

*The following is the text of the final rule that was signed on Thursday, January 14, 2021 and that the Department has sent to the Federal Register for publication. For an official version, please see the version published in the Federal Register.*

9111-97P

**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:** Final rule.

**SUMMARY:** The Department of Homeland Security (DHS or the Department), is narrowly amending its regulations to clarify how U.S. Citizenship and Immigration Services (USCIS) will determine whether there is an “employer-employee relationship” between the petitioner and the beneficiary for the purposes of qualifying as a “United States employer.” DHS is not at this time finalizing other provisions of the *Strengthening the H-1B Nonimmigrant Visa Classification Program*, Interim Final Rule published in the Federal Register on October 8, 2020.

**DATES:** This final rule is effective on [INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

**SUPPLEMENTARY INFORMATION:**

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## **II. Background and Discussion**

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

The H-1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations, defined by statute as occupations that require the theoretical and practical application of a body of highly specialized knowledge, and a bachelor's or higher degree in the specific specialty, or its equivalent. *See* INA sections 101(a)(15)(H)(i)(b) and 214(i); 8 U.S.C 1101(a)(15)(H)(i)(b) and 1184(i). 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

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the field of fashion modeling. See INA section 101(a)(15)(H)(i)(b), 8 U.S.C.

101(a)(15)(H)(i)(b); 8 CFR 214.2(h)(4)(i)(A).

Congressional intent behind creating the H-1B program was, in part, to help U.S. employers fill labor shortages in positions requiring highly skilled or educated workers using temporary workers.<sup>1</sup> A key goal of the program at its inception was to help U.S. employers obtain the temporary employees they need to meet their business needs.<sup>2</sup> To address legitimate countervailing concerns of the adverse impact foreign workers could have on U.S. workers, Congress put in place a number of measures intended to protect U.S. workers to ensure that H-1B workers would not adversely affect them.<sup>3</sup> 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. Many of those concerns have involved companies that place the H-1B workers at worksites of third-parties, i.e., companies that did not directly petition USCIS for H-1B workers. As detailed in the IFR, the extensive involvement and lack of accountability of such companies within the H-1B program is a major factor that makes the program vulnerable to fraud and weakens protection for U.S. workers.

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

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

<sup>2</sup> Bipartisan Policy Council, *Immigration in Two Acts*, Nov. 2015, at 7, <https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-Immigration-Legislation-Brief.pdf>, citing 1990 U.S.C.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.”).

<sup>3</sup> See Immigration and Nationality Act (INA) section 212(n) and (p); 8 U.S.C. 1182(n) and (p).

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guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of U.S. workers in the administration of our immigration system.”<sup>4</sup>

Consistent with the Congressional intent of the H-1B program, and to ensure that U.S. workers are protected under U.S. immigration laws, DHS is finalizing the revision and clarification detailed below. This change is needed to strengthen the H-1B program and to more effectively ensure that only qualified petitioners are eligible to petition for H-1B workers.

## **B. Legal Authority**

The Secretary of Homeland Security’s authority for these regulatory amendments is found in various sections of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* General authority for issuing this 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;

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<sup>4</sup> See Executive Order 13788, *Buy American and Hire American*, 82 FR 18837, sec. 5 (Apr. 18, 2017).

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- 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 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 Changes from the Interim Final Rule**

DHS is only finalizing the change to the regulatory definition of “employer-employee relationship” at new 8 CFR 214.2(h)(4)(ii), and the portion of the definition of “United States employer” that refers to the “employer-employee relationship.” DHS will not finalize the changes to any other provisions implemented by the interim final rule (IFR), as DHS plans to pursue future rulemaking for those provisions. While those other provisions remain in the Code of Federal Regulations, they do not currently have legal effect given that the IFR was vacated by the U.S. District Court for the Northern District of California on December 1, 2020.<sup>5</sup>

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<sup>5</sup> *JSW Chamber of Commerce of the United State of America et al. v. United States Department of Homeland Security*, et al., 4:20-cv-07331 (N.D. Cal. Dec. 1, 2020).

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#### **D. Implementation of this 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 regulation to any pending petitions nor to previously approved petitions, either through reopening or through a notice of intent to revoke.

#### **E. Procedural Validity of this Final Rule**

The U.S. District Court for the Northern District of California vacated the IFR on the ground that, in the court's view, the Departments failed to demonstrate "good cause" for foregoing notice-and-comment rulemaking. *JSW Chamber of Commerce of the United State of America et al. v. United States Department of Homeland Security, et al.*, 4:20-cv-07331 (N.D. Cal. Dec. 1, 2020) ("...[t]he Court must decide whether Defendants have demonstrated that the impact of the COVID-19 pandemic on domestic unemployment justified dispensing with the "due deliberation" that normally accompanies rulemaking to make changes to the H-1B visa program that even Defendants acknowledge are significant. . . For the reasons that follow, the Court concludes they have not . . ."). The Supreme Court, however, recently held that an IFR containing all Administrative Procedure Act ("APA") - required elements of a notice of proposed rulemaking ("NPRM"), as provided in 5 U.S.C. 553(b)-(d), satisfies the APA's procedural requirements. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384-86 (2020) ("*Little Sisters*"). The Court found that an IFR's publication as an IFR rather than an NPRM did not invalidate the final rule; rather, the Court focused on whether "fair notice" was provided to the public. *Id.* at 2385 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)). Here, the IFR contained all APA- required elements of an NPRM: a reference to legal authority, as required by 5 U.S.C. 553(b)(2) (85 FR at 63920-1 ); a description

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of the terms and substance of the rule, as required by 5 U.S.C. 553(b)(3) (85 FR at 63924-63938); and a request for public comment, as required by 5 U.S.C. 553(c) (85 FR at 63918, 63919). In addition, this final rule provides a statement of the rule's purpose and basis, as required by 5 U.S.C. 553(c). Further, this final rule is hereby published with a 60-day effective date in compliance with the Congressional Review Act, 5 U.S.C. 801 et seq., a longer effective period than the 30 days required by 5 U.S.C. 553(d) and reiterated by the Court in *Little Sisters*. See 140 S. Ct. at 2386. Accordingly, DHS is now issuing this final rule to narrowly address the comments received in response to the "employer-employee relationship" definition publicly noticed in the IFR.

### **III. Discussion of the Provision to Strengthen the H-1B Program**

Previously, the term "United States employer" was 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, "[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."<sup>6</sup> Through this rule, DHS is changing this definition by 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).

Specifically, 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

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<sup>6</sup> This refers to the regulations in effect prior to the IFR effective date of December 7, 2020. While the new provisions from the IFR now appear in the Code of Federal Regulations, they do not currently have legal effect given that the IFR was vacated by the U.S. District Court for the Northern District of California on December 1, 2020. *JSW Chamber of Commerce of the United State of America et al. v. United States Department of Homeland Security*, et al., 4:20-cv-07331 (N.D. Cal. Dec. 1, 2020).

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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.

DHS also notes that the adoption of the common-law test for determining which entities have an employment relationship with an H-1B worker suggests DHS should otherwise adjust its enforcement practices to ensure consistency and to follow the best reading of the INA and its regulations. Under the common law, multiple entities can have an employment relationship with a worker simultaneously. Further, existing DHS regulations already provide that if an H-1B “beneficiary will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition with USCIS.” 8 C.F.R. § 214.2(h)(2)(i)(C). In consequence, it is possible that under third-party placement arrangements, where a primary employer contracts out an H-1B worker to a third-party entity, the third-party entity will also be considered an employer of the H-1B worker under the common-law test adopted in this rule. In such cases, the third-party entity would also be required to file a petition for the H-1B worker.

Although third-party entities with an employment relationship with an H-1B worker have historically not been required to file petitions, this revision in practice to require them to do so is a natural and necessary consequence of DHS adopting the common law definition of what constitutes an “employment relationship.” For example, from the new definition of the employment relationship, coupled with the existing requirement of 8 C.F.R. § 214.2(h)(2)(i)(C), it necessarily follows that in cases where both a primary employer and a third-party employer have an employment relationship with an H-1B worker performing work at the third-party

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employer's jobsite, both employers will be required to file a petition for that worker. *See Comite De Apoyo A Los Trabajadores Agricolas v. Solis*, No. 09-240, 2010 WL 3431761, at \*16 (E.D. Pa. Aug. 30, 2010) (concluding, in the H-2B context, that an interpretation requiring only job contractors to file for labor certifications was contrary to the plain language of the regulation, which required "each employer" to file a petition with USCIS).

This interpretation of the new definition of the employment relationship adopted in this rule is consistent with the INA, which does not define the employers subject to H-1B requirements, and thus presumably includes *all* common-law employers of H-1B workers. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). It is also consistent with Executive Branch policy. *See* Executive Order 13490, Aligning Federal Contracting and Hiring Practices with the Interests of American Workers, 85 Fed. Reg. 47879, 47880 (Aug. 3, 2020) (directing DOL and DHS to take appropriate action to protect U.S. workers, "including measures to ensure that all employers of H-1B visa holders, including secondary employers," adhere to H-1B program requirements).

Because the adoption of this rule may require adjustments to business practices on the part of employers, including third-party common-law employers, DHS has determined that it is appropriate for this rule to go into effect 180 days from publication.

#### **IV. Public Comments on the Interim Final Rule**

DHS only is addressing substantive comments that pertain to the employer-employee relationship at new 8 CFR 214.2(h)(4)(ii). DHS is not providing responses to comments about any other provisions implemented by the IFR, as DHS plans to address those other provisions in a future rulemaking. While those other provisions remain in the Code of Federal Regulations,

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they do not currently have legal effect because the IFR was vacated by the U.S. District Court for the Northern District of California on December 1, 2020.<sup>7</sup> Public comments may be reviewed in their entirety at the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number USCIS-2020-0018.

Comments: A number of commenters expressed concern that the employer-employee definition adopted in the IFR would be confusing to apply, impose unwarranted burdens on petitioners, and provide adjudicators with too much discretion. For example, one trade association stated that the IFR would broaden the scope of the USCIS's discretion for determining whether or not there is a viable employer-employee relationship between the petitioning employer and the prospective H-1B worker and increase the amount of substantiating documentation required of petitioning employers. Similarly, a not-for-profit health care system that employs H-1B nonimmigrant visa holders explained that medical trainees, such as residents and clinical fellows, often train at multiple hospitals as part of a clinical rotation and argued that the additional documentation proposed to establish the employer-employee relationship would be unduly burdensome given the accreditation rules under which the hospital training programs already operate. An association of immigration attorneys further charged that the rule's use of "may consider" could be interpreted to mean that USCIS adjudicators do not need to give weight to a factor that may be present.

Several commenters also expressed concern about the additional analysis required when considering beneficiaries that have an ownership stake in the petitioner. A trade association asserted that adding additional criteria for demonstrating a valid employer-employee relationship

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<sup>7</sup> See *supra* note 5.

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where the H-1B beneficiary has an ownership interest will discourage speedy adjudication of such petitions, claimed that this would have the most significant impact on entrepreneurs and start-ups, and argued that it was unwise and unnecessary to impose additional burdens on those individuals and companies. Similarly, an immigration attorney argued that start-ups contribute to innovation and jobs for economic recovery, so they should be allowed to demonstrate the employment relationship under the existing definition. An association of immigration attorneys also argued that that the analysis should focus on the impact of a company's operations on the U.S. economy. The same association claimed that requiring petitioners to address the ownership interest of the H-1B beneficiary adds unnecessary complexity to the analytical process.

The association of immigration attorneys further criticized the IFR for its perceived conflict with the Department of Labor's (DOL) definition of "[e]mployed, employed by the employer, or employment relationship," contained at 20 CFR 655.715. The same association also criticized the IFR for allegedly replacing a test of whether the petitioner will have the "right to control" the beneficiary's work with a test that would require that the petitioner have actual control of the beneficiary's day-to-day work. To support that point, the association claimed that the applicable common law test, as articulated by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, does not focus on whether the employer controls how the employee works on a day-to-day basis, but, rather, focuses on the employer's control of the ultimate service or product.<sup>8</sup> The association further argued that DHS's reliance on *Clackamas Gastroenterology Associates, P.C. v. Wells* is misplaced because the factors discussed in that case were designed to address a situation where an employee was also a shareholder of the

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<sup>8</sup> 503 U.S. 318 (1992).

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petitioner.<sup>9</sup> Finally, the association claimed that the changes to the definition of the employer-employee relationship were designed to prevent consulting and professional services firms from accessing the H-1B visa program and charged that, as a consequence, DHS has engaged in an *ultra vires* action.

Response: DHS does not believe that the definition of an “employer-employee relationship” adopted in the IFR and continued here will be overly confusing or difficult to apply. Regulated parties should be used to applying the analysis adopted by the IFR, because it both codifies, with small changes, the test set out in USCIS’s previous longstanding guidance, and draws from the common law’s conception of the employment relationship applicable in many other contexts. As explained in the preamble to the IFR, this rule largely will restore, with additional clarification, the long-standing USCIS policy that had existed since 2010<sup>10</sup> and only recently was rescinded due to a judicial ruling on procedural grounds.<sup>11</sup> USCIS believes that its officers and H-1B petitioners are mostly 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 final rule best accomplishes that goal with the least amount of potential disruption for USCIS officers and H-1B petitioners.

Moreover, the definition that this new definition replaces, was confusing—as the preamble to the IFR observed, “[t]he disjunctive wording of the current regulation is confusing for USCIS officers and H-1B petitioners alike.” It is unclear whether the five factors are entirely

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<sup>9</sup> 538 U.S. 440 (2003).

<sup>10</sup> USCIS Policy Memorandum HQ 70/6.2.8, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements (Jan. 8, 2010). This memorandum was superseded and archived on June 17, 2020. Therefore, it can be found in the Supporting Documents accompanying this interim final rule.

<sup>11</sup> See, e.g., *ITServe*, 2010 WL 1150186.

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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”) always must be met. In fact, for these reasons, DHS believes that the 11-factor test will provide more clarity than the existing standard

DHS believes that the 11-factor test also will, in practice, provide USCIS officers with sufficient guidance in reviewing H-1B petitions and does not give them unbridled discretion. While the new test contains more factors, each one of them is readily ascertainable and relatively free from ambiguity. Additionally, the rule’s “may consider” language is not intended to, and does not, give adjudicators the option of ignoring factors that are implicated by the particular facts of a case. Rather, that language simply reflects the possibility that not every factor will be present in every case. Further, the definition is clear that “USCIS will assess and weigh all relevant aspects of the relationship.”

DHS acknowledges commenters’ concerns that the analysis could result in businesses’ providing additional documentation. Again, however, USCIS is merely seeking to restore the policy that has guided H-1B adjudications of this issue for more than a decade, with certain changes for added clarity. Thus, any additional documentation that could be requested consistent with this rule would likely be the same documentation that petitioners would have submitted prior to June 2020. DHS also acknowledges, as noted above, that adopting the common law test in regulatory text will result in changed requirements insofar as some secondary employers that have previously not been required to file petitions will now have to do so. However, this will not alter what documentation employers that were already required to file petitions must submit, and, to the extent secondary employers are now required to file petitions, they will have to do so, as noted above, according to longstanding policies that existed before June 2020. Importantly, any

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additional burden that may result from this rule<sup>12</sup> must be balanced against the need to ensure that the program is implemented in a manner that aligns with Congress's intent. The agency believes that its interpretation of the common-law definition of the employer-employee relationship, as set out in this rule, best effectuates that intent. Thus, any additional burden on businesses is appropriate.

Further, USCIS does not believe that any additional documentation would be overly burdensome to provide. A petitioner may demonstrate an employer-employee relationship through documentation that should be readily available. Examples of documents that should be readily available and relevant to this inquiry could include: copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract, which is already currently required under the regulations; copies of other contracts involving the beneficiary or the services to be performed by the beneficiary; a detailed letter signed by an authorized official of the ultimate end-client company or companies where the beneficiary actually will work; or other types of similar documentation. Note that these are meant to be illustrative examples and are not exhaustive; petitioners have the burden of proof to establish eligibility but are not required to submit any document not specifically listed in the regulations. USCIS routinely reviewed such documentation in the course of H-1B adjudications under the long-standing framework that had existed since 2010 and only recently was rescinded in June 2020.<sup>13</sup>

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<sup>12</sup> Note that for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., DHS did not adjust the hourly burden to reflect the potential for additional documentation because the Form I-129 burden already accounts for the documentation that USCIS would have required to adjudicate the employer-employee relationship prior to June of 2020.

<sup>13</sup> USCIS Policy Memorandum HQ 70/6.2.8, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements (Jan. 8, 2010).

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With respect to the additional analysis that this final rule will require when considering beneficiaries with an ownership stake in the petitioner, DHS is not persuaded by commenters' concerns. This rule does not single out entrepreneurs and start-up businesses; rather, it treats them in accordance with the statute, giving due regard to the special factors that may come into play when the line between proprietor and employee can be unclear, as the Supreme Court highlighted in *Clackamas*.<sup>14</sup> As stated in the IFR, the additional factors for when the beneficiary has an ownership interest mirror the Supreme Court's analysis in *Clackamas*, and the 2010 policy guidance specifically discussed *Clackamas* and the issue of self-employment.<sup>15</sup> A petitioner may demonstrate a beneficiary's ownership interest, reporting hierarchy, voting power, or other relevant aspects of the employment relationship through documentation that should be readily available, such as stock ledgers, stock certificates, corporate by-laws, partnership agreements, or other similar documentation. Note that these are meant to be illustrative examples and are not exhaustive; petitioners have the burden of proof to establish eligibility but are not required to submit any document not specifically listed in the regulations. USCIS routinely reviewed such documentation in the course of H-1B adjudications under the long-standing framework that had existed since 2010 and only recently was rescinded in June 2020. Thus, any additional documentation that could be requested would likely be the same documentation that petitioners would have submitted prior to June 2020. DHS disagrees with commenters that these additional factors for when the beneficiary has an ownership interest, and any accompanying documentation and review, would be unduly burdensome or onerous.

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<sup>14</sup> 538 U.S. 440 (2003).

<sup>15</sup> 538 U.S. 440 (2003).

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Any additional burden that may have developed in the short time since June 2020<sup>16</sup> must be balanced against the need to ensure that the program is implemented in a manner that aligns with Congress’s intent. DHS believes that implementing the statute as enacted by Congress must be the agency’s first priority. Congress created the H-1B program to allow U.S. “employer[s]” to take advantage of skilled labor available outside of the United States.<sup>17</sup> Entrepreneurs and start-ups may continue to qualify for this program. However, to do so, the petitioner, unless filing as an agent, must be able to demonstrate a bona fide employer-employee relationship between the petitioning U.S. employer and the H-1B beneficiary. This rule simply clarifies what is necessary to establish such a relationship. Notably, Congress did not allow an individual to self-petition for H-1B classification. Thus, this rule aligns DHS’s implementation of the H-1B program with Congress’ decision to provide H-1B classification through “employer[s].”<sup>18</sup> The agency believes these policy considerations outweigh countervailing considerations related to the potential impact of this rule on entrepreneurs, start-up companies, or other businesses.

With respect to comments about a perceived conflict between the final rule and DOL definitions, DHS does not agree that there is a conflict between the definition of the “employer-employee relationship” adopted in the final rule and DOL’s related definition of the “employment relationship.” Like the definition contained in the final rule, DOL’s regulations provide that “*employment relationship* means the employment relationship as determined under the common law” and state that “all of the incidents of the relationship must be assessed and

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<sup>16</sup> See *supra* note 12.

<sup>17</sup> See, e.g., section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), defining 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), stating 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.

<sup>18</sup> See *supra* note 17.

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weighed with no one factor being decisive.”<sup>19</sup> Notably, DOL’s definition quotes *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1965), for these propositions, a decision quoted approvingly for the same propositions in the cases DHS relies on here, *Clackamas* and *Darden*.<sup>20</sup> Although the definition adopted in the IFR and retained here provides additional detail, the definitions do not conflict. These tests broadly overlap, despite some differences.

DHS believes that it has adopted the best understanding of the common-law definition of the employer-employee relationship, as explained by the Supreme Court. DHS disagrees with commenters that claim that *Darden* adopted a test that “focuses on the employer’s control of the ultimate service or product.” As explained in the IFR, *Darden* expressly states that “all of the incidents of the [putative employment] relationship must be assessed and weighed with no one factor being decisive” and set out “the other factors relevant to the inquiry.”<sup>21</sup> In light of these statements and later decisions, such as *Clackamas*, DHS believes that all of the factors listed in the rule are relevant to finding a common law employer-employee relationship. DHS also does not agree that *Clackamas* is distinguishable simply because it involved a factual scenario in which a putative employee was also a shareholder. The Court in *Clackamas* spoke more broadly about the common law test for an employer-employee relationship, making it useful for the agency’s purposes.

DHS rejects the claim that the IFR is designed to prevent consulting and professional services firms from accessing the H-1B visa program. Consulting and professional services firms may still access the program so long as they satisfy the relevant employer-employee test.

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<sup>19</sup> See 20 CFR § 655.715.

<sup>20</sup> See 538 U.S. at 451.

<sup>21</sup> 503 U.S. at 323–24.

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As DHS explained throughout the IFR, the alterations to the definition of an “employer-employee relationship” are designed to provide additional clarity to participants in the H-1B program and better align the program with Congressional intent.

Finally, DHS rejects the claim that it is engaging in *ultra vires* action. The agency is well within its congressionally delegated authority to clarify the meaning of language in a statute that it administers. DHS is adhering to the statute’s terms more closely by employing a definition of employer and employer-employee relationship that is based on USCIS’s interpretation of the common-law description of the employer-employee relationship as set out by the Supreme Court.

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

### **A. Administrative Procedure Act**

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 Department has appropriately invoked the exception in this case, for the reasons set forth below.

This final rule merely alters the definition of the employer-employee to provide additional clarity to participants in the H-1B program and better align the program with Congressional intent. This alternation will have a *de minimus* impact on the program as a whole and therefore it is unnecessary to engage in notice and comment and the good cause exception properly applies.

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Furthermore, the relatively limited scope of this rule also conforms it to the proper application of the “good cause” exception. First, the final rule only affects one discrete aspect 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).

Alternatively, even if the good cause exemption does apply, DHS did take comments on the IFR and considered such comments. DHS published the IFR on October 8, 2020 and delayed its effective date to December 7, 2020 to allow the public to comment on its provisions prior to its effect and to allow DHS to consider such comments prior to issuing a final rule. DHS has now considered such comments on the employer-employee provision being implemented via this final rule and addressed each of these substantive comments above, as required under the APA. The publication of the IFR and the public’s ability to submit comments on the IFR, including the portion of the IFR which is being finalized in this rule, satisfies the notice and comment requirement of the APA.

**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

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importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Pursuant to Executive Order 12866 (Regulatory Planning and Review), the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget (OMB) determined the IFR that published on October 8, 2020 at 85 FR 63918 was an economically significant regulatory action. DHS has retained that determination in this final rule. However, OIRA has waived review of this regulation under section 6(a)(3)(A) of Executive Order 12866.

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

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

DHS’s objectives and legal authority for this final rule are discussed earlier in the preamble. DHS is amending its regulations governing H-1B specialty occupation workers to better ensure that H-1B petitions are approved when the petitioner and beneficiary have a proper employer/employee relationship. DHS believes this change bring clarity to the H-1B program, eliminate the ambiguity that presently exists, and thereby better ensures that H-1B visas are only approved for those who are eligible.

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

An initial regulatory flexibility analysis was not required in the IFR as the rule was exempted from notice and comment rulemaking as started in the Administrative Procedures Act (APA), 5 U.S.C. 551 et seq. of the preamble. As noted above, comments were, however, solicited on the rule itself prior to its effective date and prior to issuance of this final rule. Commenters focused largely on the burdens to entities on applying the new employer-employee definition. As was stated in the preamble of this rule, DHS did not make changes to the rule as the burdens described are minimal and are inline with congressional intent of the H--B program.

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

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

**3. A Description of and an Estimate of the Number of Small Entities to which this Final Rule Will Apply or an Explanation of Why No Such Estimate is Available**

Despite the fact that DHS estimated that 80.1 percent of those that filed Form I-129 were small entities, DHS believes that no small entities would be significantly impacted by the final rule. 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 petitioner will have an employer-employee relationship with the beneficiary for any or all of the period

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requested in petition, especially considering that the beneficiary may be placed at multiple worksites. 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.

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.

For the analysis of H-1B rules recently promulgated, DHS conducted a sample analysis of historical Form I-129 H-1B petitions to estimate the number of small entities impacted by this final rule. DHS utilized a subscription-based online database of U.S. entities, ReferenceUSA, as well as three other open-access, free databases of public and private entities, Manta, Cortera, and Guidestar, to determine the North American Industry Classification System (NAICS) code,<sup>22</sup> revenue, and employee count for each entity in the sample. To determine whether an entity is small for purposes of the RFA, DHS first classified the entity by its NAICS code and, then, used

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<sup>22</sup> U.S. Census Bureau, North American Industry Classification System, <http://www.census.gov/eos/www/naics/> (last visited Oct. 21, 2020).

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SBA size standards guidelines<sup>23</sup> to classify the revenue or employee count threshold for each entity. Based on the NAICS codes, some entities were classified as small based on their annual revenue, and some by their numbers of employees. Once as many entities as possible were matched, those that had relevant data were compared to the size standards provided by the SBA to determine whether they were small or not. Those that could not be matched or compared were assumed to be small under the presumption that non-small entities would have been identified by one of the databases at some point in their existence.

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

DHS randomly selected a sample of 473 entities from the population of 24,111 entities that filed Form I-129 for H-1B petitions in FY 2020. Of the 473 entities, 406 entities returned a successful match of a filing entity in the ReferenceUSA, Manta, Cortera, and Guidestar

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<sup>23</sup> DHS utilized a subscription-based online database of U.S. entities, ReferenceUSA, as well as three other open-access, free databases of public and private entities, Manta, Cortera, and Guidestar, to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity. Guidelines suggested by the SBA Office of Advocacy indicate that the impact of a rule could be significant if the cost of the regulation exceeds 5 percent of the labor costs of the entities in the sector. Small Business Administration, Office of Advocacy, *A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act* (Aug. 2017), at 19, <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

<sup>24</sup> Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Form I-129H-1B, Claims 3, IRFA data (Aug. 18, 2020) & USCIS Analysis.

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databases; 67 entities did not return a match. Using these databases' revenue or employee count and their assigned North American Industry Classification System (NAICS) code, DHS determined 312 of the 406 matches to be small entities, 94 to be non-small entities. Based on previous experience conducting RFAs, DHS assumes filing entities without database matches or missing revenue/employee count data are likely to be small entities. As a result, to prevent underestimating the number of small entities this rule will affect, DHS conservatively considers all the non-matched and missing entities as small entities for the purpose of this analysis.

Therefore, DHS conservatively classifies 379 of 473 entities as small entities, including combined non-matches (67), and small entity matches (312). Thus, DHS estimates that 80.1% (379 of 473) of the entities filing Form I-129 H-1B petitions are small entities.

In this analysis DHS assumes that the distribution of firm size for our sample is the same as the entire population of Form I-129. Thus, DHS estimates the number of small entities to be 80.1% of the population of 24,111 entities that filed Form I-129 under the H-1B classification. below. The annual numeric estimate of the small entities impacted by this final rule is 19,319 entities.

Following the distributional assumptions above, DHS uses the set of 312 small entities with matched revenue data to estimate the economic impact of this final rule on each small entity. The economic impact on each small entity, in percentages, is the sum of the impacts of the final rule divided by the entity's sales revenue.<sup>25</sup> DHS constructed the distribution of

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<sup>25</sup> The economic impact, in percent, for each small entity  $i$  = (Cost of one petition for entity  $i$  x Number of petitions for entity  $i$ ) x 100. The cost of one petition for entity  $i$  (\$75.60) is estimated by adding the two cost components per petition of this final rule (\$75.60 = \$32.59 + \$43.01). The first component (\$32.59) is the weighted average additional cost of filing a petition, and is calculated by dividing total cost by the number of petitions (\$32.59 =

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economic impact of the final rule based on the sample of 312 small entities. Across all 312 small entities, the increase in cost to a small entity will range from 0.00000026 percent to 2.5 percent of that entity's FY 2020 revenue. Of the 312 small entities, 0 percent (0 small entities) will experience a cost increase that is greater than 5 percent of revenues. Extrapolating to the population of 19,319 small entities and assuming an economic impact significance threshold of 5 percent of annual revenues, DHS estimates no small entities will be significantly affected by this final rule.

Based on this analysis, DHS does not believe that this final rule will have a significant economic impact on a substantial number of small entities that file H-1B petitions as this rule neither amends any forms or substantively changes the process upon which small entities, or any entities, would petition for H-1B beneficiaries. This rule merely changes a definition.

#### **4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities that will be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record**

This rule does not impose any reporting, recordkeeping or other compliance requirements on entities that could be small entities.

#### **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.

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\$3,457,401 / 106,100) from Table 1. The second component (\$43.01) is the weighted average cost of submitting information on the registration and is calculated by dividing total cost by the number of baseline petitions ( $\$43.01 = \$11,795,997 / 274,237$ ) from Table 3. The number of petitions for entity  $i$  is taken from USCIS internal data on actual filings of I-129 H-1B petition. The entity's sales revenue is taken from ReferenceUSA, Manta, Cortera, and Guidestar databases.

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Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of \$100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI-U) is approximately \$168 million based on the Consumer Price Index for All Urban Consumers.<sup>26</sup>

While this final rule may result in the expenditure of more than \$100 million by the private sector annually, the rulemaking is not a “Federal mandate” as defined for UMRA purposes.<sup>27</sup> The cost of preparation of H-1B petitions (including required evidence) and the payment of H-1B nonimmigrant petition fees by petitioners or other private sector entities is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.<sup>28</sup> This 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.

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<sup>26</sup> See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items*, available at <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf> (last visited Aug. 11, 2020).

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

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

<sup>27</sup> See 2 U.S.C. 658(6).

<sup>28</sup> See 2 U.S.C. 658(7)(A)(ii).

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#### **E. Congressional Review Act**

The Office of Information and Regulatory Affairs has determined that this final rule is a major rule as defined by 5 U.S.C. 804, also known as the “Congressional Review Act” (CRA), as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, 110 Stat. 847, 868-874, and codified at 5 U.S.C. 801-808. Therefore, the rule requires at least a 60-day delayed effective date. DHS has complied with the CRA’s reporting requirements and has sent this final rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

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

This 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, DHS has determined that this 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 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 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.

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## **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 final 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 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.

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The primary purpose of these changes is to better ensure that each H-1B nonimmigrant worker will be working for a qualified petitioner.” While this final rule revises regulatory eligibility requirements and may result in denials of some H-1B petitions, this rule does not change the number of H-1B workers that may be employed by U.S. employers; the final 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 change made by this rule or whether the regulatory amendment 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 amendment 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 in a way that will better ensure that each H-1B nonimmigrant worker will be working for a qualified petitioner. 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.

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## **J. Paperwork Reduction Act**

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. This rule does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

## **K. Signature**

The Senior Official Performing the Duties of the Deputy Secretary of Homeland Security, Ken Cuccinelli, having reviewed and approved this document, is delegating the authority to electronically sign this document to Ian J. Brekke, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the Federal Register.

## **List of Subjects in 8 CFR Part 214**

Administrative practice and procedure, Aliens, Cultural exchange 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.

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2. Amend § 214.2 by revising the definitions of “Employer-employee relationship” and “U.S. employer” in paragraph (h)(4)(ii), to read as follows:

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

\* \* \* \* \*

(h) \* \* \*

(4) \* \* \*

(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.

(I) 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;

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(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

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

\* \* \* \* \*

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

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part;

and

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

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Ian J. Brekke,  
Senior Official Performing the Duties of the General Counsel,  
U.S. Department of Homeland Security.