https://www.census.gov/newsroom/blogs/random-samplings/2013/02/acquiring-work-experience-with-age.html.*

[163] This analysis is based on data from U.S. Citizenship and Immigration Services about the demographic characteristics of H–1B workers.

[164] Elka Torpey, Same occupation, different pay: How wages vary, Bureau of Labor Statistics (2015), *available at https://www.bls.gov/careeroutlook/2015/article/wage-differences.htm.*

[165] U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.*

beginning of the labor certification process, which often occurs before the identity and actual qualifications of the worker who will fill the position are known. Giving some weight to the actual characteristics of entry-level workers in the programs furthers the purpose of the statute, which is designed to ensure that foreign workers make at least as much as similarly employed U.S. workers with comparable levels of education, experience, and responsibility.

Further, practice in the H–1B program shows that a significant number of H–1B workers are placed at the first wage level, which demonstrates that the Department's focus on specialty occupation requirements in setting an entry-level wage is also consistent with how workers are presently classified for prevailing wage purposes under the 2009 Guidance. In FY2019, 14.4 percent of all worker positions on LCAs were for entry-level positions. This cohort includes LCAs filed for some of the most common H–1B occupations, including Software Developers, 19.4 percent of which were placed at the first wage level; Computers Systems Analysts, 4.8 percent of which were placed at the first wage level; and Computer Occupations, 7 percent of which were placed at the first wage level. As discussed previously, these occupations, as described in the OOH, likely include some workers at the lower end of the OES distribution who are not performing work that would fall within the INA's definition of ''specialty occupation.'' Thus, many workers in the H–1B program that have master's degrees or some other qualification that satisfies the INA's baseline, specialized knowledge requirement—a level of expertise that makes them more highly skilled than a portion of workers at the bottom end of the OES distribution for many occupations—also work in positions that fit within the entry-level classification as currently administered by the Department under its 2009 Guidance.

To determine the wages typically made by individuals having comparable levels of education, experience, and responsibility to the prototypical entry-level H–1B and EB–2 workers and working in the most common H–1B and PERM occupations, the Department consulted a variety of data sources, most importantly wage data on individuals with master's degrees or higher and limited years of work experience from the 2016, 2017, and 2018 Current Population Surveys (CPS) [166] conducted by the U.S. Census Bureau, and data on the salaries of recent graduates of master's degree programs in STEM occupations garnered from surveys conducted by the National Science Foundation (NSF) in 2015 and 2017. Both of these surveys represent the highest standards of data collection and analysis performed by the federal government. Both surveys have large sample sizes that have been methodically collected and are consistently used not just across the federal government for purposes of analysis and policymaking, but by academia and the broader public as well.

In the case of the CPS survey, the Department used a wage prediction model to identify the wages an individual with a master's degree or higher and little-to-no work experience (based on age) would be expected to make and matched the predicted wage with the corresponding point on the OES wage distribution. Using the NSF surveys, the Department calculated the average wage of individuals who recently graduated from STEM master's degree programs and matched the average wage against the corresponding point on the OES distribution.

These analyses located three points within the OES wage distribution at which the wages of U.S. workers with similar levels of education and experience to the prototypical entry-level workers in specialty occupations and the EB–2 program are likely to fall. In particular, the 2015 NSF survey data indicate that workers in some of the most common H–1B and PERM occupations with a master's degree and little-to-no relevant work experience are likely to make wages at or near the 49th percentile of the OES distribution.[167] The 2017 NSF survey suggests that these workers are likely to make wages at or near the 46th percentile of the OES distribution. On the low end, the CPS data suggest that such individuals make wages at or near the 32nd percentile.

The Department thus identified a range within the OES data wherein fall the wages of workers who, while being relatively junior within their occupations, clearly possess the kinds of specialized education and/or experience that the vast majority of foreign workers covered by the Department's wage structure are, at a minimum, required to have.[168] Put another way, through an assessment of the experience and education generally possessed by some of the least skilled and least experienced H–1B and EB–2 workers—workers who are likely entry-level workers within their respective programs—the Department determined what U.S. workers with similar levels of education and experience are likely paid. Accordingly, it is appropriate for the wages paid to such U.S. workers to govern the entry-level prevailing wage paid under the Department's wage structure.[169]

Translating the identified range into an entry-level wage for the Department's use in the H–1B and PERM programs could be accomplished in a number of ways. One option would be to simply calculate the average wage of all workers that fall within the range, meaning those workers whose reported wage falls between the 32nd and 49th percentiles, which would place the entry-level wage at just above the 40th percentile. An alternative would be to identify a subset of wages within the range—either on the lower end or the higher end of the range—and calculate the average wage paid to workers within such subset. Because of the greater suitability of the NSF data for the Department's purposes, likely distortions in the wage data of both surveys caused by the presence of lower-paid foreign workers in the relevant labor markets, and the purposes of the INA's wage protections, the Department has decided that the most appropriate course is to set the entry-level wage by calculating the average of a subset of the data located at the higher end of the identified wage range. This

[166] The Current Population Survey (CPS), sponsored jointly by the U.S. Census Bureau and BLS, is the primary source of labor force statistics for the population of the U.S. *See* United States Census Bureau, Current Population Survey, available at *https://www.census.gov/programs-surveys/cps.html.*

[167] For the CPS data, the Department looked at the wages of workers in all occupations that account for 1 percent or more of the total H–1B population. These occupations also account for the majority of PERM workers. For the NSF data the Department examined the wages of workers in 11 of the most common (in the top 17) occupational codes for H–1B workers that were convertible to the occupational code convention of the NSF, which account for approximately 63 percent of all H–1B workers, according to data from USCIS.

[168] The Department notes again by way of clarification that it is not suggesting that possession of a master's degree is required to work in a specialty occupation. Rather, as explained above, possession of a master's degree by someone with little-to-no relevant work experience is being employed as a useable proxy, for analytical purposes, of the level of education and experience that approximates the baseline level of specialized knowledge needed to work in the H–1B and EB–2 programs and that many entry-level workers in those programs actually possess.

[169] *See* 8 U.S.C. 1182(a)(5)(A) (requiring the Secretary to certify that the employment of immigrants seeking EB–2 classification ''will not adversely affect the *wages* and working conditions *of workers in the United States similarly employed*) (emphasis added); 8 U.S.C. 1182(n)(1)(A)(i) (requiring prospective H–1B employers to offer and pay at least the actual wage level or ''the prevailing wage level for the occupational classification in the area of employment'').

results in the entry-level wage being placed at approximately the 45th percentile.

As between the two data sources and the manner in which they were analyzed, the NSF data are better tailored to the Department's purposes in identifying an entry-level wage for the H–1B program. The NSF surveys provide data on the wages of individuals with degrees directly relevant to the specialized occupations in which they are working, namely degrees in STEM fields. By contrast, the CPS data only show whether a person does or does not have a master's degree, and does not identify what field the master's degree or the individual's undergraduate course of study was in. It is therefore likely that some of the wage data relied on in generating the CPS estimate were based on the earnings of individuals who possess degrees not directly related to the occupation in which they work. Given that the CPS data used only accounted for persons with little-to-no experience, such individuals would therefore be unlikely to have the qualifications needed to work in a ''specialty occupation,'' as that term is defined in the INA. Having neither a specialized degree nor experience, and therefore lacking in specialized skills or expertise, at least with respect to the occupations in which they work, such individuals would not qualify as similarly employed to even the least skilled H–1B workers and are thus not appropriate comparators for identifying an entry-level wage in the H–1B program. Because of these workers' relative lack of skill and expertise, they are likely to command lower wages, and thus decrease the predicted wage below what would be an appropriate entry-level wage for the Department's foreign labor programs.

Relatedly, the Department's method for approximating experience in the CPS data is also not as closely tailored to the goal of determining what U.S. workers similarly employed to the prototypical entry-level H–1B and EB–2 workers are paid as is the NSF data. The CPS analysis relied on potential experience as a proxy for actual experience, which was calculated using a standard formula of subtracting from individuals' ages their years of education and six, based on the common assumption that most individuals start their education at the age of six.[170] While a standard measure for potential experience, this method of approximation is imprecise because it shows each individual of the same age and education level as having the same level of work experience. In reality, such individuals may vary significantly in their levels of experience.

For one thing, the approximation does not take into account the possibility of a worker temporarily exiting the workforce, and would count the time spent outside the workforce as work experience. It also does not account for gaps between when a person received his or her bachelor's degree and when he or she enrolled in a master's degree program. In such cases, the work experience captured by the proxy of potential experience may thus not be directly relevant to the work a person performs after he or she graduates from a master's degree program since in some cases the work experience in question was likely acquired before the individual enrolled in a master's degree program. In consequence, the sample used in the CPS analysis almost certainly includes some individuals who have no relevant experience in the specialized occupations in which they are working, which likely decreases the wage estimate calculated using the CPS data and makes it a less precise and reliable estimation of the wages of U.S. workers with similar levels of education and experience to the prototypical, entry-level H–1B and EB–2 workers. In other words, the CPS data allows for only a rough approximation of experience—a key factor the Department must take into account in adjusting the prevailing wage levels. This, in combination with the fact that some workers contained within the CPS dataset likely also lack specialized education relevant to the occupations in which they work, means that CPS data is, in some degree, distorted by wage earners who should be discounted in identifying the appropriate entry-level wage because they likely possess neither the type of specialized experience nor the education in their field that is comparable to that possessed by entry-level H–1B and EB–2 workers.

The NSF survey data, by contrast, are uniquely suited to the Department's purposes. The NSF surveys in 2015 and 2017 capture wage data about exactly the sort of workers the Department has determined serve as the appropriate comparators for entry-level H–1B and EB–2 workers. They surveyed individuals with master's degrees in STEM fields who are working in STEM occupations, including some of the most common H–1B and PERM occupations, and who are approximately three years or less out of their master's degree programs. In other words, the NSF surveys report wage data for individuals with specialized knowledge and expertise working in the occupations in which H–1B and PERM workers are most often employed and who are relatively junior within their respective occupations. The NSF data therefore provide a more accurate wage profile of workers similarly employed to entry-level H–1B and EB–2 workers. While both data sources are useful in helping determine a wage range for entry-level H–1B and PERM workers, of the two, the NSF surveys provide information more relevant to the Department's assessment of what is the appropriate entry-level wage. Therefore, the Department's analysis relies more on the NSF surveys. This suggests that the entry-level wage should be placed higher up in the identified wage range given that is where the NSF survey results fall.

Beyond the relative weight of each data source, the Department also takes into account in identifying the appropriate entry-level wage the fact that both sources are likely distorted to some degree by the presence, in both the surveyed population and the labor market as a whole, of the very foreign workers the Department has determined are, in some instances, paid wages below the market rate. As noted above, various studies and data demonstrate that some H–1B workers are paid wages substantially below the wages paid to their U.S. counterparts, and that this has a suppressive effect on the wages of U.S. workers. Further, these adverse effects are most likely to occur and be severe in occupations with higher concentrations of foreign workers. It is therefore relevant to how the Department weighs the data that many of the occupations examined in the analyses of the NSF and CPS datasets have very high concentrations of H–1B workers. As noted previously, H–1B nonimmigrants make up about 10 percent of the total IT labor force in the U.S.[171] In certain fields, including

[170] For example, under this metric, a 30 year old individual with 18 years' worth of education would be counted as having six years of work experience.

[171] The Department estimated the share of H–1B workers in the IT sector by tallying the total number of computer occupation workers in the U.S., subtracting those workers that fill positions for which H–1B workers are generally ineligible, and dividing the total by the total number of H–1B workers likely working in computer occupations, based on data and reports issued by USCIS. *See* Bureau of Labor Statistics, Employment by detailed occupation, *https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm*; United States Citizenship and Immigration Services, H–1B Authorized-to-Work Population Estimate, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H–1B%20Authorized%20to%20Work%20Report.pdf*; United States Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018—September 30,

Continued

software developers, applications (22 percent); statisticians (22 percent); computer occupations, all other (18 percent); and computer systems analysts (12 percent), H–1B workers likely make up an even higher percentage of the overall workforce.[172]

From this, the Department draws two conclusions. First, the respondents reporting wages in the CPS and NSF surveys are likely in some cases H–1B or PERM workers, given that both surveys contain responses from both U.S. citizens and noncitizens and the surveyed occupations have high concentrations of such foreign workers. The reported wages are thus in some instances likely not the market wage paid to U.S. workers similarly employed to H–1B and PERM workers, but rather the wages of the foreign workers themselves, which, as discussed previously, will be likely lower than the wages of U.S. workers in some cases. Second, even the reported wages of respondents who are not H–1B and PERM workers are likely not perfectly accurate reflections of what the market rate would be absent wage suppression given that high concentrations of lower-paid foreign workers likely decrease the overall average wage paid in the relevant labor market, as detailed above.

The need to account for these distortions weighs in favor of the Department's decision to set the entry-level wage at the higher end of the identified wage range. To do otherwise would mean that, far from ensuring that the adjusted wage levels guard against adverse effects on U.S. workers caused by the presence and availability of lower-cost foreign labor, the Department would, to some degree, be basing its regulations on a preexisting distortion caused by the current, flawed wage rates.[173]

Finally, the purpose of the relevant INA authorities, particularly the prevailing wage requirement, also weighs in favor of adjusting the entry-level wage higher up within the identified wage range. As emphasized throughout, the guiding purpose of the INA's prevailing wage requirements is to ''protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.''[174] This consideration supports the Department's decision about how the entry-level wage should be set. Giving due weight to the purpose of the statutory scheme means, in the Department's judgment, resolving uncertainties so as to eliminate the risk of adverse effects on U.S. workers' wages and job opportunities. That means favoring the higher end of the wage range.

The Department therefore concludes that, within the portion of the OES wage distribution identified as likely consisting of U.S. workers with levels of education and experience similar to prototypical entry-level H–1B and EB–2 workers, the first wage level should be placed at the higher end. Each of the considerations described above—the relative strength of the NSF surveys as compared to the CPS data in serving the purpose of the Department's analysis; the likely distortion of both survey datasets caused by the presence of lower-paid foreign workers in the relevant labor markets; and the purposes of the INA's wage protections—alone would strongly countenance in favor of using the higher end of the identified wage range. In combination, they make the option of focusing on the upper portion of the range particularly compelling.

The wage range spans from the 32nd percentile to the 49th percentile. What accounts for the upper half of this range is approximately the fifth decile of the OES distribution. The arithmetic mean of the wages of workers similarly employed to entry-level H–1B and EB–2 workers, taking into account the experience and education of the types of workers who actually fill entry-level positions in these programs, is thus the mean of the fifth decile, or approximately the 45th percentile. This point within the distribution will govern the wages of workers placed at the first wage level and allows for a statistically meaningful calculation.

4. The Second, Third, and Fourth Wage Levels

Having concluded that the entry-level wage should be adjusted to the 45th percentile, the Department turns to explaining the manner in which the remaining three prevailing wage levels will be modified. The Department has determined that the upper-most level will be adjusted to the mean of the upper decile of the OES wage distribution, or approximately the 95th percentile, to reflect the wages of the most competent, experienced, and skilled workers in any given occupation. The intermediate wage levels will continue to be calculated in accordance with 8 U.S.C. 1182(p)(4), which yields second and third wage levels at the 62nd and 78th percentiles, respectively.

The highest wage level should be commensurate with the wages paid to the most highly compensated workers in any given occupation because such workers are also generally the workers with the most advanced skills and competence in the occupation, and therefore the type of workers who are similarly employed to the most highly qualified H–1B and PERM workers.[175] Again, as noted above, it is generally the case that, as a worker's education and experience increase, so too do his wages. Further, while the INA places baseline, minimum skills-based qualifications on who can obtain an H–1B or EB–2 visa, it does not place any limit on how highly-skilled a worker can be within these programs. Thus, while the Department necessarily discounted the lower end of the OES wage distribution in determining the entry-level wage, full consideration must be given to the uppermost portion of the distribution in adjusting the Level IV wage.

H–1B workers can be, and at least in some cases already are among the most highly paid, and therefore likely among the most highly skilled workers within their respective occupations.[176] This is demonstrated by a review of the highest salaries paid to H–1B workers in the most common occupations in which H–1B workers are employed. In FY19, for example, the most highly compensated

2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.*

[172] These findings come from data provided by USCIS and the 2017 Occupational Employment Statistics survey from the Bureau of Labor Statistics. They are based the total number of H–1B workers according the FY19 USCIS tracker data within a SOC code divided by the 2017 OES estimate of total workers in a SOC code.

[173] *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3453 (Jan. 19, 2011) (acknowledging the Department did not conduct ''meaningful economic analysis to test [the] validity'' of its ''assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage''); *see also Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013).

[174] *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States,* 65 FR 80110, 80110 (Dec. 20, 2000).

[175] Edward P. Lazear, *Productivity and Wages: Common Factors and Idiosyncrasies Across Countries and Industries,,* National Bureau of Economic Research, 11/2019, Working Paper 26428, *available at http://www.nber.org/papers/w26428*; David H. Autor & Michael J. Handel, *Putting Tasks to the Test: Human Capital, Job Tasks and Wages, National Bureau of Economic Research*, 6/2009, Working Paper 15116, available at *http://www.nber.org/papers/w15116.*

[176] Data on the actual wages paid to H–1B workers shows that in some cases such workers are paid at or near the very top of the OES wage distribution.

H–1B nonimmigrants employed as Computer Systems Analysts command annual wages as high as $450,000. That figure was $357,006 for H–1B workers in other Computer Occupations. The wages of workers at the 90th percentile of the OES distribution for these occupations, by contrast, are significantly lower. Computer Systems Analysts at the 90th percentile in the OES distribution make approximately $142,220. That figure is $144,820 for workers in other computer occupations. In other words, H–1B workers in some instances make wages far in excess of those earned by 90 percent of all U.S. workers in the same occupation. Indeed, a review of the wages of the top five percent highest earners among H–1B nonimmigrants in the 16 occupational classifications that account for one percent or more of all approved H–1B petitions in FY2019 shows that such workers make wages that are, on average, at least 20 percent higher than those made by workers at the 90th percentile in the OES wage distribution.

Further demonstrating that H–1B workers can be and sometimes are among the most skilled and competent workers in their occupations, an examination of the top end of the wage distribution within the H–1B program shows that, for H–1B nonimmigrants with graduate and bachelor's degrees, the association between education and income level begins to break down to some extent. Among the most highly compensated H–1B workers, the higher the income level, the more likely the foreign worker beneficiary only has a bachelor's degree.[177] This strongly suggests that individuals at the fourth wage level truly possess the most advanced skills and competence—the only remaining parameters that can reasonably account for significant wage differentials—within their occupations, as additional years of education are largely irrelevant in explaining wages among top earners. The U.S. workers who are similarly employed to the most highly qualified H–1B workers are, therefore, also likely to be among the most highly skilled, and, therefore, the most highly compensated workers within the OES wage distribution.

The high levels of pay that the most skilled H–1B workers can command is also shown by the fact that, due to their advanced skills, diversified knowledge, and competence, workers placed at the fourth wage level are likely to be far more productive than their less experienced and educated peers. Whereas experience itself generally increases on a linear basis, as a function of age and time spent in an occupation, productivity and an individual's supervisory responsibilities, as a function of experience and skills, do not. For example, the nature of senior management or supervisory roles, in particular, means workers who serve as productivity multipliers are more likely to fill such positions, which in turn translates to higher wages. Perhaps even more relevant to the Department's assessment of the wages paid to H–1B workers is the nature of the work these individuals do, which is highly specialized and typically in computer or engineering-related fields. In such occupations, experience and abilities can result in exponentially divergent levels of productivity, which in turn means that workers with the most advanced skills and competence can command wages far above what other workers in those occupations do.[178]

All of these considerations strongly indicate that U.S. workers similarly employed to the H–1B and PERM workers with the most advanced skills and competence are themselves among the most highly skilled workers in any given occupation, and therefore the most highly compensated. The uppermost wage level should, in accordance with the INA, therefore be calculated by taking the arithmetic mean of the wages paid to the most highly paid workers in the OES distribution. In consequence, the Department has determined that the fourth wage level should be calculated as the mean of the upper decile of the OES distribution, or approximately the 95th percentile. This calculation ensures that the fourth wage level is based on the wages paid to workers with the most advanced skills and competence in an occupation, while using a sample of workers to identify an average wage sufficiently large to allow for a statistically meaningful calculation.

The Department will continue to calculate the two intermediate wage levels in accordance with 8 U.S.C. 1182(p)(4), which provides that, in establishing a four-tier wage structure, ''[w]here an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.'' [179] The BLS OES survey is, as provided in the statute, an existing survey that has long provided two wage levels for Department's use in setting the prevailing wage rates.[180]

The statutory formula was designed by Congress specifically for use in the Department's high-skilled immigrant and nonimmigrant programs, and provides for an efficient way of calculating evenly-spaced, intermediate wage rates between the lower bound and upper bound of the Department's wage structure.[181] Creating new wage levels, as opposed to adjusting the field values within the existing levels produced by BLS (as the Department is doing here) would potentially result in less reliable statistical data and be unlikely to yield intermediate wage rates meaningfully different from those generated by operation of the statute. Further, the adjustments the Department is making to the two existing wage levels provided by the BLS OES survey preserve the same segmentation as the previous first and fourth wage level values—meaning they will continue to fall approximately 50 percentiles apart within the OES distribution and will thus preserve the intermediate level segmentation contemplated by the statute. Using the INA's formula to generate intermediate wage levels therefore continues to be, in the Department's judgment, the appropriate method to complete the prevailing wage structure.

The Department applies the statutory formula as follows: The difference between the two levels provided by the OES survey data is 50 percentiles. Dividing this by three yields a quotient of 16.67. This quotient, added to the value of the Level I wage at the 45th percentile, yields a Level II wage at approximately the 62nd percentile. When subtracted from the value of the Level IV wage at the 95th percentile, the quotient yields a Level III wage at approximately the 78th percentile of the OES distribution.

The Department acknowledges that the existing wage levels—set at approximately the 17th, 34th, 50th, and 67th percentiles—have been in place for over 20 years, and that many employers likely have longstanding practices of paying their foreign workers at the rates produced by the current levels.

[177] This analysis is based on data provided by U.S. Citizenship and Immigration Services and 2019 OFLC Disclosure Data.

[178] Andy Oram & Greg Wilson, Making Software: What Really Works, and Why We Believe It (2010).

[179] 8 U.S.C. 1182(p)(4).

[180] BLS also produces data for the public from the OES survey that is divided into five different wage levels. However, the public data BLS produces is not broken down with the level of granularity by area of employment needed to administer the Department's immigrant and nonimmigrant programs, which is why BLS has also long produced a separate dataset with two wage levels for the Department's use.

[181] *See Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3462 (January 19, 2011).

Adjusting the levels to the 45th, 62nd, 78th, and 95th percentiles represents a significant change, and may result in some employers modifying their use of the H–1B and PERM programs. It will also likely result in higher personnel costs for some employers, as detailed below. However, to the extent employers have reliance interests in the existing levels, the Department has determined that setting the wage levels in a manner that is consistent with the text of the INA and that advances the statute's purpose of protecting U.S. workers outweighs such interests and justifies such increased costs.

5. The EB–3 Immigrant Classification

As noted previously, the Department's four-tier wage structure is used to set the prevailing wage in five different immigrant and nonimmigrant programs. Having explained the Department's reasoning for how the adjusted wage levels are appropriate for the programs that consist of more highly skilled workers with advanced degrees and/or specialized knowledge—namely the EB–2 immigrant classification and the H–1B, E–3, and H–1B1 nonimmigrant programs—the Department now turns to explaining the appropriateness of using those same wage levels for the EB–3 classification, which consists of lower-skilled workers, professionals with bachelor's degrees, and individuals capable of performing unskilled labor. The Department concludes that the adjusted wage levels under the four-tiered structure also satisfy the statutory requirement that the wage levels be set based on experience, education, and level of supervision with respect to the EB–3 classification, taking into account the statutory and regulatory purposes of protecting U.S. workers from displacement and adverse wage effects.

At the outset, the Department notes that the close connections between the EB–3 classification and the other programs covered by the Department's wage structure make it inadvisable and impractical to treat the EB–3 classification differently. As detailed above, many H–1B workers adjust status to that of lawful permanent residents through EB–3 classification, and the manner in which the programs operate means that, in many cases, foreign workers can, in some sense, have one foot in each program simultaneously for extended periods of time. Using different wage methodologies in the programs would therefore result in the incongruous possibility of a worker doing the same job for the same employer suddenly receiving a different wage upon adjusting status. Similarly, while having somewhat different eligibility criteria, the EB–2 and EB–3 classifications are not mutually exclusive—many workers that satisfy the eligibility criteria for one would also do so for the other.[182] Applying the same wage methodology in both classifications is therefore important to ensure consistent treatment of similarly situated workers and prevent the creation of incentives for employers to prefer one classification over the other because different wage methodologies yield different wages.[183] These considerations make it important to treat the EB–3 classification the same as the EB–2 and H–1B programs. The question then devolves to whether the EB–3 classification is properly accounted for by the adjusted wage levels. The Department believes it is.

The Department acknowledges that applying the four-tier wage structure in five different immigrant and nonimmigrant programs with varying populations, and across hundreds of different occupational classifications presents inherent challenges. The breadth of occupations to which the wage levels apply means that the prevailing wages established by the wage structure will not be perfectly tailored to the circumstances of each individual job opportunity.[184] The Department has sought to address this challenge by focusing much of its analysis on the programs and occupations that represent the largest share of the immigrant and nonimmigrant populations covered by the four-tier wage structure. Doing so is, in the Department's judgment, the approach to addressing variations across the programs that is most consistent with the INA. The wage protections in the H–1B and PERM programs are designed to guard against the displacement of, or adverse effect on U.S. workers caused by the employment of foreign labor.[185] As noted above, the risk that the presence of lower-wage foreign workers in a labor market will undercut U.S. workers' wages and job opportunities is greatest when there are larger concentrations of such workers.[186] Adjusting the wage levels with particular attention to those occupations and visa classifications with the largest numbers of foreign workers therefore puts the focus on addressing the danger the statutory scheme is intended to guard against—adverse effects on U.S. workers—where it is most acute.

Thus, as previously explained, in ascertaining the wages paid to U.S. workers similarly employed to H–1B workers, the Department's analysis focused, to the greatest extent possible, on those occupations that account for 1 percent or more of the total H–1B population, and which also account for a significant share of the PERM population.[187] Similarly, the Department has given due weight in its analysis of where to set the prevailing wage levels to the fact that the EB–3 classification represents an exceedingly small share of the overall foreign worker population covered by the wage structure. The H–1B program is America's largest guest worker program.[188] In FY2017, the Department of Homeland Security approved 365,682 H–1B petitions.[189] That same year, 19,432 workers were admitted for lawful permanent residence in the EB–2 classification.[190] A total of only 18,115 EB–3 immigrant workers were admitted that year. Thus, the EB–3 program accounts for, at most, approximately 5 to 10 percent of the total immigrant and nonimmigrant population governed by the four-tier wage structure that is admitted or otherwise provided status in any given year.[191] That does not

[182] *See Musunuru* v. *Lynch,* 831 F.3d 880, 885 (7th Cir. 2016) (describing a person applying for both EB–2 and EB–3 status).

[183] *See Comite' De Apoyo A Los Trabajadores Agricolas* v. *Perez,* 774 F.3d 173, 185 (3d Cir. 2014) (noting loopholes that can be created if employers are able to use different methodologies to calculate wages for the same types of workers).

[184] *Cf. Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3461 (Jan. 19, 2011).

[185] *See, e.g., Cyberworld Enter. Techs., Inc.* v. *Napolitano,* 602 F.3d 189, 199 (3d Cir. 2010).

[186] George Borjas, Immigration Economics, 2014.

[187] In some instances, particularly when analyzing the NSF data, the Department was constrained in its ability to analyze wages for all top H–1B occupations because of discrepancies between how the NSF and BLS surveys classify workers by occupation.

[188] Nicole Torres, *The H–1B Debate, Explained,* Harvard Business Review (May 4, 2017), *available at https://hbr.org/2017/05/the-h-1b-visa-debate-explained.*

[189] *https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2018.pdf.*

[190] Department of Homeland Security, 2017 Yearbook of Immigration Statistics, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017, *available at https://www.dhs.gov/immigration-statistics/yearbook/2017/table7.*

[191] The Department notes that the total number of approved H–1B petitions ''exceeds the number of individual H–1B workers sponsored because of the different types of petitions that can be filed (*e.g.,* requests for concurrent employment with another employer, requests for extension of stay, amended petitions).'' U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2018 Annual Report to Congress October 1, 2017–September 30, 2018, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2018.pdf.* The filing of these types of petitions means that some nonimmigrants are counted multiple times in the total number of

mean that the Department has not given full consideration to the EB–3 classification in assessing how best to adjust the wage levels. It only means that the Department has appropriately weighed the size of the program, and therefore the risk it poses to U.S. workers, in identifying a solution to the adverse effects caused by the existing wage levels—an approach the Department regards as the best way to take into account the variations across the programs covered by the wage structure in effectuating the purpose of the INA's wage protections.

After assessing the nature of the EB–3 immigrant population, the Department has determined that the adjusted wage levels under the four-tiered structure adequately take into account the experience, education, and level of supervision of EB–3 workers, in light of the purpose of the INA's wage safeguards. The EB–3 program consists of three discrete classifications: ''skilled workers,'' defined as aliens who are ''capable . . . of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States;'' ''professionals,'' defined as aliens ''who hold baccalaureate degrees and who are members of the professions;'' and ''other workers,'' defined as aliens who are ''capable . . . of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.'' [192] For each of these classifications, the revised wage levels, set at approximately the 45th, 62nd, 78th, and 95th percentiles, provide an appropriate method for calculating the prevailing wage.

As to the lower-skill classifications, the Department has previously recognized that lower-skilled workers are less likely to vary in the wages they are paid based on differences in skill levels.[193] This is because skill levels themselves are less likely to vary in such occupations. A job that requires limited skills, such as can be acquired through two years of training or less, can likely be performed with similar proficiency by someone with lower levels of education and experience as by someone with greater experience and education.[194] Meaningful differentiation between workers based on skills in such occupations is therefore reduced. From this, the Department has previously concluded that setting prevailing wages for lower-skilled workers closer to the mean of the overall OES wage distribution is a more appropriate way of guarding against adverse wage effects.[195] Since most workers in lower-skilled occupations have similar levels of skill, a wage that approximates the average wage for all workers in the occupation is more likely to ensure that similarly employed workers make similar wages.

That reasoning holds true for the lower-skilled classifications in the EB–3 immigrant visa preference category, which include workers whose jobs are unskilled or require two years of training. These workers are far more likely to fall within the lower two wage levels given their relative lack of education and experience. Under the new wage levels, they will thus likely be placed at either the 45th or the 62nd percentiles of the OES wage distributions. Both levels, while not perfectly tailored to the lower-skilled component of the EB–3 classification, fall near the middle part of the wage distribution, and are therefore generally appropriate for lower-skilled workers.

For separate reasons, the Department concludes that the newly adjusted wage levels also adequately satisfy the Department's obligations in setting the wage levels under the INA with respect to EB–3 professionals. Unlike lower-skilled EB–3 workers, professionals with bachelor's degrees in the EB–3 classification do possess a level of skill that allows for greater differentiation within the occupation. It is also the case that such workers will likely generally have lower levels of education and experience than EB–2 workers, who are required to possess a master's degree or higher. An entry-level wage at the 45th percentile, while more closely tailored to the education and experience of an EB–2 or H–1B worker, may be on the higher end for an EB–3 professional in some cases.[196] But other considerations demonstrate the appropriateness of the 45th percentile of the OES wage distribution as the entry-level wage for such workers.

The Department emphasizes that the labor certification process in the PERM programs is designed to ensure that there are not available and willing U.S. workers and that the wages and the wages and working conditions of U.S. workers will not be adversely affected by the employment of the immigrant worker(s). From when the INA was first enacted, its labor certification provisions were designed ''to provide strong safeguards for American labor and to provide American labor protection against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.'' [197] The availability of U.S. workers to fill jobs for which foreign workers are sought, being a guiding consideration behind the INA's wage protections, is also an appropriate consideration in determining the adequacy of the prevailing wage levels for EB–3 professionals.

Within the U.S. workforce, the credentials associated with the EB–3 professional classification are significantly more common than the credentials associated with the EB–2 classification. As of 2019, 36 percent of people age 25 and older in the United States possessed a bachelor's degree or higher.[198] That is compared to only 13.4 percent of native-born Americans and 14.1 percent of the foreign born population who possess an advanced degree, such as a master's degree or doctorate.[199] It follows that employers seeking to recruit individuals with only a bachelor's degree should be more likely to find qualified and available U.S. workers than if they are recruiting for a position that requires a master's degree. The pool of available workers in such cases is significantly larger.

As noted above, the Department is required to determine and certify that ''there are not sufficient workers who are able, willing, qualified'' and available to fill the position for which an EB–3 worker is sought.[200] This requirement is critical to the INA's ''core objective[] [of] balanc[ing] certain industries' temporary need for foreign

approved petitions. The total number of petitions for initial employment in FY17 was 108,101. However, that number does not account for the petitions filed on behalf of H–1B nonimmigrants to extend their status, and thus undercounts the total number of actual H–1B workers who were authorized to work in FY17.

[192] 8 U.S.C. 1153(b)(3); 8 CFR 204.5(l).

[193] *See Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3461 (January 19, 2011).

[194] *Id.* at 3458.

[195] *Id.* at 3459.

[196] The Department also notes that, in some cases, EB–3 workers may in fact have higher levels of formal education than H–1B workers, given that H–1B workers can demonstrate specialized knowledge through experience and training, whereas possession of a bachelor's degree is required for all EB–3 immigrants. *See Employment-Based Immigrants,* 56 FR 60897, 60900 (Nov. 29, 1991).

[197] *Econo Inn Corp.* v. *Rosenberg,* 145 F. Supp. 3d 708, 713 (E.D. Mich. 2015) (quoting H.R. Rep. No. 1365, 82nd Cong. 2nd Session (1952)).

[198] United States Census Bureau, U.S. Census Bureau Releases New Educational Attainment Data, *available at https://www.census.gov/newsroom/press-releases/2020/educational-attainment.html.*

[199] *Id.*

[200] 8 U.S.C. 1182(a)(5)(A)(i)(I).

workers against a policy interest in protecting U.S. workers' jobs, salaries, and working conditions.'' [201] How to strike that balance turns on a variety of considerations, including the likely availability of U.S. workers for a given position. Where the nature of the labor market is such that U.S. workers are more likely to be readily found, it is appropriate that the Department have extra assurance that no qualified U.S. workers are available to fill a position before certifying as much. In the case of EB–3 professionals, the adjusted wage levels, which may in some cases place a slight premium on the wages paid to professionals with bachelor's degrees, are thus appropriately tailored to the circumstances of the EB–3 immigrant visa preference category. Because U.S. workers with bachelor's degrees are more common, placing some premium on the wage offered for these kinds of workers during the labor certification recruitment process helps advance the purpose of the INA's wage protections and provides the necessary extra assurance to the Department that U.S. workers with comparable levels of education, experience, and responsibility are not available. This approach is also entirely consistent with the Department's authority to prevent adverse effects on similarly employed U.S. workers.[202]

Finally, the Department notes that continuing to employ the same wage structure in this manner across both the H–1B and PERM programs advances the Department's interest in administrative consistency and efficiency. As noted already, there is significant overlap between the H–1B and PERM programs. In FY2019, 68.2 percent of all PERM applications were for aliens that at the time the applications were filed were already working in the U.S. on H–1B visas.[203] Further, the top ten most common H–1B occupations include seven of the ten most common PERM occupations. Through the third quarter of FY2020, 80 percent of PERM cases were for jobs in Job Zones 4 and 5 [204]—the most highly skilled job categories, which also account for 94 percent of all H–1B cases.[205] In sum, the close connection between the types of jobs and aliens that are covered by the two programs further supports using the same wage structure for both the PERM and H–1B programs.

For these reasons, the Department has concluded that using the adjusted wage levels for the EB–3 preference category is in keeping with the relevant statutory considerations that govern how the Department sets prevailing wage levels.

B. Explanation of Amendments To Adjust the Prevailing Wage Levels

In light of the foregoing, the Department is amending its regulations at part 20, sections 656.40 and 655.731 to reflect the new wage level computations the Department will use to determine prevailing wages in the H–1B, H–1B1, E–3, EB–2, and EB–3 classifications. These amendments are in accordance with the President's Executive Order (E.O.) 13788, ''Buy American and Hire American,'' which instructed the Department 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.'' [206] The amendments are also consistent with the aims of the Presidential ''Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak'' (Proclamation). This Proclamation found that the entry of additional foreign workers in certain immigrant and nonimmigrant classifications ''presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID–19 outbreak.'' [207] Section 5 of the Proclamation directed the Secretary of Labor to, ''as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action . . . to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit . . . pursuant to an EB–2 or EB–3 immigrant status or an H–1B nonimmigrant visa does not disadvantage United States workers.''

Although the amendments discussed below will extend beyond the duration of the Proclamation, the threats described in the Proclamation highlight the urgent need for strengthening wage protections in these programs to support the economic recovery. A core part of the Department's mission is to promote opportunities for profitable employment and ensure fair wages and working conditions for U.S. workers. This responsibility includes ensuring that U.S. workers similarly employed to foreign workers are not adversely affected by the employment of foreign workers on a permanent or temporary basis in the U.S., as required by the INA.

This rule will only apply to applications for prevailing wage determination pending with the NPWC as of the effective date of the regulation; applications for prevailing wage determinations filed with the NPWC on or after the effective date of the regulation; and LCAs filed with the Department on or after the effective date of the regulation where the OES survey data is the prevailing wage source, and where the employer did not obtain the PWD from the NPWC prior to the effective date of the regulation. The Department will not apply the new regulations to any previously-approved prevailing wage determinations, permanent labor certification applications, or LCAs, either through reopening or through issuing supplemental prevailing wage determinations or through notices of suspension, invalidation, or revocation.

1. Amending the Computation of the Wage Levels Based on the OES in the Permanent Labor Certification Program (20 CFR 656.40)

The Department is revising paragraphs (a), (b)(2), and (3) of 20 CFR 656.40. The most substantial changes are those made to paragraphs (b)(2). First, the Department has amended § 656.40(b)(2) by adding new paragraphs (b)(2)(i) and (ii) to codify the practice of using four wage levels and to specify the manner in which the wage levels are calculated. Specifically, new paragraph (b)(2)(i) stipulates that ''The BLS shall provide the OFLC Administrator with the OES wage data by occupational classification and geographic area,'' and goes on to specify the four new levels (Levels I through IV) to be applied.

New paragraph (b)(2)(i)(A) describes the Level I Wage. This first wage level—currently calculated as the mean of the bottom third of the OES wage

[201] *Comite de Apoyo a los Trabajadores Agricolas* v. *Solis,* 933 F. Supp. 2d 700, 712 (E.D. Pa. 2013).

[202] *Cf. Williams* v. *Usery,* 531 F.2d 305, 306 (5th Cir. 1976) (''Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers. His authority is limited to making an economic determination of what rate must be paid all workers to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers.'').

[203] Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

[204] Under the O*Net system a job zone is a group of occupations that are similar in the amount of education, experience, and on the job training that is required for a worker to fill a position in the occupation. Job Zone 4 includes occupations that require considerable preparation; Job Zone 5 includes occupations that require extensive preparation. *See https://www.onetonline.org/help/online/zones.*

[205] This information is based on data collected by the Department's Office of Foreign Labor Certification on LCAs filed between March 1, 2020, and August 14, 2020.

[206] *See* Exec. Order 13788, 82 FR 18837 (Apr. 18, 2017).

[207] *See* Proclamation No. 10052, 85 FR 38263 (June 22, 2020).

distribution—will now be calculated as the mean of the fifth decile of the wage distribution for the most specific occupation and geographic area available. Roughly speaking, this means that the first wage level will be adjusted from the 17th percentile to the 45th percentile of the relevant OES wage distribution.

Next, new paragraph (b)(2)(i)(D) provides that the Level IV Wage—currently calculated as the mean of the upper two thirds of the OES wage distribution—will now be calculated as the mean of the upper decile of the distribution for the most specific occupation and geographic area available. This means the fourth wage level will increase approximately from the 67th percentile to the 95th percentile of the relevant OES wage distribution.

For the two intermediate levels, II and III, the Department will continue to rely on the mathematical formula Congress provided in the INA.[208] Thus, new paragraph (b)(2)(i)(B) states that the Level II Wage shall be determined by first dividing the difference between Levels I and IV by three and then adding the quotient to the computed value for Level I. The Level III Wage is defined in new paragraph (b)(2)(i)(C) as a level determined by first dividing the difference between Levels I and IV by three and then subtracting the quotient from the computed value for Level IV. This yields second and third wage levels at approximately the 62nd and 78th percentiles, respectively, as compared to the current computation, which places Level II at approximately the 34th percentile and Level III at approximately the 50th percentile.

The newly created paragraph (b)(2)(ii) states that the OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the prevailing wage rates produced under the new paragraph (b)(2)(i) of section 656.40 as a notice posted on the OFLC website. This continues the Department's practice of having the OFLC Administrator to announce, via a notice of implementation, updates to OES wage data. Currently, OFLC publishes a routine announcement each year implementing updated OES prevailing wages for the new wage year and discussing any other significant related updates, including changes to OES survey areas and relevant updates to the SOC system. These announcements also serve as notice to employers of changes they need to make to the wage information on applications to reflect the changes to the OES. This IFR codifies the current publication practice in the regulations at section 656.40(b)(2)(ii).

The new regulation aligns with OFLC's current practice for notifying employers directly, rather than through the **Federal Register**, because the administrative burden of contacting employers directly is less than publishing multiple prevailing wage rates in the **Federal Register**. The Department has determined that the increased transparency resulting from publishing these updates via a notice on OFLC's website, at least once in a calendar year, will provide clear expectations for employers to meet their prevailing wage obligations in the coming year, prior to filing an application for permanent employment certification.

Further revisions to paragraph (b)(2) provide greater precision in the language used by changing the term ''DOL'' to ''BLS'' when describing which entity administers the OES survey and eliminate redundancy by deleting the language ''except as provided in (b)(3) of this section.'' Because the Department is now specifying within the regulation exactly how the prevailing wage levels are calculated, the revised text also removes the existing reference to how the levels are calculated—namely the reference to the ''arithmetic mean''—and will instead provide that the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be based on the wages of workers similarly employed using the wage component of the OES survey, in accordance with paragraph (b)(2)(i), unless the employer provides an acceptable survey under paragraphs (b)(3) and (g) of this section or elects to utilize a wage permitted under paragraph (b)(4).

Revisions to paragraph (a) remove an out-of-date reference, explained further below, to SWAs' role in the prevailing wage determination process. The changes to paragraph (b)(3) account for the elimination of the reference to the ''arithmetic mean'' in (b)(2).

2. Amending the Wage Requirement for LCAs in the H–1B, H–1B1, and E–3 Visa Classifications (20 CFR 655.731)

The Department amends section 655.731 by making technical revisions to paragraph (a)(2)(ii)(A) to remove another out-of-date reference to SWAs' role in the prevailing wage determination process. Non-agricultural PWD requests are no longer processed by SWAs; since 2010 they have solely been processed by the Department at a National Processing Center (NPC). PWD requests are primarily adjudicated by the NPWC, located in Washington, DC, but through interoperability, they may be processed by any regional NPC. The regulatory text is amended to reflect the current practice and to provide for operational flexibilities in the future with respect to where PWD requests are processed.

The Department also revises the language in section 655.731 to more clearly explain that it will use BLS's OES survey to determine the prevailing wages under this paragraph and has added a sentence to specify that these determinations will be made in a manner consistent with the amended section 656.40(b)(2).

The revised language in paragraphs (a)(2)(ii) introductory text, (a)(2)(ii)(A) introductory text, and (a)(2)(ii)(A)(*2*) also includes technical and clarifying revisions regarding other permissible wage sources (*i.e.,* applicable wage determinations under the Davis-Bacon Act or McNamara-O'Hara Service Contract Act, as well as other independent authoritative or legitimate sources of wage data in accordance with paragraph (a)(2)(ii)(B) or (C)).

The new language also removes the reference to ''arithmetic mean'' in paragraph (a)(2)(ii) and now states ''. . . the prevailing wage shall be based on the wages of workers similarly employed as determined by the OES survey in accordance with 20 CFR 656.40(b)(2)(i) . . .'' The revised language also corrects an error referencing ''H–2B nonimmigrant(s)'' by changing the reference to ''H–1B nonimmigrant(s)'' in paragraph (a)(2)(ii)(A)(*2*). The revisions further provide that an NPC will continue to determine whether a job is covered by a collective bargaining agreement that was negotiated at arms-length, but in the event the occupation is not covered by such agreement, an NPC will determine the wages of workers similarly employed using the wage component of the BLS OES, unless the employer provides an acceptable survey. An NPC will determine the wage in accordance with secs. 212(n) and 212(t) of the INA and in a manner consistent with the newly revised section 656.40(b)(2).

[208] *See* 8 U.S.C. 1182(p)(4) (''Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.'').

III. Statutory and Regulatory Requirements

A. Good Cause To Forgo Notice and Comment Rulemaking

The Administrative Procedure Act (APA) authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' [209] Under the APA, notice and comment is deemed ''impracticable'' when an agency ''cannot both follow section 553 and execute its statutory duties,'' [210] while the ''public interest'' prong ''connotes a situation in which the interest of the public would be defeated by any requirement of advance notice.'' [211] Generally, the good cause exception for forgoing notice and comment rulemaking ''excuses notice and comment in emergency situations, or where delay could result in serious harm.'' [212] While emergency situations are the most common circumstances in which good cause is invoked, the infliction of real harm that would result from delayed action even absent an emergency can be sufficient grounds to issue a rule without undergoing prior notice and comment.[213]

Here, two different circumstances are present that satisfy the APA's good cause criteria. First, the shock to the labor market caused by the widespread unemployment resulting from the coronavirus public health emergency has created exigent circumstances that threaten immediate harm to the wages and job prospects of U.S. workers. The INA's wage protections are meant to ensure that the employment of foreign workers does not have an adverse impact on similarly employed U.S. workers. But the flaws in the existing wage levels—which were promulgated through guidance and without meaningful economic justification, are inconsistent with the statute, and serve as the source of adverse labor effects on U.S. workers even under normal economic conditions—can only exacerbate, and severely so, the dangers posed to U.S. workers by recent mass lay-offs unless immediate action is taken. Keeping in place the current levels is untenable, and any delay in issuing this rule is contrary to the public interest. Notice and comment procedures in these circumstances would make it impracticable for the Department to fulfill its statutory mandate and carry out the ''due and required execution of [its] agency functions'' to protect U.S. workers.[214]

Separately, even absent the emergency labor market conditions caused by the coronavirus pandemic, providing the public an opportunity to comment before the adjustments to the wage levels take effect is contrary to the public interest insofar as it would impede the Department's ability to solve the problems this interim final rule is meant to address. Advance notice of the intended changes would create an opportunity, and the incentives to use it, for employers to attempt to evade the adjusted wage requirements. This constitutes a situation where the public's interest is ''defeated by any requirement of advance notice'' and also justifies the Department's decision to forgo notice and comment before issuing the rule.[215]

Preventing Fiscal Harm to U.S. Workers

To begin, an agency may invoke the good cause exception where the serious harm to be prevented is fiscal or economic in nature, particularly in cases where the agency is acting to prevent fiscal harm to third parties.[216] In this instance, serious fiscal harm would befall U.S. workers absent immediate action by the Department because the wage and employment risks, already immense, posed to workers by recent mass lay-offs are greatly compounded by the inappropriately low prevailing wage rates.

On January 31, 2020, the Secretary of the Department of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d) in response to the Coronavirus Disease 2019 (COVID–19) outbreak.[217] This was followed on March 13th by the President's declaration of a National Emergency concerning the COVID–19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the U.S.[218]

On April 22, 2020, the President issued Proclamation 10014, *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID–19 Outbreak* (Proclamation 10014).[219] Proclamation 10014 suspended the entry of aliens in various immigrant classifications, including EB–2 and EB–3 classifications, on the grounds that ''the United States faces a potentially protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand.'' [220] The President found that, once admitted, these immigrants are granted ''open market'' employment documents, which allow them ''immediate eligibility to compete for almost any job, in any sector of the economy,'' meaning it is especially difficult to ''protect already disadvantaged and unemployed Americans from the threat of competition for scarce jobs from new lawful permanent residents by directing those new residents to particular economic sectors with a demonstrated need not met by the existing labor supply.'' [221] Based on his findings, the President concluded that the entry of

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[209] 5 U.S.C. 553(b)(B).

[210] *Nat. Res. Def. Council, Inc.* v. *Evans,* 316 F.3d 904, 911 (9th Cir. 2003); *see also Riverbend Farms, Inc.* v. *Madigan,* 958 F.2d 1479, 1485 (9th Cir. 1992) (''The existence of the good cause exception is proof that Congress intended to let agencies depart from normal APA procedures where compliance would jeopardize their assigned missions.''); *Kollett* v. *Harris,* 619 F.2d 134, 145 (1st Cir. 1980) ('''Impracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings.'').

[211] *Utility Solid Waste Activities Grp.* v. *E.P.A.,* 236 F.3d 749, 755 (D.C. Cir. 2001); *see also N.C. Growers Ass'n* v. *United Farm Workers,* 702 F.3d 755, 767 (4th Cir. 2012).

[212] *Jifry* v. *FAA,* 370 F.3d 1174, 1179 (D.C. Cir. 2004); *see also U.S. Corp.* v. *U.S. E.P.A.,* 595 F.2d 207, 214 (5th Cir. 1979) (''It is an important safety valve to be used where delay would do real harm.'').

[213] *Nat. Res. Def. Council, Inc.* v. *Evans,* 316 F.3d 904, 911 (9th Cir. 2003) (''[W]e have observed that notice and comment procedures should be waived only when 'delay would do real harm.' . . . 'Emergencies, though not the only situations constituting good cause, are the most common.' '') (citations omitted); *see also Buschmann* v. *Schweiker,* 676 F.2d 352, 357 (9th Cir. 1982) (''The notice and commend procedures in Section 553 should be waived only when 'delay would do real harm' . . . The good cause exception is essentially an emergency procedure.'') (citations omitted).

[214] *Kollet,* 619 F.2d at 145.

[215] *Utility Solid Waste Activities Grp.* 236 F.3d at 755.

[216] *Sorenson Commc'ns, Inc.* v. *F.C.C.,* 755 F.3d 702, 707 (D.C. Cir. 2014) (explaining that ''no particular catechism is necessary to establish good cause. . .''); *Nat'l Venture Capital Ass'n* v. *Duke,* 291 F. Supp. 3d 5, 18 (D.D.C. 2017) (explaining that preventing fiscal harm is most likely to justify good cause when it is harm ''to *third parties,* not the government''); *Am. Fed'n of Gov't Emp., AFL–CIO* v. *Block,* 655 F.2d 1153, 1157 (D.C. Cir. 1981) (finding good cause where ''the absence of specific and immediate guidance from the Department [of Agriculture] in the form of new standards would have forced reliance by the Department upon antiquated guidelines, thereby creating confusion among field administrators, and caused economic harm . . .'').

[217] Department of Health and Human Services, Determination that a Public Health Emergency Exists, *https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx* (last reviewed Jan. 31, 2020). *See also* Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020).

[218] Proclamation No. 9994, 85 FR 15337 (Mar. 18, 2020).

[219] Proclamation No. 10014, 85 FR. 23441 (Apr. 22, 2020).

[220] *Id.*

[221] *Id.*

aliens in these immigrant visa categories would be detrimental to the interests of the U.S. given that ''[e]xisting immigrant visa processing protections are inadequate for recovery from the COVID–19 outbreak.'' [222] Proclamation 10014 further required the Secretary of Labor and the Secretary of Homeland Security, in consultation with the Secretary of State, to review nonimmigrant programs and recommend other measures appropriate to ''stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers.'' [223]

On June 22, 2020, the President issued a *Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak.*[224] Subject to certain exceptions, the Proclamation restricts the entry of certain immigrants and nonimmigrants, including certain H–1B nonimmigrants and EB–2 and EB–3 immigrants, into the U.S. through December 31, 2020, as their entry would be detrimental to the interests of the U.S. The Proclamation notes that ''between February and April of 2020 . . . more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H–1B and L workers to fill positions.'' [225] It further explained that ''American workers compete against foreign nationals for jobs in every sector of our economy, including against millions of aliens who enter the United States to perform temporary work,'' and that while, ''[u]nder ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy,'' because of the ''extraordinary circumstances of the economic contraction resulting from the COVID–19 outbreak, certain nonimmigrant visa programs authorizing such employment pose an unusual threat to the employment of American workers.'' [226]

The Proclamation only suspends and limits new entries into the United States by aliens who did not have valid visas and required travel documents on the effective date of the Proclamation. It does not address potential harms to U.S. workers caused by the employment of foreign workers already in the country. Section 5(b) of the Proclamation, however, directs the Department of Labor as soon as practicable consider promulgating regulations or take other appropriate action to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit, or who are seeking admission or a benefit, pursuant to an EB–2 or EB–3 immigrant visa or an H–1B nonimmigrant visa does not disadvantage United States workers in violation of section 212(a)(5)(A) or (n)(1) of the INA (8 U.S.C. 1182(a)(5)(A) or (n)(1)).[227]

Accordingly, the issuance of this interim final rule, designed to ensure that U.S workers are not disadvantaged by the employment of aliens already present in the United States as the nation continues its economic recovery, is consistent with the aims of the Proclamation, and mitigates aspects of the danger to U.S. workers caused by recent shocks to the labor market and the employment of foreign workers not fully addressed by the Proclamation.

Notwithstanding the ongoing COVID–19 emergency, hiring in the U.S. has increased, with continued hiring across all sectors of the economy anticipated. Despite these gains, unemployment remains significantly above the historically low levels seen prior to the emergence of COVID–19 and the resultant economic emergency. As states continue to reopen their economies and the pace of hiring accelerates, U.S. workers will still face risks to their wages and job opportunities. It is therefore imperative that the Department take immediate action to ensure that U.S. workers' current and future wages and job prospects are protected.

As noted above, a substantial body of evidence shows that the Department's current prevailing wage rates, which govern, in many cases, the wages that employers offer when recruiting for U.S. workers and pay when employing foreign workers, have long been set below the rates at which similarly employed U.S. workers are paid, and that these rates are inconsistent with the statutory scheme. Even during normal economic circumstances this is likely to result in adverse effects on the wages and job opportunities of U.S. workers. Under the high unemployment rates experienced in the U.S. labor market this year, which reached 14.7 percent in April, a rate not seen since the Great Depression, and remain elevated, the existing flawed and arbitrary wage levels pose an immediate threat to the livelihoods of U.S. workers.[228]

More particularly, if, as the economy recovers, the existing wage levels remain in place, at least two negative consequences for U.S. workers are likely to occur. First, employers seeking to employ EB–2 and EB–3 workers, as well as, in some cases, H–1B nonimmigrants, are required to use prevailing wage rates to recruit U.S. workers before they are permitted to employ foreign workers. The provision of improperly low prevailing wage determinations under the existing wage level computations therefore means that U.S. workers reentering the workforce will not, in some cases, be offered wages commensurate with their education and experience. In such cases where an employer's job advertisement includes a wage rate for a position that does not accurately reflect the wage rate that should be paid, U.S. workers may be less likely to apply for the position.

Relatedly, the current wage level computations may adversely affect the wages and job opportunities of U.S. workers by allowing employers to pay wages to foreign workers at a rate below the market rate for similarly employed U.S. workers. This can result in either employers preferring to hire foreign workers over U.S. workers, or result in wage suppression for U.S. workers. These problems, in turn, can also impede U.S. workers' return to the workforce at income levels comparable to what they were making before the downturn.

Both delays in workers returning to the workforce and their doing so at wages below what they were making before being laid off can have severe immediate and long term adverse effects on workers' wellbeing. Extensive academic research shows that mass lay-offs that occur during times of elevated unemployment have dramatic and persistent consequences for individuals' earnings for years following the lay-off event.[229] This is because workers who become unemployed during an economic recession often have to accept employment at lower wages than they were making before the recession, or will remain unemployed for extended periods of time, which exacerbates the negative wage effects, also known as wage scarring, that result from lay-offs.[230] Some studies have found that

[222] *Id.*

[223] *Id.* at 23442.

[224] Proclamation 10052, 85 FR 38263 (June 25, 2020); *see also* Proclamation 10054, 85 FR 40085 (July 2, 2020).

[225] Proclamation 10052, 85 FR 38263, 38263–264.

[226] *Id.*

[227] *Id.* at 38266.

[228] Bureau of Labor Statistics, Civilian Unemployment Rate, *https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm.*

[229] Steven Davis & Till von Wachter, *Recessions and the Costs of Job Loss,* The Brookings Institution (2011), *available at https://www.brookings.edu/wp-content/uploads/2011/09/2011b_bpea_davis.pdf* (finding that

[230] Ben Leubsdorf, *Six Ways the Recession Inflicted Scars on Millions of Unemployed*

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workers laid off during a recession may experience negative wage effects for as long as 20 years after the lay-off event, and may have average wage growth over their lifetimes that is 14.7 percent lower than what they would have otherwise enjoyed.[231]

Further, now is a critical moment for mitigating against the threat of these wage scarring effects. Without interventions to help U.S. workers, as many as 8 million individuals laid off earlier this year may reach 27 weeks or more of unemployment starting in October 2020. Unemployment of this duration, known as long term unemployment, is the point at which the risk of wage scarring and other adverse employment effects of unemployment becomes especially acute.[232]

The reforms to the prevailing wage levels that the Department is undertaking in this rulemaking—changes that the Department acknowledges should have been undertaken years ago—have therefore become urgently needed. U.S. workers, in the millions, have already experienced one of the most significant, mass lay-off events in U.S. history.[233] Ensuring that these workers can quickly return to work at wages equal to or greater than what they were making before being laid off is critical to reducing the long-term wage scarring effects of mass unemployment. In the Department's expert judgment, and based on its review of the evidence of the effects of the current wage levels, the existing levels are impeding and will continue to impede, to a significant degree, many U.S. workers' ability to return to well-compensated employment given that the current levels have, in many instances, a suppressive effect on U.S. workers' wages and allow employers to prefer foreign labor as a lower-cost labor alternative. Preserving the existing levels, a flawed policy even under ordinary economic conditions, is untenable as the U.S. continues through critical stages of its recovery from the labor market shocks of the coronavirus public health emergency. Immediate corrective action is therefore required to ensure that the Department's regulations are, consistent with their purpose, safeguarding the well-being of U.S. workers at a moment when workers are highly vulnerable to extreme vicissitudes in the labor market. Any delay in taking this action would mean not only that the Department was failing to protect the wages and job opportunities of U.S. workers, but, worse still, that its application of the existing, faulty wage levels during the recovery would be an active source of harm exacerbating the long term consequences of the public health emergency for workers' livelihoods.[234]

It is of course true that, even with appropriately set wage levels, some degree of wage scarring would occur for U.S. workers in any mass lay-off event. The regulatory changes produced by this rule will not alleviate all the adverse effects associated with the current downturn, and some level of wage scarring is likely to be associated with any recessionary period. The recent shocks to the labor market, however, bring the Department's invocation of good cause well within the admittedly narrow bounds of section 553(b)(B).[235] The Department is not seeking to use section 553(b)(B) as an ''escape clause'' from notice and comment requirements that would apply whenever, in the Department's view, a regulatory change would advance good policy aims.[236] Rather, the Department finds good cause here under extraordinary circumstances brought about by the unique confluence of a public health emergency of a kind not experienced in living memory, its impact on the labor market, and the aggravating effect the Department's arbitrary current wage levels are likely having on the harms experienced by U.S. workers under current economic conditions.

It is also clear that the change worked by this rule going immediately into effect directly and substantially addresses the harm the Department has determined poses an ongoing and grave danger to U.S. workers. As noted above, the Proclamation temporarily suspends entry of new H–1B and PERM workers, but does not affect those workers currently in the United States pursuant to an earlier admission into the U.S. Yet the presence of such workers in the labor market is substantial and should not be overlooked. For example, in recent years, over 80 percent of all foreign workers granted EB–2 and EB–3 status in a given year are adjustment of status cases, meaning they were already present in the U.S. before being granted an employment-based green card. In other words, one of the biggest risks U.S. workers face from having to compete with EB–2 and EB–3 immigrants recruited and paid at inappropriately low wage levels comes from workers who are already present in the U.S. The adjustments the Department is making to the prevailing wage levels will therefore have an immediate and substantial impact as U.S. employers recruit for and employ EB–2 and EB–3 workers even with the Proclamation in place and help mitigate the short and long term adverse wage effects caused by the existing wage levels as the economy recovers.

Similarly, in FY2019, 249,476 of H–1B petitions for continuing employment, *i.e.* petitions for workers already present in the U.S., were approved out of the 388,403 total approved petitions.[237] Thus, as with EB–2 and EB–3 immigrants, a substantial number of H–1B nonimmigrants who will be affected by the adjusted wage levels are already in the United States. Ensuring that they are paid an appropriate wage, even with the Proclamation in effect, in order to reduce the wage scarring and other adverse employment consequences of the coronavirus public health emergency to U.S. workers is therefore an urgent and important priority for the Department that demands immediate corrective action.

Simply put, millions of U.S. workers, many of whom work in industries that employ large numbers of H–1B and employment-based immigrants, lost their jobs over the past six months. This

Americans, Wall Street Journal (May 10, 2016), *available at https://blogs.wsj.com/economics/2016/05/10/six-ways-the-recession-inflicted-scars-on-millions-of-unemployed-americans/.*

[231] Justin Barnette & Amanda Michaud, *Wage Scars and Human Capital Theory, available at https://ammichau.github.io/papers/JBAMWageScar.pdf*; Daniel Cooper, *The Effect of Unemployment Duration on Future Earnings and Other Outcomes,* Federal Reserve Bank of Boston (2014).

[232] *See* Bureau of Labor Statistics, An Analysis of Long-Term Unemployment (2016), *available at https://www.bls.gov/opub/mlr/2016/article/pdf/an-analysis-of-long-term-unemployment.pdf.*

[233] Bureau of Labor Statistics, Unemployment rate rises to record high 14.7 percent in April 2020 (May 13, 2020), *available at https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm?view_full.*

[234] *See Nat'l Fed'n of Fed. Emp.* v. *Devine,* 671 F.2d 607, 611 (D.C. Cir. 1982) (finding good cause was properly invoked where under prior regulations ''the agency would have been compelled to take action which was not only impracticable but also potentially harmful.'').

[235] *See Am. Iron & Steel Inst.* v. *E.P.A.,* 568 F.2d 284, 292 (3d Cir. 1977).

[236] *United States* v. *Garner,* 767 F.2d 104, 120 (5th Cir. 1985).

[237] *See* U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019 (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf*, (showing 66 percent of H–1B petitions approved in FY2019 were for computer-related occupations). Per USCIS, ''continuing employment'' refers to ''extensions, sequential employment and concurrent employment, which are filed for aliens already in the United States.''

kind of mass lay-off event can and often does result in wage scarring, meaning immediate and long term adverse consequences for workers' wages. The scale of the mass layoffs recently experienced makes the current risk of wage scarring especially acute, which is further compounded by flaws in the Department's existing wage levels for these foreign labor programs. Even under ordinary economic conditions the wage levels likely result, in many instances, in adverse effects on the wages and job prospects of U.S. workers. In light of the recent and unprecedented shocks to the labor market, keeping the existing levels in place is entirely untenable if the Department is to mitigate to the fullest extent possible against the threat to the livelihoods of U.S. workers caused by the pandemic. Immediate action is needed as the economy continues through critical stages of its recovery. Congress charged the Department, and more specifically, the Secretary, with ensuring the employment of foreign workers does not adversely affect similarly employed U.S. workers. Without the issuance of this rule, the Department is hindered in its ability to meet its statutory mandate and thus has appropriately found that notice and comment procedures in this instance would be impracticable and contrary to the public interest.

Preventing Evasion of the New Wage Rates

Beyond the immediate and long term harm to U.S. workers' wages and job opportunities that would result from delay in changes to the wage levels, the Department is also justified in bypassing notice and comment to prevent the evasion by employers of the new wage requirements that would likely result from announcing a change to the levels in advance of the change taking effect. Forgoing notice and comment is permitted under circumstances where advance notice of a rule and its delayed effectiveness would result in significant, changed behavior by private parties to evade the rule, or that would otherwise result in harmful market distortions.[238] For example, where a rule would effect a price freeze, invoking good cause to bypass notice and comment has been justified on the grounds that ''[h]ad advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct 'actual transactions'—or avoid them—before the freeze deadline.'' [239] Similarly, courts have found good cause was properly invoked where the announcement of a price increase to take effect at a future date would have likely resulted in producers withholding their product ''from the market until such time as they could take advantage of the price increase.'' [240] Advance notice of the new rule in such cases contravenes the public interest because it would result in private parties evading or being able to improperly take advantage of regulatory changes, thereby undermining their effectiveness and exacerbating the very harm the changes are meant to ameliorate.[241]

The same holds true for the Department's adjustments to the prevailing wage levels. Under the INA, the Department is required to approve an LCA within seven days of when the application is filed.[242] Further, employers have discretion as to when they file LCAs with the Department. The only limitation is that they are not permitted to file an LCA earlier than six months before the beginning date of the period of intended employment.[243] The Department therefore receives LCAs throughout the year in large numbers, at times that are, to some extent, of employers' choosing, including a substantial number during the period that would coincide with the submission of public comment and finalization of this rule if it were not issued as an interim final rule. For example, during the six month periods beginning in September for fiscal years 2017, 2018, and 2019, the Department received, on average, 147,123 LCAs.

The limited discretion the Department has with respect to how quickly it reviews LCAs, in combination with the leeway employers have on when they file, as well as historical filing patterns, show that advance notice of the wage level changes effected by this rule could result in the kind of ''massive rush'' to evade price changes—in this case changes to the price employers must pay for foreign labor—that have repeatedly been found to justify bypassing notice and comment.[244] The scale of the wage change achieved by this rule, and the fact that an LCA, once approved, can be and often is valid for multiple years, means that the incentive for employers to change their filing behavior and, to the greatest extent possible, thereby secure wages at the current low levels for extended periods of time is substantial, and would very likely result in a spate of LCA filings during a comment period.[245] Even leaving aside the potential administrative burden this increase in filing may place on the Department's operations, the harm it would cause to the public interest is clear. Allowing employers to lock in for extended periods prevailing wage rates that the Department has determined often result in adverse effects on U.S. workers' wages and job opportunities would prolong the very problem—made exigent by the current state of the labor market—that the Department is seeking to address through this rule.[246] This on its own is sufficient reason for the Department to bypass notice and comment in order to safeguard the public interest.

For the foregoing reasons, each of which is independently sufficient to justify bypassing notice and comment, the regulatory change made by this interim final rule is urgently needed. Although the Department acknowledges that the good cause exception is ''narrowly construed and only reluctantly countenanced,'' the Department has appropriately invoked the exception in this case.[247] Both to ensure that the Nation continues through critical stages of its economic recovery without severely disadvantaging U.S. workers or affecting their current or future wages and to avoid creating opportunities for employers to evade the new wage requirements, the Department is issuing this interim final rule without providing

[238] *See Mobil Oil Corp.* v. *Dep't of Energy,* 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983) (''On a number of occasions, however, this court has held that, in special circumstances, good cause can exist when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare.'').

[239] *DeRieux* v. *Five Smiths, Inc.,* 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974).

[240] *Nader* v. *Sawhill,* 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975).

[241] *U.S. Steel Corp.* v. *U.S. E.P.A.,* 595 F.2d 207, 214 n.15 (5th Cir. 1979) (''Use of the exception has repeatedly been approved, for example, in cases involving government price controls, because of the market distortions caused by the announcement of future controls.'').

[242] 8 U.S.C. 1182(n)(1).

[243] 20 CFR 655.730(b).

[244] *DeRieux* v. *Five Smiths, Inc.,* 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974).

[245] *Cf. Carpenters 46 Cty. Conference Bd.* v. *Constr. Indus. Stabilization Comm.,* 393 F. Supp. 480, 501 (N.D. Cal. 1975) (finding that an agency lacked good cause to bypass notice and comment on the grounds that private ''parties would not be expected to alter their conduct in such a way as to frustrate the purposes of the Program in response to announcement of the proposed 'Substantive Policies.' Indeed, the improbability of any change in conduct based upon the 'Substantive Policies' underscores the fact that they did not impose any obligations on anybody that could stimulate evasive conduct.'').

[246] *See Mobil Oil Corp.* v. *Dep't of Energy,* 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983).

[247] *Tenn. Gas Pipeline Co.* v. *FERC,* 969 F.2d 1141, 1144 (D.C. Cir. 1992).

a prior opportunity for comment before the rule takes effect.

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay.[248] The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for foregoing notice and comment rulemaking.[249] For the same reasons set forth above, the Department also concludes that it has good cause to dispense with the 30-day effective date requirement.

In accordance with the above authorities, the Department is bypassing notice and comment requirements of 5 U.S.C. 553(b) and (c) to urgently respond to the economic crisis resulting from COVID–19. This rule is being issued as an interim final rule, and the Department requests public input on all aspects of the rule. Instead of issuing a notice of proposed rulemaking, the Department is taking post-promulgation comments and will review and consider the public comments before issuing a final rule.

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

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* Pursuant to E.O. 12866, OIRA has determined that this is an economically significant regulatory action. However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A). Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated that this rule is a ''major rule,'' as defined by 5 U.S.C. 804(2).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and qualitatively discuss values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Outline of the Analysis

Section III.B.1 describes the need for the IFR, and section III.B.2 describes the process used to estimate the costs of the rule and the general inputs used to reach these estimates, such as wages and number of affected entities. Section III.B.3 explains how the provisions of the IFR will result in costs and transfer payments, and presents the calculations the Department used to reach the cost and transfer payment estimates. In addition, this section describes the qualitative transfer payments and benefits of the changes contained in this IFR. Section III.B.4 summarizes the estimated first-year and 10-year total and annualized costs, perpetuated costs, and transfer payments of the IFR. Finally, section III.B.5 describes the regulatory alternatives that were considered during the development of the IFR.

Summary of the Analysis

The Department expects that the IFR will result in costs and transfer payments. As shown in Exhibit 1, the IFR will have an annualized cost of $3.06 million and a total 10-year cost of $21.51 million at a discount rate of 7 percent in 2019 dollars.[250] The IFR will result in annualized transfer payments of $23.5 billion and total 10-year transfer payments of $165.1 billion at a discount rate of 7 percent in 2019 dollars.[251] When the Department uses a perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost of this IFR is $1.95 million at a discount rate of 7 percent in 2016 dollars.[252]

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND TRANSFER PAYMENTS OF THE IFR

[2019 $ millions]

	Costs	Transfer payments
10-Year Total with a Discount Rate of 3%	$24.79	$198,292
10-Year Total with a Discount Rate of 7%	21.51	165,090
Annualized at a Discount Rate of 3%	2.91	23,246
Annualized at a Discount Rate of 7%	3.06	23,505
Perpetuated Costs * with a Discount Rate of 7% (2016 $ Millions)	.....	1.95

[248] 5 U.S.C. 553(d)(3).

[249] *Riverbend Farms, Inc.* v. *Madigan,* 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed'n of Gov't Emps., AFL–CIO* v. *Block,* 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp.* v. *EPA,* 605 F.2d 283, 289–90 (7th Cir. 1979).

[250] The IFR will have an annualized net cost of $2.91 million and a total 10-year cost of $24.79 million at a discount rate of 3 percent in 2019 dollars.

[251] The IFR will result in annualized transfer payments of $23.25 billion and total 10-year transfer payments of $198.2 billion at a discount rate of 3 percent in 2019 dollars.

[252] To comply with E.O. 13771 accounting, the Department multiplied the initial and then constant rule familiarization costs (initial cost of $4,709,218; constant costs of $2,578,885 in 2019$) by the GDP deflator (0.94242) to convert the cost to 2016 dollars (initial cost of $4,438,062; constant costs of $2,430,393 in 2019$). The Department used this result to determine the perpetual annualized cost ($2,561,735) at a discount rate of 7 percent in 2016 dollars. Assuming the rule takes effect in 2020, the Department divided $2,561,735 by 1.07^4, which equals $1,954,336. This amount reflects implementation of the rule in 2020.

The total cost associated with the IFR includes only rule familiarization. The rule is not expected to result in any cost savings. Transfer payments are the result of changes to the computation of prevailing wage rates for employment opportunities that U.S. employers seek to fill with foreign workers on a temporary basis through H–1B, H–1B1, and E–3 nonimmigrant visas.[253] See the costs and transfer payments subsections of section III.B.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some transfer payments and benefits of the IFR. The Department describes them qualitatively in section III.B.3 (Subject-by-Subject Analysis). The Department invites comments regarding the assumptions, data sources, and methodologies used to estimate the costs and transfer payments from this IFR. The Department invites public comment on any additional benefits or costs that could result from this IFR.

1. Need for Regulation

The Department has determined that new rulemaking is urgently needed to more effectively protect the recruitment and wages of U.S. workers, eliminate any economic incentive or advantage in hiring foreign workers on a permanent or temporary basis in the United States, and further the goals of E.O. 13788, Buy American and Hire American. *See* 82 FR 18837. The ''Hire American'' directive of the E.O. articulates the executive branch policy to rigorously enforce and administer the laws governing entry of nonimmigrant workers into the United States in order to create higher wages and employment rates for U.S. workers and to protect their economic interests. *Id.* sec. 2(b). It directs Federal agencies, including the Department, to propose new rules and issue new guidance to prevent fraud and abuse in nonimmigrant visa programs, thereby protecting U.S. workers. *Id.* sec. 5.

In addition, this IFR is consistent with the aims of the Presidential ''Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak,'' [254] which determined that the entry of additional foreign workers in certain immigrant and nonimmigrant classifications ''presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID–19 outbreak.'' Section 5 of the Proclamation directs the Secretary of Labor to, ''as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action . . . to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit . . . pursuant to an EB–2 or EB–3 immigrant status or an H–1B nonimmigrants visa does not disadvantage United States workers.'' [255]

The Department is therefore amending its regulations at Sections 656.40 and 655.731 to reflect the methodology it will use to determine prevailing wages using wage data from the BLS OES survey for job opportunities in the H–1B, H–1B1, E–3, and permanent labor certification programs. The reports discussed and analyses provided in the preamble above expose how the application of the current wage levels for the four-tier OES prevailing wage structure fail to produce prevailing wages at a level consistent with the wages of U.S. workers similarly employed, and has a suppressive effect on the wages of similarly employed U.S. workers. The Department has a statutory mandate to protect the wages and working conditions of similarly employed U.S. workers from adverse effect caused by the employment of foreign workers in the United States on a permanent or temporary basis. The regulatory changes contained in this IFR are urgently needed as the country continues to recover from the economic crisis caused by the COVID–19 public health emergency in order to more effectively protect the recruitment and wages of U.S. workers and eliminate any economic incentive or advantage in hiring foreign workers on a permanent or temporary basis in the United States through these visa programs.

2. Analysis Considerations

The Department estimated the costs and transfer payments of the IFR relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the regulations governing permanent labor certifications at 20 CFR part 656 and labor condition applications at 20 CFR part 655, subpart H).

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the IFR (*i.e.,* costs and transfer payments that accrue to entities affected). The analysis covers 10 years (from 2021 through 2030) to ensure it captures major costs and transfer payments that accrue over time. The Department expresses all quantifiable impacts in 2019 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4.

Exhibit 2 presents the number of entities affected by the IFR. The number of affected entities is calculated using OFLC performance data from fiscal years (FYs) 2018 and 2019. The Department uses them throughout this analysis to estimate the costs and transfer payments of the IFR.

EXHIBIT 2—NUMBER OF AFFECTED ENTITIES BY TYPE

[FY 2018–2019 average]

Entity type	Number
Unique H–1B Program Certified Employers [256]	64,462
H–1B Program Certified Worker Positions with Prevailing Wage Set by OES [257]	965,885
Unique PERM Employers [258]	26,226

[253] As explained, *infra,* the Department did not quantify transfer payments associated with certifications under the Permanent Labor Certification Program (*e.g.,* EB–2 and EB–3 classifications) because they are expected to be *de minimis.*

[254] Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,* 85 FR 38263 (June 25, 2020); *see also* Proclamation 10054 of June 29, 2020, *Amendment to Proclamation 10052,* 85 FR 40085 (July 2, 2020).

[255] *Id.*

[256] The total unique LCA employers in 2018 and 2019 were 64,875 and 64,049, respectively.

[257] The total number of worker positions associated with LCA certifications that use OES prevailing wages in 2018 and 2019 were 1,023,552 and 908,218, respectively.

[258] The unique employers in 2018 and 2019 were 28,856 and 23,596, respectively.

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of applicants and the change in burden hours required for rule familiarization in section III.B.3 (Subject-by-Subject Analysis).

Compensation Rates

In section III.B.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with implementation of the provisions contained in this IFR. Exhibit 3 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the IFR. The Department used the BLS mean hourly wage rate for private sector human resources specialists.[259] We adjust the wage rates to reflect total compensation, which includes non-wage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). We use an overhead rate of 17 percent [260] and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2019. For the private sector employees, we use a fringe benefits rate of 42 percent.[261]

The Department used the hourly compensation rates presented in Exhibit 3 throughout this analysis to estimate the labor costs for each provision.

EXHIBIT 3—COMPENSATION RATES

[2019 dollars] [262]

Position	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
HR Specialist	$32.58	$13.81 ($32.58 × 0.42)	$5.54 ($32.58 × 0.17)	$51.93

3. Subject-by-Subject Analysis

The Department's analysis below covers the estimated costs and transfer payments of the IFR. In accordance with Circular A–4, the Department considers transfer payments as payments from one group to another that do not affect total resources available to society. The regulatory impact analysis focuses on the costs and transfer payments that can be attributed exclusively to the new requirements in the IFR.

Costs

The following section describes the costs of the IFR.

Rule Familiarization

When the IFR takes effect, existing employers of foreign workers with H–1B, H–1B1, E–3 visas, and those employers sponsoring foreign workers for permanent employment, will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost for existing employers in the temporary and permanent visa programs in the first year. Each year, there are new employers that participate in the temporary and permanent visa programs. Therefore, in each year subsequent to the first year, new employers will need to familiarize themselves with the new regulations.

To estimate the first-year cost of rule familiarization, the Department calculated the average (90,688) number of unique employers requesting H–1B certifications and PERM certifications in FY18 (64,875 + 28,856 = 93,731) and FY19 (64,049 + 23,596 = 87,645). The average number of unique H–1B and PERM employers (90,688) was multiplied by the estimated amount of time required to review the rule (1 hour).[263] This number was then multiplied by the hourly, fully loaded compensation rate of Human Resources Specialists ($51.93 per hour). This calculation results in an initial cost of $4,709,218 in the first year after the IFR takes effect. Each year after the first year the same calculation is done for the number of new unique employers requesting H–1B and PERM certifications (34,164 H–1B + 15,499 PERM = 49,663) in FY19.[264] This calculation results in a continuing annual undiscounted cost of $2.58 million in years 2–10 of the analysis. The one-time and continuing cost yields a total average annual undiscounted cost of $2.79 million. The annualized cost over the 10-year period is $2.91 million and $3.06 million at discount rates of 3 and 7 percent, respectively.

Transfer Payments

Quantifiable Transfer Payments

This section discusses the quantifiable transfer payments related to changes to the computation of the prevailing wage levels.

As discussed in the preamble, the Department determined that current wage levels result in prevailing wage rates for H–1B workers that are far below what their U.S. counterparts are likely paid, which has a suppressive effect on the wages of similarly employed U.S. workers. While allowing employers to access high-skilled workers to fill specialized positions can help U.S. workers' job opportunities in some instances, the benefits of this policy diminish or disappear when the prevailing wage levels do not accurately reflect the wages paid to similarly situated workers in the U.S. labor market. The resulting distortions from a poor calculation of the prevailing wage allow some firms to replace qualified U.S. workers with lower-cost foreign workers.

Therefore, the Department is amending § 656.40(b) by codifying the practice of using four prevailing wage levels and the computations of those wage levels. Specifically, new paragraph (b)(2)(i) stipulates that the ''prevailing wage shall be provided by the OFLC

[259] Bureau of Labor Statistics. (2019). May 2019 National Occupational Employment and Wage Estimates: 13–1071—Human Resources Specialist. Retrieved from: *https://www.bls.gov/oes/current/oes131071.htm.*

[260] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' June 10, 2002, *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[261] BLS. (2019). ''2019 Employer Costs for Employee Compensation.'' Retrieved from: *https://www.bls.gov/news.release/ecec.toc.htm.* Ratio of total compensation to wages and salaries for all private industry workers.

[262] Numbers may slightly differ due to rounding.

[263] This estimate reflects the nature of the IFR. As an IFR to amend parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

[264] FY19 is the only full year of data with new unique entities. In Q1–Q3 of FY20 has a partial year the same percentage of total employers are new as FY19.

Administrator at four levels.'' This paragraph specifies the four new levels (Levels I through IV) to be applied. Level I—currently calculated as the mean of the bottom third of the OES wage distribution—will be calculated as the mean of the fifth decile of the wage distribution. Roughly speaking, this means that the Level I prevailing wage will be adjusted from the 17th percentile to the 45th percentile. Level IV—currently calculated as the mean of the upper two thirds of the OES wage distribution—will now be calculated as the mean of the upper decile of the distribution. This means the fourth wage level will increase approximately from the 67th percentile to the 95th percentile.

Consistent with the formula provided in the INA, Level II will be calculated by dividing by three, the difference between Levels I and IV, and adding the quotient to the computed value for Level I. Level III will be calculated by dividing by three the difference between Levels I and IV, and subtracting the quotient from the computed value for Level IV. This yields a Level II prevailing wage at approximately the 62nd percentile and a Level III prevailing wage at approximately the 78th percentile, as compared to the current computation, which places Level II at approximately the 34th percentile and Level III at approximately the 50th percentile.

Finally, the Department is revising § 655.731 to explain that it will use the BLS's OES survey wage data to establish the prevailing wages in the H–1B, H–1B1, and E–3 visa classifications and added a sentence to explain that these determinations will be made by the OFLC NPC in a manner consistent with § 656.40(b)(2).

The Department calculated the impact on wages that would occur from implementation of the prevailing wage computation changes contained in the IFR. It is expected that the increase in prevailing wages under the IFR will induce some employers to employ U.S. workers instead of foreign workers from the H–1B program, but nonetheless the Department still expects that the same number of H–1B visas will be granted under the annual caps. For many years, the Department has observed that the number of petitions exceeds the numerical cap, as the annual H–1B cap was reached within the first five business days each year from FY2014 through FY2020, and higher prevailing wage levels do not necessarily mean that demand for temporary foreign labor will fall below the available supply of visas. Under existing prevailing wage levels, which the Department has shown are too low and do not accurately reflect the wages paid to similarly situated U.S. workers, demand for temporary foreign labor far exceeds the statutory limits on supply. Usually prices rise in a market when demand exceeds supply. However, given the statutory design of the H–1B system, along with the lower wages for comparable work in many other countries and the non-pecuniary benefits of participating the H–1B program, prices for temporary foreign labor under the H–1B program have stayed too low to depress overall employer demand.

The IFR is still inducing a wage transfer under these cases where U.S. workers are employed instead of H–1B workers and therefore no adjustments to the wage estimates are necessary due to this effect. However, it is possible that prevailing wage increases will induce some employers to train and provide more working hours to incumbent workers, resulting in no increase in employment but an increase in earnings. It is also possible that prevailing wage increases will induce some employers to not hire a worker at all (either U.S. worker or worker from the H–1B program that is subject to the annual cap or not subject to the annual cap), resulting in a decrease in employment of guest workers. However, given that participation in temporary labor certification programs is voluntary and there exists an alternative labor market of U.S. workers who are not being prevented from accepting work offered at potentially lower market-based wages, there is some reason to doubt whether an increase in prevailing wages will lead to an efficiency loss from decreased labor demand. Due to data limitations on the expected change in labor demand and supply of U.S. workers, the Department cannot measure accurately the efficiency gains or losses to the U.S. labor market created by the new prevailing wage system. While the Department discusses this potential impact qualitatively, it welcomes comments on how to estimate changes to efficiency from the new prevailing wage levels.

For each H–1B certification in FY 2018, FY 2019, and FY 2020, the Department used the difference between the estimated prevailing wage level under the IFR and the wage offered under the current baseline to establish the wage impact of the prevailing wage computation changes in each calendar year of the certification's employment period. Under the H–1B visa classification, employment periods for certifications can last for up to three years in length and generally begin up to six months after a certification is issued by the Department. Therefore, a given fiscal year can have wage impacts that start in that calendar year and last up to three years, or could start in the following calendar year and have an end-date up to four calendar years past the fiscal year. For example, an employment start date in March of 2019 may be associated with an H–1B application certified by the Department during FY 2018 and, if that certified application contains a three-year employment period, the wage impacts on the employer will extend through March of 2022. The IFR does not retroactively impact certified wages, so there will be new H–1B applications certified by the Department during FY 2020 that may extend well into the analysis period. Therefore, the first year of the rule will only impact new certifications, the second year new and continuing certifications from year 1 will be impacted, and the third year and beyond both new and continuing certifications from years 1 and 2 will be impacted.

To account for this pattern of wage impacts we classify certifications into three length cohorts and calculate annual wage impacts for each cohort based on FY 2018–FY 2020 data. Those cohorts are: Certifications lasting less than 1 year, certifications lasting 1–2 years, and certifications lasting 2–3 years.

H–1B, H–1B1, or E–3 applications certified by the Department do not necessarily result in employment and employer wage obligations. After obtaining a certification, employers must then submit a Form I–129, Petition for a Nonimmigrant Worker, for approval by U.S. Citizenship and Immigration Services (USCIS). USCIS may approve or deny the H–1B visa petition. USCIS approval data represents approvals of petitions based on both certifications issued by the Department that used OES data for the prevailing wage or that were based on other approved sources to determine the prevailing wage (*e.g.,* Collective Bargaining Agreements, employer-provided surveys). In FY 2020, approximately 92 percent of workers associated with H–1B, H–1B1, and E–3 certifications had prevailing wages based on the OES survey. Therefore, we adjusted the USCIS approvals downward by 8 percent, and then computed the approval rates. Exhibit 4 summarizes FY 2018 and FY 2019 data on H–1B, H–1B1, and E–3 certifications with their prevailing wage based on the OES survey, adjusted USCIS approvals,

and approval rate.[265] To account for approval rates that may differ by geographic location and whether a certification is new or continuing, we adjust each certification's wage impact by the approval rate of the state of intended employment for the employer's certification and whether it is a new or continuing application.[266]

EXHIBIT 4—LCA AND I–129 H–1B, H–1B1, AND E–3 APPROVALS AND DENIALS

	FY 2018			FY 2019			Average percent approved
	LCA certified	USCIS approved +	Percent approved	LCA certified	USCIS approved +	Percent approved	
Total	1,023,552	308,147	30	908,218	368,811	41	35
New	423,174	80,855	19	378,175	132,965	35	27
Continuing *	600,378	227,292	38	530,043	235,846	44	41

* Includes: ''Continued Employment'', ''Change Previous Employment'', ''Change Employer'', ''Amended Petition'', ''New Concurrent Employment''
+ Approval numbers adjusted by 92% to account for approvals with prevailing wages set by sources other than OES.

To estimate the wage impacts of new percentiles contained in this IFR, the Department used publicly available BLS OES data that reports the 10th, 25th, 50th, 75th, and 90th percentile wages by SOC code and metropolitan or non-metropolitan area.[267] In order to estimate wages for the new IFR levels of 45th, 62nd, 78th, and 95th percentiles, the Department linearly interpolated between relevant percentiles for reported wages at each SOC code and geographic area combination.[268] For the 95th percentile, the Department used OES wages reported for the 90th percentile at each SOC code and geographic area combination.

For an illustrative example in Exhibit 5, to calculate projected wage impacts under the IFR, the Department first multiplied the number of certified workers by the number of hours worked in each calendar year (2,080 hours) and the new prevailing wage for the level the workers were certified at for the particular SOC and the geographic area combination. The examples in Exhibit 5 set forth how the Department calculated the IFR wage impact for an individual case of each length cohort.

EXHIBIT 5—PREVAILING WAGE UNDER THE IFR
[Example cases]

Length cohort	Number of certified workers	Prevailing wage (hour)	Number of hours worked in 2018	Number of hours worked in 2019	Number of hours worked in 2020	Total wages 2018	Total wages 2019	Total wages 2020	Total wages 2018–2020	USCIS approval rate (percent)	Adjusted total wages
	(a)	(b)	(c)	(d)	(e)	(a * b * c) = (f)	(a * b * d) = (g)	(a * b * e) = (h)	(f + g + h) = (i)	(j)	(i * j)
<1 Year	100	$39.56	648	1032	0	$2,563,488	$4,082,592	$0	$6,646,080	19	$1,262,755
1–2 Years	100	27.13	1048	1032	0	2,843,224	2,799,816	0	5,643,040	25	1,410,760
2–3 Years	100	27.92	528	2080	1568	1,474,176	5,807,360	4,377,856	11,659,392	18	2,098,691

After the total wages for the IFR was determined, the wage calculation under the current offered wage levels was calculated. The currently offered wage is always equal to or greater than the current prevailing wage because some certifications offer a wage higher than the prevailing wage. The methodology is the same as that used to estimate the projected wages under the IFR: Number of certified workers is multiplied by the number of hours worked in each calendar year (based on 2,080 hours in a full year) of certified employment and the actual offered wage for the certified workers (Exhibit 6 provides an example of the calculation of the baseline wages for the same case as in Exhibit 5).

EXHIBIT 6—CURRENT PREVAILING WAGE
[Example cases]

Length cohort	Number of certified workers	Prevailing wage (year)	Prevailing wage	Number of hours worked in 2018	Number of hours worked in 2019	Number of hours worked in 2020	Total wages 2018	Total wages 2019	Total wages 2020	Total wages 2018–2020	USCIS approval rate (percent)	Adjusted total wages
	(a)	(b)	(b/2080) = (c)	(d)	(e)	(f)	(a * c * d) = (g)	(a * c * e) = (h)	2020 (a * c * f) = (i)	(g+h+i) = (j)	(k)	(j*k)
<1 Year	100	$77,459.00	$37.24	648	1032	0	$2,413,146	$3,843,158	$0	$6,256,304	19	$1,188,698
1–2 Years	100	50,316.00	24.19	1048	1032	0	2,535,152	2,496,448	0	$5,031,600	25	1,257,900
2–3 Years	100	48,432.00	23.28	528	2080	1568	1,229,428	4,843,200	3,651,028	9,723,655	18	1,750,258

Once the baseline offered wage was obtained, the Department estimated the wage impact of the IFR prevailing wage levels by subtracting the baseline offered wage for each calendar year from the IFR prevailing wage. The total wage impact was then multiplied by the average USCIS petition beneficiary approval rate for the state of intended employment. Estimating wage impacts is calculated here for the examples in Exhibits 5 and 6, above. For the length cohort less than 1 year, the impact in 2018 was $28,565 (($2,563,488 − $2,413,146) * 0.19) and

[265] Form I–129 data for H–1B is obtained from the USCIS H–1B data hub. Retrieved from: *https://www.uscis.gov/tools/reports-and-studies/h-1b-employer-data-hub.*

[266] Both USCIS H–1B data and LCA data indicate the state for which the work is to be completed. Therefore, approval rates are calculated separately for each state and used in the analysis.

[267] BLS OES data for Metropolitan and Nonmetropolitan Areas acquired for each year required for the analysis: May 2016–May 2019. Retrieved from *https://www.bls.gov/oes/current/oessrcma.htm.*

[268] For example, if OES reports a wage of $30 per hour at the 25th percentile and $40 per hour at the 50th percentile then the 45th percentile is interpolated as $30 + ($40 − $30) * ((45–25)/(50–25)) = $38 per hour.

$45,492 in 2019 (($4,082,592 − $3,843,158) * 0.19). For the length cohort of 1–2 years, the impact in 2018 was $77,018 (($2,843,224 − $2,535,152) * 0.25), and in 2019 was $75,842 (($2,799,816 − $2,496,448) * 0.25). The example for length cohort 2–3 years had wage impacts in 2018, 2019, and 2020. In the 2018 the wage impact was $44,055 (($1,474,176 − $1,229,428) * 0.18), $173,549 in 2019 (($5,807,360 − $4,843,200) * 0.18), and $130,829 in 2020 (($4,377,856 − $3,651,028) * 0.18).

To base the estimated wage impacts on three years of data, and to include the most recent data (*i.e.,* FY 2020), this process was done for each certification using the FY 2018–FY 2020 certification data. FY 2020 certification data only consists of three quarters of data as of the publication date of this IFR. Therefore, to estimate wage transfers for three full years of data, FY 2020 Q4 data was simulated based on FY 2019 data. The Department used the Employment Cost Index (ECI) to inflate the FY 2019 Q4 total wage impacts by length cohort to be representative of the potential FY 2020 Q4 total wage impacts. The most recent annual growth rate of the ECI, from June 2019 to June 2020 (2.7 percent), was used to inflate the 2019 Q4 total wage impacts. Total wage impacts were inflated in each calendar year for each length cohort, separated by whether the wages in each calendar year and cohort were paid to new workers for the first time in that year, or if the wages were being paid to workers whose employment was continuing from prior calendar years. The estimated FY 2020 Q4 wage impacts were summed with the FY 2020 Q1–Q3 wage impacts to create an estimate of the total wage impact for the fiscal year.

Existing prevailing wage data from the Foreign Labor Certification (FLC) Data Center, accessible at *http://www.flcdatacenter.com*, contains wage data for each SOC code and geographic area combination that are not readily available in the public OES data used to estimate new prevailing wage levels. For example, when a wage is not releasable for a geographic area, the prevailing wage available through the FLC Data Center may be computed by BLS for the geographic area plus its contiguous areas. Additionally, in publicly available OES data, some percentiles are missing for certain combinations of SOC codes and geographic areas. These two factors result in a small number of certifications having no match with a new prevailing wage level.[269] To estimate wage impacts for workers associated with these certifications, the average wage impact per worker, for the given cohort and fiscal year the certification is associated with, is calculated and then applied to the number of workers associated with the certification that does not match. This produces a series of estimated wage impacts for workers that are not matched with new prevailing wages in the public OES data for each calendar year for which they have employment. These wage impacts are then estimated to the calculated wage impact to produce a final total wage impact for each cohort in each calendar year.

The Department determined the total impact of the IFR prevailing wage levels for each length cohort in each calendar year by summing the wage impacts for all certifications in each year and averaging the totals. The wage impacts for each cohort and calendar year are presented in Exhibit 7. Some calendar years do not have values because the cohort, based on FY 2018–FY 2020 data, does not have a full year of data for those years. For example, calendar year 2021 does have new entries from FY 2020 data but it is not a complete year of data as FY 2021 would also have new entries, and therefore it is not included.

EXHIBIT 7—ESTIMATED WAGE TRANSFERS (FY18–FY20 DATA)

[Million 2019$]

	CY 18	CY 19	CY 20	CY 21	CY 22	Annual average
<1 Year:						
New	$24.8	$16.8	$17.2	N/A	N/A	$19.6
Continuing	7.0	13.5	8.3	4.2	N/A	8.3
1–2 Years:						
New	86.2	61.7	54.0	N/A	N/A	67.3
Continuing	N/A	144.6	119.6	75.4	N/A	113.2
2–3 Years:						
New	6,965	3,502	2,806	N/A	N/A	4,424
Continuing	N/A	13,910	7,401	5,655	N/A	8,989
Continuing 3+	N/A	N/A	15,790	14,031	8,794	12,872

The annual average for each length cohort is used to produce the total transfers over the 10-year horizon. Each cohort enters in each year and has continuing wage impacts based on its cohort length. Therefore, in years 3–10 (2023–2030), the annual wage impact is equal to the sum of each cohort's annual average. This series is presented below in Exhibit 8.

EXHIBIT 8—TOTAL TRANSFER PAYMENTS OF THE IFR

[2019$ millions]

Cohort	<1		1–2 Years		2–3 Years			Total
	New	Continuing	New	Continuing	New	Continuing	Continuing 3+	
2021	$19.6	$0.0	$67.3	$0.0	$4,424	$0	$0	$4,511

[269] In FY 2018, 6 percent of certifications do not match, in FY 2019 9 percent, and FY 2020 6 percent.

EXHIBIT 8—TOTAL TRANSFER PAYMENTS OF THE IFR—Continued
[2019$ millions]

Cohort	<1		1–2 Years		2–3 Years			Total
	New	Continuing	New	Continuing	New	Continuing	Continuing 3+	
2022	19.6	8.3	67.3	113	4,424	8,989	0	13,621
2023	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2024	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2025	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2026	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2027	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2028	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2029	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2030	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
10-year total	196	74	673	1,019	44,245	80,898	102,973	230,077

The changes in prevailing wage rates constitute a transfer payment from employers to employees. The Department estimates the total transfer over the 10-year period is $198.29 billion and $165.09 billion at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $23.25 billion and $23.5 billion at discount rates of 3 and 7 percent, respectively.

With the increases in prevailing wage levels under this IFR, some employers may decide not to hire a U.S. worker or a foreign worker on a temporary or permanent basis. The prevailing wage increase may mitigate labor arbitrage and induce some employers to train and provide more working hours to incumbent workers, resulting in no increase in employment. The Department is unable to quantify the extent to which these two factors will occur and therefore discusses them qualitatively.

The labor economics literature has a significant volume of research on the impact of wages on demand for labor. Of interest in the context of the H–1B program is the long-run own-wage elasticity of labor demand that describes how firms demand labor in response to marginal changes in wages. There is significant heterogeneity in estimates of labor demand elasticities that can depend on industry, skill-level, region, and more.[270] A commonly cited value of average long-run own-wage elasticity of labor demand is −0.3.[271] This would mean that a one percent increase in wage would reduce demand for labor by 0.3 percent. The average annual increase in wage transfers is a 25.8 percent increase in wage payments,[272] which would imply a potential reduction in labor demand by 7.74 percent (25.8 * .3). It is likely that U.S. employers will pay higher wages to H–1B workers or replace them with U.S. workers to the extent that is possible. However, we can approximate that, if U.S. employers were limited in the ability to pay higher wages and did reduce demand, it would reduce the transfer payment by approximately 7.74 percent. The annual average undiscounted wage transfer estimate of $23.0 billion would therefore be reduced to $21.2 billion.

Non-Quantifiable Transfer Payments

This section discusses the non-quantifiable transfer payments related to changes to the computation of the prevailing wage levels. Specifically, the Department did not quantify transfer payments associated with certifications under the Permanent Labor Certification Program because they are expected to be *de minimis.*

The PERM programs have a large proportion of certifications issued annually to foreign beneficiaries that are working in the U.S. at the time of certification and would have changes to wages under the IFR prevailing wage. Prior to the PERM certification, these beneficiaries are typically working under H–1B, H–1B1, and E–3 temporary visas and wage transfers for these PERM certifications are therefore already factored into our wage transfer calculations for H–1B, H–1B1, and E–3 temporary visas. Below, Exhibit 9 illustrates the percentage of PERM certifications that are on H–1B, H–1B1, or E–3 temporary visas, the percent that are not on a temporary visa and/or are not currently in the U.S. and would therefore enter on an EB–2 or EB–3 visa, and all other visa classes.

EXHIBIT 9—PERM CERTIFICATIONS BY CLASS OF ADMISSION, FY18–FY20

Category	FY18	FY19	FY20	Average percent of total
Not on a temporary visa/not currently residing in the United States	10,047	9,841	5,311	9.7
H–1B visa	74,454	63,976	44,887	71.7
H–1B1 visa	109	81	54	0.1
E–3 visa	471	280	160	0.3
All other visa classifications *	24,469	12,907	10,520	18.1

[270] For a full discussion of labor demand elasticity heterogeneity see Lichter, A., Peichl, A., & Siegloch, S. (2015). The own-wage elasticity of labor demand: A meta-regression analysis. European Economic Review, 94–119: Retrieved from: *https://www.econstor.eu/bitstream/10419/93299/1/dp7958.pdf.*

[271] This value is the best-guess in seminal work by Hamermesh, D.H. (1993). Labor Demand. Princeton University Press. Values around −0.3 have been further estimated by additional studies including in meta-analysis studies as cited in footnote 10.

[272] The average unadjusted total wages paid to employees impacted by the IFR in the FY18–FY20 datasets is $209.1 billion. The average unadjusted total wages paid to those same employees in the baseline in the FY18–FY20 datasets is $263.2 billion. This represents a 25.8 percent increase in wages. Not all of these wages are paid due to USCIS approval rates, but the wages would adjust proportionally (*i.e.,* the percentage increase would remain the same).

EXHIBIT 9—PERM CERTIFICATIONS BY CLASS OF ADMISSION, FY18–FY20—Continued

Category	FY18	FY19	FY20	Average percent of total
Total	109,550	87,085	60,932	100

Other visa classes include: A1/A2, L–1, F–1, A–3, B–1, C–1, TN, C–3, E–2, B–2, D–1, D–2, H–4, O–1, E–1, EWI, J–1, TPS, F–2, L–2, G–4, H–2A, G–1, G–5, H–1A, Parolee, P–1, J–2, H–3, I, M–1, R–1, O–2, M–2, P–3, O–3, VWT, TD, P–2, P–4, Q, VWB, R–2, N, S–6, T–1, V–2, T–2, K–4, U–1.

About 10 percent of PERM certifications are issued annually by OFLC to foreign beneficiaries who do not currently reside in the U.S. and would enter on immigrant visas in the EB–2 or EB–3 preference category. Employment-based immigrant visa availability and corresponding wait times change regularly for different preference categories and countries. Foreign workers from countries with significant visa demand consistently experience delays, at times over a decade. Therefore, employers would not have wage obligations until at the earliest, the very end of the 10-year analysis period and the number of relevant certifications is a relatively small percent of all PERM certifications; the Department therefore has not included associated wage transfers in the analysis.

Benefits Discussion

This section discusses the non-quantifiable benefits related to changes to the computation of the prevailing wage levels.

The Department's increase in the prevailing wages for the four wage levels is expected to result in multiple benefits that the Department is unable to quantify but discusses qualitatively. One benefit of the IFR's increase in prevailing wages is the economic incentive to increase employee retention, training, and productivity which will increase benefits to both employers and U.S. workers. The increase in prevailing wages is expected to induce employers—particularly those using the permanent and temporary visa programs—to fill critical skill shortages, to minimize labor costs by implementing retention initiatives to reduce employee turnover, and/or to increase the number of work hours offered to similarly employed U.S. workers. Furthermore, for employers in the technology and health care sectors, this could mean using higher wages to attract and hire the industry's most productive U.S. workers and to provide them with the most advanced equipment and technologies to perform their work in the most efficient manner.

This high-wage, high-skill approach to minimizing labor costs is commonly referred to as the ''efficiency wage'' theory in labor economics; a well-established strategy that allows companies employing high-wage workers to minimize labor costs and effectively compete with companies employing low-wage workers. The efficiency wage theory supports the idea that increasing wages can lead to increased labor productivity because workers feel more motivated to work at higher wage levels. Where these jobs offer wages that are significantly higher than the wages and working conditions of alternative jobs, workers will have a greater incentive to be loyal to the company, impress their supervisors with the quality of their work, and exert an effort that involves no shirking. Thus, if employers increase wages, some, or all, of the higher wage costs can be recouped through increased staff retention, lower costs of supervision, and higher labor productivity.

Strengthening prevailing wages will also help promote and protect jobs for American workers. By ensuring that the employment of any foreign worker is commensurate with the wages paid to similarly employed U.S. workers, the Department will be protecting the types of white-collar, middle-class jobs that are critical to ensuring the economic viability of communities throughout the country.

There is some evidence that the existing prevailing wage levels offer opportunities to use lower-cost alternatives to U.S. workers doing similar jobs by offering two wage levels below the median wage. For example, in FY 2019, 60 percent of H–1B workers were placed at either the first or second wage level, meaning a substantial majority of workers in the program could be paid wages well below the median wage for their occupational classification.[273] By setting the Level I wage level at the 45th percentile, employers using the H–1B and PERM programs will have less of an incentive to replace U.S. workers doing similar jobs at lower wage rates when there are available U.S. workers. This will increase earnings and standards of living for U.S. workers. It also will level the playing field by reducing incentives to replace similarly employed U.S. workers with a low-cost foreign alternative.

In addition, because workers with greater skills tend to be more productive, and as a result can command higher wages, raising the prevailing wage levels will lead to the limited number of H–1B visas going to higher-skilled foreign workers, which will likely increase the spillover economic benefits associated with high-skilled immigration.

Finally, ensuring that skilled occupations are not performed at below-market wage rates by foreign workers will provide greater incentives for firms to expand education and job training programs. These programs can attract and develop the skills of a younger generation of U.S. workers to enter occupations that currently rely on elevated levels of foreign workers.

4. Summary of the Analysis

Exhibit 10 below summarizes the costs and transfer payments of the IFR. The Department estimates the annualized cost of the IFR at $3.06 million and the annualized transfer payments (from H–1B, H–1B1, and E–3 employers to workers) at $23.5 billion, at a discount rate of 7 percent. The Department did not estimate any cost savings. For the purpose of E.O. 13771, the annualized cost, when perpetuated, is $1.95 million at a discount rate of 7 percent in 2016 dollars.

[273] Costa and Hira (2020), H–1B Visas and Prevailing Wage Levels, Economic Policy Institute: Retrieved August 12, 2020 from *https://files.epi.org/pdf/186895.pdf.*

EXHIBIT 10—ESTIMATED MONETIZED COSTS AND TRANSFER PAYMENTS OF THE IFR

[2019$ millions]

	Costs	Transfer payments
2021	$4.71	$4,511
2022	2.58	13,621
2023	2.58	26,493
2024	2.58	26,493
2025	2.58	26,493
2026	2.58	26,493
2027	2.58	26,493
2028	2.58	26,493
2029	2.58	26,493
2030	2.58	26,493
Undiscounted Total	27.92	230,077
10-Year Total with a Discount Rate of 3%	24.79	198,292
10-Year Total with a Discount Rate of 7%	21.51	165,090
10-Year Average	2.79	23,008
Annualized with a Discount Rate of 3%	2.91	23,246
Annualized with a Discount Rate of 7%	3.06	23,505
Perpetuated Net Costs with a Discount Rate of 7% (2016$ Millions)		1.95

5. Regulatory Alternatives

The Department considered two alternatives to the chosen approach of establishing the prevailing wage for Levels I through IV, respectively, at approximately the 45th percentile, the 62nd percentile, the 78th percentile, and the 95th percentile.

First, the Department considered an alternative that would modify the number of wage tiers from four levels to three levels. Under this alternative, prevailing wages would be set for Levels I through III at the 45th, 75th, and 95th percentile, respectively. Modifying the number of wage tiers to three levels would allow for more manageable wage assignments that would be easier for employers and employees to understand due to decreased complexity to matching wage tiers with position experience. A three-tiered prevailing wage structure would maintain the minimum entry-level and fully competent experience levels and simplify the intermediate level of experience by combining the current qualified and experienced distinctions. The Department prefers the chosen methodology over this alternative because the chosen four-tiered prevailing wage structure is likely to produce more accurate prevailing wages than a three-tiered structure due to the ability to have two intermediate wage levels. In addition, creating a three-tiered prevailing wage structure would require a statutory change.

The Department considered a second alternative that would modify the geographic levels for assigning prevailing wages for the SOC code within the current four-tiered prevailing wage structure, which ranges from local MSA or BOS areas to national, to a two-tiered geographic area structure containing only statewide or national area estimates. By assigning prevailing wages at a statewide or, where statewide averages cannot be reported by the BLS, national geographic area, this second alternative would again simplify the prevailing wage determination process by reducing the number of distinct wage computations reported by the BLS and provide employers with greater certainty regarding their wage obligations, especially where the job opportunity requires work to be performed in a number of different worksite locations within a state or regional area. This process would also reduce variability in prevailing wages within a state for the same occupations across time, making prevailing wages more consistent and uniform. However, this method would not account for wage variability that may occur within states and that can account for within-state differences in labor market dynamics, industry competitiveness, or cost of living.

The Department prefers the chosen methodology because it preserves important differences in county and regional level prevailing wages and better aligns with the statutory requirement that the prevailing wage be the wage paid in the area of employment. The Department also seeks public comments to help us to identify any other regulatory alternatives that should be considered.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is unlikely to have a significant economic impact on a substantial number of small entities, the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required.[274] The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department expects that this IFR will likely have a significant economic impact on a substantial number of small entities and is therefore publishing this Initial Regulatory Flexibility Analysis (IRFA), as required by the RFA. The Department invites public comment on all aspects of this IRFA, including the estimates related to the number of small entities affected by the IFR and expected

[274] *See* 5 U.S.C. 605.

costs. The Department also invites public comment on whether viable alternatives exist that would reduce the burden on small entities while remaining consistent with statutory requirements and the objectives of the IFR.

1. Why the Department Is Considering Action

The Department has determined that new rulemaking needed to will better protect the wages and job opportunities of U.S. workers, minimize incentives to hire foreign workers over U.S. workers on a permanent or temporary basis in the United States under the H–1B, H–1B1, and E–3 visa programs and the PERM program, and further the goals of Executive Order 13788, Buy American and Hire American. In addition, this IFR is consistent with the aims of the Presidential ''Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak,'' which found that the entry of additional foreign workers in certain immigrant and nonimmigrant classifications ''presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID–19 outbreak.'' Accordingly, this IFR revises the computation of wage levels under the Department's four-tiered wage structure based on the OES wage survey administered by the BLS to ensure that wages paid to immigrant and nonimmigrant workers are commensurate with the wages of U.S. workers with comparable levels of education, experience, and levels of supervision in the occupation and area of employment.

2. Objectives of and Legal Basis for the IFR

The Department is amending its regulations at Sections 656.40 and 655.731 to reflect the methodology the Department will use to determine prevailing wages based on the BLS's OES survey for job opportunities in the H–1B and PERM programs. The revised methodology will establish the prevailing wage for Levels I through IV, respectively, at approximately the 45th percentile, the 62nd percentile, the 78th percentile, and the 95th percentile.

The INA assigns responsibilities to the Secretary relating to the entry and employment of certain categories of employment-based immigrants and nonimmigrants. This rule relates to the labor certifications that the Secretary issues for certain employment-based immigrants and to the LCAs that the Secretary certifies in connection with the temporary employment of foreign workers under the H–1B, H–1B1, and E–3 visa classifications.[275] The Department has a statutory mandate to protect the wages and working conditions of similarly-employed U.S. workers from adverse effects caused by the employment of foreign workers in the U.S. on a permanent or temporary basis. This, in turn, will protect jobs of U.S. workers as a part of responding to the coronavirus public health emergency, and facilitate the Nation's economic recovery.

3. Estimating the Number of Small Entities Affected by the Rulemaking

The Department collected employment and annual revenue data from the business information provider Data Axle and merged those data into the H–1B, H–1B1, and E–3 visa program disclosure data (H–1B disclosure data) for FY 2019.[276] This process allowed the Department to identify the number and type of small entities using the H–1B program and their annual revenues. A single employer can apply for H–1B workers multiple times; therefore, unique employers were identified. The Department was able to obtain data matches for 34,203 unique H–1B employers. Next, the Department used the SBA size standards to classify 26,354 of these employers (or 77.1 percent) as small.[277] These unique small employers had an average of 75 employees and average annual revenue of approximately $18.61 million. Of these unique employers, 22,430 of them had revenue data available from Data Axle. The Department's analysis of the impact of this IFR on small entities is based on the number of small unique employers (22,430 with revenue data).

To provide clarity on the types of industries impacted by this regulation, Exhibit 11 shows the number of unique H–1B small entity employers with certifications in FY 2019 within the top 10 most prevalent industries at the 6-digit and 4-digit NAICS code level. Depending on when their employment period starts and the length of the employment period (up to 3 years), small entities with certifications in FY 2019 can have wage obligations in calendar years 2018 through 2023,three.

EXHIBIT 11—NUMBER OF H–1B SMALL EMPLOYERS BY NAICS CODE

	Description	Number of employers					
		2018	2019	2020	2021	2022	2023
6-Digit NAICS:							
511210	Software Publishers	468 (13%)	1,570 (6%)	1,578 (6%)	1,557 (6%)	1,477 (6%)	127 (14%)
541511	Custom Computer Programming Services.	413 (11%)	1,149 (4%)	1,155 (4%)	1,141 (5%)	1,082 (5%)	101 (11%)
621111	Offices of Physicians (except Mental Health Specialists).	138 (4%)	1,092 (4%)	1,097 (4%)	1,082 (4%)	1,004 (4%)	34 (4%)
541330	Engineering Services	94 (3%)	971 (4%)	977 (4%)	964 (4%)	913 (4%)	13 (1%)
611310	Colleges, Universities, and Professional Schools.	104 (3%)	637 (2%)	644 (2%)	627 (2%)	588 (3%)	39 (4%)
541110	Offices of Lawyers	58 (2%)	607 (2%)	606 (2%)	596 (2%)	549 (2%)	13 (1%)
611110	Elementary and Secondary Schools	45 (1%)	625 (2%)	621 (2%)	577 (2%)	509 (2%)	11 (1%)
541310	Architectural Services	24 (1%)	501 (2%)	503 (2%)	499 (2%)	465 (2%)	1 (0%)
541714	Research and Development in Biotechnology (except Nano biotechnology).	53 (1%)	444 (2%)	445 (2%)	437 (2%)	411 (2%)	15 (2%)

[275] *See* 8 U.S.C. 1101(a)(5), 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i)(b), 1101(a)(15)(H)(i)(b1), 1182(n), 1182(t)(1), 1184(c).

[276] The PERM program has a large proportion of certifications issued annually to foreign beneficiaries that are working in the U.S. at the time of certification. Prior to the PERM certification, these beneficiaries are typically working under H–1B, H–1B1, and E–3 temporary visas. Therefore, the Department has not included estimates for PERM employers in the IRFA, consistent with the analysis and estimates contained in the E.O. 12866 section. The Department considered PERM employers for purposes of calculating one–time costs in the E.O. 12866 section but did not consider these employers for purposes of cost transfers.

[277] Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes.* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

EXHIBIT 11—NUMBER OF H–1B SMALL EMPLOYERS BY NAICS CODE—Continued

	Description	Number of employers					
		2018	2019	2020	2021	2022	2023
541614	Process, Physical Distribution, and Logistics Consulting Services.	89 (2%)	394 (2%)	399 (2%)	392 (2%)	369 (2%)	25 (3%)
Other NAICS		2,197 (60%)	17,695 (69%)	17,755 (69%)	17,395 (69%)	15,841 (68%)	556 (59%)
4-Digit NAICS:							
5112	Software Publishers	468 (13%)	1,570 (6%)	1,578 (6%)	1,557 (6%)	1,477 (6%)	127 (14%)
5413	Architectural, Engineering, and Related Services.	128 (3%)	1,677 (7%)	1,687 (7%)	1,667 (7%)	1,572 (7%)	17 (2%)
5415	Computer Systems Design and Related Services.	521 (14%)	1,518 (6%)	1,526 (6%)	1,508 (6%)	1,427 (6%)	128 (14%)
5416	Management, Scientific, and Technical Consulting Services.	320 (9%)	1,437 (6%)	1,449 (6%)	1,427 (6%)	1,318 (6%)	70 (7%)
6211	Offices of Physicians	138 (4%)	1,092 (4%)	1,097 (4%)	1,082 (4%)	1,004 (4%)	34 (4%)
5417	Scientific Research and Development Services.	101 (3%)	660 (3%)	663 (3%)	652 (3%)	606 (3%)	28 (3%)
6113	Colleges, Universities, and Professional Schools.	104 (100%)	637 (2%)	644 (2%)	627 (2%)	588 (3%)	39 (4%)
5239	Other Financial Investment Activities	73 (2%)	635 (2%)	638 (2%)	629 (2%)	572 (2%)	21 (2%)
5411	Legal Services	59 (2%)	615 (2%)	614 (2%)	604 (2%)	556 (2%)	13 (1%)
5412	Accounting, Tax Preparation, Bookkeeping, and Payroll Services.	41 (1%)	596 (2%)	599 (2%)	589 (2%)	558 (2%)	12 (1%)
Other NAICS		1,730 (47%)	15,248 (59%)	15,285 (59%)	14,925 (59%)	13,530 (58%)	446 (48%)

4. Compliance Requirements of the IFR, Including Reporting and Recordkeeping

The Department has considered the incremental costs for small entities from the baseline (*i.e.,* the current practices for complying, at a minimum, with the regulations governing permanent labor certifications at 20 CFR part 656 and labor condition applications at 20 CFR part 655, subpart H) to this IFR. We estimated the cost of (a) the time to read and review the IFR and (b) wage costs. These estimates are consistent with those presented in the E.O. 12866 section.

5. Calculating the Impact of the IFR on Small Entities

The Department estimates that small entities using the H–1B program, 22,430 unique employers would incur a one-time cost of $51.93 to familiarize themselves with the rule.[278] [279]

In addition to the total first-year cost above, each small entity using the H–1B program may have an increase in the annual wage costs due to the revisions to the wage structure if they currently offer a wage lower than the IFR prevailing wage levels. For each small entity, we calculated the likely annual wage cost as the sum of the total IFR wage minus the total baseline wage for each small entity identified from the H–1B disclosure data in FY 2019. We added this change in the wage costs to the total first-year costs to measure the total impact of the IFR on the small entity. Small entities with certifications in FY 2019 can have wage obligations in calendar years 2018 through 2023, depending on when their employment period starts and the length of the employment period (up to 3 years). Because USCIS does not approve all certifications, the estimated wage obligations for some small entities may be overestimated. The Department is unable to determine which small entities had certifications approved or not approved by USCIS and therefore estimates the total wage obligation with no adjustment for USCIS approval rates. As a result estimates of the total cost to small entities are likely to be inflated. The Department seeks public comments on how to best estimate which small entities had certifications approved by USCIS. Exhibit 12 presents the number of small entities with a wage impact in each year, as well as the average wage impact per small entity in each year.

EXHIBIT 12—WAGE IMPACTS ON H–1B PROGRAM SMALL ENTITIES

Proportion of revenue impacted	2018	2019	2020	2021	2022	2023
Number of H–1B Small Entities with Wage Impacts	2,790	20,418	20,503	20,158	18,756	717
Average Wage Impact per Small Entity	$14,664	$110,504	$216,187	$212,130	$112,563	$19,044

The Department determined the proportion of each small entity's total revenue affected by the costs of the IFR to determine if the IFR would have a significant and substantial impact on small entities. The cost impacts included estimated first-year costs and the wage costs introduced by the IFR. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact, and assumed that 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities generally.

[278] $51.93 = 1 hour × $51.93, where $51.93 = $32.58 + ($32.58 × 42%) + ($32.58 × 17%).

[279] The Department considered PERM employers for purposes of calculating one-time costs in the E.O. 12866 section.

The Department has used a threshold of three percent of revenues in prior rulemakings for the definition of significant economic impact.[280] This threshold is also consistent with that sometimes used by other agencies.[281] The Department also believes that its assumption that 15 percent of small entities will be substantially affected experiencing a significant impact to determine whether the rule has a substantial impact on small entities is appropriate. The Department has used the same threshold in prior rulemakings for the definition of substantial number of small entities.[282]

Of the 22,430 unique small employers with revenue data, up to 16 percent of employers would have more than 3 percent of their total revenue affected in 2019, 28 percent in 2020 and 2021, and up to 21 percent in 2022. Exhibit 13 provides a breakdown of small employers by the proportion of revenue affected by the costs of the IFR.

EXHIBIT 13—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	2018	2019	2020	2021	2022	2023
<1%	2,708 (85%)	15,098 (69%)	11,748 (54%)	11,748 (54%)	12,411 (62%)	737 (94%)
1%–2%	232 (7%)	2,215 (10%)	2,475 (11%)	2,475 (11%)	2,274 (11%)	18 (2%)
2%–3%	75 (2%)	1,119 (5%)	1,464 (7%)	1,464 (7%)	1,182 (6%)	10 (1%)
3%–4%	64 (2%)	615 (3%)	965 (4%)	965 (4%)	730 (4%)	8 (1%)
4%–5%	29 (1%)	429 (2%)	674 (3%)	674 (3%)	568 (3%)	1 (0%)
>5%	89 (3%)	2,538 (12%)	4,363 (20%)	4,363 (20%)	2,815 (14%)	10 (1%)
Total >3%	182 (6%)	3,582 (16%)	6,002 (28%)	6,002 (28%)	4,113 (21%)	19 (2%)

6. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the IFR

The Department is not aware of any relevant Federal rules that conflict with this IFR.

7. Alternative to the IFR

The RFA directs agencies to assess the effects that various regulatory alternatives would have on small entities and to consider ways to minimize those effects. Accordingly, the Department considered two regulatory alternatives to the chosen approach of establishing the prevailing wage for Levels I through IV, respectively, at approximately the 45th percentile, the 62nd percentile, the 78th percentile, and the 95th percentile.

First, the Department considered an alternative that would modify the number of wage tiers from four levels to three levels. Under this alternative, the Department attempted to set the prevailing wages for Levels I through III, respectively, at the 45th, 75th, and 95th percentile. Modifying the number of wage tiers to three levels would allow for more manageable wage assignments that would be easier for small entities and their employees to understand due to decreased complexity to matching wage tiers with position experience. The Department decided not to pursue this alternative because the chosen four-tiered wage methodology is likely to be more accurate than the three-tiered wage level because it has two intermediate wage levels. In addition, creating a three-tiered wage level would require a statutory change. Although the Department recognizes that legal limitations prevent this alternative from being actionable, the Department nonetheless presents it as a regulatory alternative in accord with OMB guidance.[283]

The Department considered a second alternative that attempted to modify the geographic levels for assigning prevailing wages for the occupation from the current four-tiered structure, which ranges from local MSA or BOS areas to national, to a two-tiered structure containing statewide or national levels. By assigning prevailing wages at a statewide or national level (depending on whether statewide averages can be reported by BLS), this second alternative attempted to simplify the prevailing wage determination process by reducing the number of distinct wage computations reported by the BLS. It would also provide small entities with greater certainty regarding their wage obligations, especially where the job opportunity requires work to be performed in a number of different worksite locations within a state or regional area. The Department decided not to pursue this alternative because the chosen methodology preserves important differences in county and regional level prevailing wages, and it would require a statutory change.

The Department invites public comments on these alternatives and other alternatives to reduce the burden on small entities while remaining consistent with the objectives of the proposed rule.

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of $100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI–U) is approximately $168 million based on the Consumer Price Index for All Urban Consumers.[284]

[280] *See, e.g.,* 79 FR 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors), 81 FR 39108 (June 15, 2016, Discrimination on the Basis of Sex), and 84 FR 36178 (July 26, 2019, Proposed Rule for Temporary Agricultural Employment of H–2A Nonimmigrants in the United States).

[281] *See, e.g.,* 79 FR 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant).

[282] *See, e.g.,* 79 FR 60633 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 84 FR 36178 (July 26, 2019, Proposed Rule for Temporary Agricultural Employment of H–2A Nonimmigrants in the United States).

[283] OMB Circular A–4 advises that agencies ''should discuss the statutory requirements that affect the selection of regulatory Approach. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, [agencies] should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.''

[284] *See* U.S. Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, available at https://www.bls.gov/cpi/tables/supplemental-files/*

Continued

While this IFR rule may result in the expenditure of more than $100 million by the private sector annually, the rulemaking is not a ''Federal mandate'' as defined for UMRA purposes.[285] The cost of obtaining prevailing wages, preparing labor condition and certification applications (including all required evidence) and the payment of wages by employers is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.[286] This IFR does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DOL has not prepared a statement under UMRA. Therefore, no actions were deemed necessary under the provisions of the UMRA.

E. Congressional Review Act

The Office of Information and Regulatory Affairs, of the Office of Management and Budget, has determined that this IFR is a major rule as defined by 5 U.S.C. 804, also known as the ''Congressional Review Act,'' as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868 *et seq.* In the preceding APA section of this preamble, the Department explained that it has for good cause found that notice and public procedure thereon are impracticable and contrary to the public interest. Accordingly, this rule shall take effect immediately, as permitted by 5 U.S.C. 808(2).

F. Executive Order 13132 (Federalism)

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

G. Executive Order 12988 (Civil Justice Reform)

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

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

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

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This IFR does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Australia, Chile, Employment, Employment and training, Immigration, Labor, Migrant labor, Wages.

20 CFR Part 656

Administrative practice and procedure, Employment, Foreign workers, Labor, Wages.

DEPARTMENT OF LABOR

Accordingly, for the reasons stated in the preamble, the Department of Labor amends parts 655 and 656 of chapter V, title 20, Code of Federal Regulations, as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), (p), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. Amend § 655.731 by revising paragraphs (a)(2)(ii) introductory text, (a)(2)(ii)(A), and (a)(2)(ii)(A)(*2*) to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(a) * * *

(2) * * *

(ii) If the job opportunity is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be based on the wages of workers similarly employed as determined by the wage component of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES) in accordance with 20 CFR 656.40(b)(2)(i); a current wage as determined in the area under the Davis–Bacon Act, 40 U.S.C. 276a *et seq.* (see 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (see 29 CFR part 4); an independent authoritative source in accordance with paragraph (a)(2)(ii)(B) of this section; or another legitimate source of wage data in accordance with paragraph (a)(2)(ii)(C) of this section. If an employer uses an independent authoritative source or other legitimate source of wage data, the prevailing wage shall be the arithmetic

historical-cpi-u-202003.pdf (last visited June 2, 2020).

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

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

[285] *See* 2 U.S.C. 658(6).

[286] *See* 2 U.S.C. 658(7)(A)(ii).

mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(*2*), and (b)(3)(iii)(C)(*2*) of this section. The prevailing wage rate shall be based on the best information available. The following prevailing wage sources may be used:

(A) *OFLC National Processing Center (NPC) determination.* The NPC shall receive and process prevailing wage determination requests in accordance with these regulations and Department guidance. Upon receipt of a written request for a PWD, the NPC will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arm's length, and, if not, determine the wages of workers similarly employed using the wage component of the BLS OES and selecting an appropriate wage level in accordance with 20 CFR 656.40(b)(2)(i), unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with secs. 212(n), 212(p), and 212(t) of the INA and in a manner consistent with 20 CFR 656.40(b)(2). If an acceptable employer-provided wage survey provides an arithmetic mean then that wage shall be the prevailing wage; if an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the NPC will follow 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

* * * * *

(*2*) If the employer is unable to wait for the NPC to produce the requested prevailing wage for the occupation in question, or for the CO and/or the BALCA to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the PWD from the NPC, that the information relied upon produced a wage below the final PWD and the employer was not paying the NPC-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the PWD.

* * * * *

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 3. The authority citation for part 656 is revised to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1182(p); sec.122, Pub. L. 101–649, 109 Stat. 4978; and Title IV, Pub. L. 105–277, 112 Stat. 2681.

■ 4. Amend § 656.40 by revising paragraphs (a) and (b)(2) and (3), to read as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

* * * * *

(a) *Application process.* The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. The NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(p) of the INA. Unless the employer chooses to appeal the center's PWD under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) * * *

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be based on the wages of workers similarly employed using the wage component of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES) in accordance with paragraph (b)(2)(i) of this section, unless the employer provides an acceptable survey under paragraphs (b)(3) and (g) of this section or elects to utilize a wage permitted under paragraph (b)(4) of this section.

(i) The BLS shall provide the OFLC Administrator with the OES wage data by occupational classification and geographic area, which is computed and assigned at four levels set commensurate with the education, experience, and level of supervision of similarly employed workers, as determined by the Department. Based on this determination, the prevailing wage shall be provided by the OFLC Administrator at four levels:

(A) The Level I Wage shall be computed as the arithmetic mean of the fifth decile of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(B) The Level II Wage shall be determined by first dividing the difference between Level I and IV by three and then adding the quotient to the computed value for Level I and assigned for the most specific occupation and geographic area available.

(C) The Level III Wage shall be determined by first dividing the difference between Level I and IV by three and then subtracting the quotient from the computed value for Level IV and assigned for the most specific occupation and geographic area available.

(D) The Level IV Wage shall be computed as the arithmetic mean of the upper decile of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(ii) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the prevailing wage levels under paragraph (b)(2)(i) of this section as a notice posted on the OFLC website.

(3) If the employer provides a survey acceptable under paragraph (g) of this section, the prevailing wage for labor certification purposes shall be the arithmetic mean of the wages of workers similarly employed in the area of intended employment. If an otherwise acceptable survey provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

* * * * *

John Pallasch,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2020–22132 Filed 10–6–20; 4:15 pm]

BILLING CODE 4510–FN–P

JS 44 (Rev. 09/19)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Chamber of Commerce of the United States of America; National Association of Manufacturers; Bay Area Council; National Retail Federation; American Association of International Healthcare Recruitment; Presidents' Alliance on Higher Education and Immigration; California Institute of Technology; Cornell University; The Board of Trustees of the Leland Stanford Junior University; University of Southern California; University of Rochester; University of Utah; and ARUP Laboratories

(b) County of Residence of First Listed Plaintiff Washington, DC

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

William G. Gaede, III (650) 815-7400

415 Mission Street, Suite 5600, San Francisco, CA 94105-2533

DEFENDANTS

U.S. Dept. of Homeland Security; U.S. Dept. of Labor; Chad F. Wolf, in his official capacity; Eugene Scalia, in his official capacity

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities-Employment
- ☐ 446 Amer. w/Disabilities-Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District ☐ 6 Multidistrict Litigation-Transfer ☐ 8 Multidistrict Litigation -Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
Administrative Procedure Act, 5 U.S.C. §§ 705 & 706

Brief description of cause:
Lawsuit seeking to enjoin recent DHS and DOL regulations regarding international employees.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE, IF ANY

JUDGE _____ DOCKET NUMBER _____

DATE October 19, 2020 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.