DEPARTMENT OF HOMELAND SECURITY

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RIN 1615–AC70

Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers

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

ACTION: Final rule.

SUMMARY: The U.S. Department of Homeland Security (DHS) is issuing this final rule to modernize and improve the efficiency of the H–1B program, add benefits and flexibilities, and improve integrity measures. These provisions mainly amend the regulations governing H–1B specialty occupation workers, although some of the provisions narrowly impact other nonimmigrant classifications, including: H–2, H–3, F–1, L–1, O, P, Q–1, R–1, E–3, and TN.

DATES: This final rule is effective January 17, 2025.

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SUPPLEMENTARY INFORMATION:

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AC21—American Competitiveness in the Twenty-first Century Act
ACWIA—American Competitiveness and Workforce Improvement Act of 1998
BLS—Bureau of Labor Statistics
CEQ—Council on Environmental Quality
CFR—Code of Federal Regulations
CMSA—Consolidated Metropolitan Statistical Area
COS—Change of Status
CPI–U—Consumer Price Index for All Urban Consumers
DHS—U.S. Department of Homeland Security
DOL—U.S. Department of Labor
DOS—U.S. Department of State
FDNS—Fraud Detection and National Security
FR—Federal Register
FY—Fiscal Year
HR—Human Resources
HSA—Homeland Security Act of 2002
ICE—Immigration and Customs Enforcement
IMMACT 90—Immigration Act of 1990
INA—Immigration and Nationality Act
INS—legacy Immigration and Naturalization Service
IRFA—Initial Regulatory Flexibility Analysis
IRS—Internal Revenue Service
LCA—Labor Condition Application
MSA—Metropolitan Statistical Area
AICS—North American Industry Classification System
NEPA—National Environmental Policy Act
NOID—Notice of Intent to Deny
NPRM—Notice of Proposed Rulemaking
OIRA—Office of Information and Regulatory Affairs
OMB—Office of Management and Budget
OP&S—Office of Policy and Strategy
OPT—Optional Practical Training
PM—Policy Memorandum
PMSA—Primary Metropolitan Statistical Area
PRA—Paperwork Reduction Act
PRD—Policy Research Division
Pub. L.—Public Law
RFA—Regulatory Flexibility Act of 1980
RFE—Request for Evidence
RIA—Regulatory Impact Analysis
RIN—Regulation Identifier Number
SBA—Small Business Administration
SEVP—Student and Exchange Visitor Program
SOC—Standard Occupational Classification
Stat.—U.S. Statutes at Large
TLC—Temporary Labor Certification
UMRA—Unfunded Mandates Reform Act
U.S.C.—United States Code
USCIS—U.S. Citizenship and Immigration Services

I. Executive Summary

DHS is amending its regulations by finalizing many of the provisions proposed in the ''Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers,'' notice of proposed rulemaking (NPRM), published in the **Federal Register** on October 23, 2023 (88 FR 72870). DHS previously finalized portions of the NPRM relating to H–1B registration in a separate final rule, ''Improving the H–1B Registration Selection Process and Program Integrity,'' published in the **Federal Register** on February 2, 2024 (89 FR 7456).

A. Purpose of the Regulatory Action

The purpose of this rulemaking is to modernize and improve the H–1B program by: (1) clarifying the requirements of the H–1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) strengthening program integrity measures.

B. Summary of the Major Provisions of the Regulatory Action

1. Clarifying Requirements and Improving Program Efficiencies

Through this rule, DHS is: (1) revising the regulatory definition and criteria for a position to be deemed a ''specialty occupation''; (2) clarifying that ''normally'' does not mean ''always'' within the criteria for a specialty occupation; and (3) clarifying that the petitioner may accept a range of qualifying degree fields as sufficient to qualify for the position, but the required field(s) must be directly related to the job duties in order for the position to be deemed a specialty occupation. *See* new 8 CFR 214.2(h)(4)(ii) and (h)(4)(iii)(A). DHS is also updating the regulations governing when an amended or new petition must be filed due to a change in an H–1B worker's place of employment to be consistent with current policy guidance. *See* new 8 CFR 214.2(h)(2)(i)(E).

Additionally, DHS is codifying its current deference policy to clarify that, when adjudicating a Form I–129, Petition for Nonimmigrant Worker, involving the same parties and the same underlying facts, adjudicators generally should defer to a prior USCIS determination on eligibility, unless a material error in the prior approval is discovered or other material change or information impacts the petitioner's, beneficiary's, or applicant's eligibility. *See* new 8 CFR 214.1(c)(5). DHS is also updating the regulations to expressly require that evidence of the beneficiary's maintenance of status must be included with a petition seeking an extension or amendment of stay. *See* new 8 CFR 214.1(c)(6). This policy impacts all employment-based nonimmigrant classifications that use Form I–129, Petition for Nonimmigrant Worker. DHS is also eliminating the itinerary requirement, impacting all H classifications. *See* new 8 CFR 214.2(h)(2)(i)(B) and (F). Additionally, DHS is updating the regulations to allow petitioners to amend the initially requested validity periods (*i.e.,* dates of employment) in cases where the petition is deemed approvable after the requested end date for employment has passed. *See* new 8 CFR 214.2(h)(9)(ii)(D).

2. Providing Greater Benefits and Flexibilities

DHS is modernizing regulatory definitions to provide additional flexibilities for nonprofit and governmental research organizations and petitions for certain beneficiaries who are not directly employed by a qualifying organization. These changes better reflect modern organizational and staffing structures for both nonprofit and nongovernmental research organizations. Specifically, through this rulemaking, DHS is changing the definition of ''nonprofit research organization'' and ''governmental research organization'' by replacing the terms ''primarily engaged'' and ''primary mission'' with ''fundamental activity'' to permit nonprofit entities or governmental research organizations that conduct research as a fundamental activity, but are not primarily engaged in research or where research is not a primary mission, to meet the definition of a nonprofit research entity or governmental research organization for purposes of establishing exemption from the annual statutory limit on H–1B visas. Additionally, DHS is revising the regulations to recognize that certain beneficiaries may qualify for H–1B cap exemption when they are not directly employed by a qualifying organization, but still spend at least half of their time providing essential work that supports or advances a fundamental purpose, mission, objective, or function of the qualifying organization. *See* new 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*), (h)(8)(iii)(F)(*4*), (h)(19)(iii)(B)(*4*), and (h)(19)(iii)(C). DHS is also providing flexibility to students seeking to change their status to H–1B by automatically extending the duration of their F–1 status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), until April 1 of the relevant fiscal year to avoid disruptions in lawful status and employment authorization while a petition requesting a change of status to

H–1B is pending. *See* new 8 CFR 214.2(f)(5)(vi)(A).

3. Strengthening Program Integrity

DHS is strengthening the integrity of the H–1B program through this rulemaking by: (1) requiring that the petitioner establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the requested start date; (2) codifying its authority to request contracts or similar evidence to determine if the position is bona fide; (3) ensuring that the LCA supports and properly corresponds to the petition; (4) revising the definition of ''United States employer'' by codifying current DHS policy that the petitioner have a bona fide job offer for the beneficiary to work within the United States as of the requested start date; and (5) adding a requirement that the petitioner have a legal presence and be amenable to service of process in the United States. *See* new 8 CFR 214.2(h)(4)(i)(B)(*1*), (h)(4)(ii), and (h)(4)(iv)(C) and (D).

DHS is also clarifying that certain owners of the petitioning entity may be eligible for H–1B status (''beneficiary-owners''), while setting reasonable parameters around H–1B eligibility when the beneficiary owns a controlling interest in the petitioning entity. For example, USCIS will limit the validity of the initial H–1B petition and first extension to 18 months each. *See* new 8 CFR 214.2(h)(9)(iii)(E).

DHS is also codifying USCIS' authority to conduct site visits and clarifying that refusal to comply with site visits may result in denial or revocation of the petition. *See* new 8 CFR 214.2(h)(4)(i)(B)(*2*). Additionally, DHS is clarifying that if an H–1B worker will be staffed to a third party, meaning they will be contracted to fill a position in the third party's organization, the work to be performed by the beneficiary for the third party must be in a specialty occupation, and it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. *See* new 8 CFR 214.2(h)(4)(i)(B)(*3*).

C. Summary of Costs and Benefits

DHS analyzed two baselines for this final rule, the no action baselines and the without-policy baseline. The primary baseline for this final rule is the no action baseline. For the 10-year period of analysis of the final rule, DHS estimates the annualized net cost savings of this rulemaking will be $333,835 annualized at a 2 percent discount rate. DHS also estimates that there will be annualized monetized transfers of $1.4 million from newly cap-exempt petitioners to USCIS and $38.8 million from employers to F–1 workers, both annualized at a 2 percent discount rate.

D. Summary of Changes From the Notice of Proposed Rulemaking

Following careful consideration of public comments received, this final rule adopts many of the provisions proposed in the NPRM, with revisions as described below.

1. Specialty Occupation Definition and Criteria

In response to commenters' concerns, DHS is modifying the definition of specialty occupation from the proposed definition. After carefully considering the comments, DHS is not finalizing the proposed regulatory text, ''[t]he required specialized studies must be directly related to the position,'' as this language may be misread to conclude that USCIS would only consider a beneficiary's specialized studies in assessing whether the position is a specialty occupation. DHS is, however, retaining the ''directly related'' requirement in the definition of ''specialty occupation'' and related criteria, and is adding language clarifying that ''directly related'' means there is a logical connection between the degree or its equivalent, and the duties of the position.

The specialty occupation definition also clarifies that although the position may allow for a range of qualifying degree fields, each of the fields must be directly related to the duties of the position.

To address commenters' concerns about the potential for adjudicators to inappropriately rely solely on degree titles, DHS is removing the references to ''business administration'' and ''liberal arts.'' These changes recognize that the title of the degree alone is not determinative and that degree titles may differ among schools and evolve over time.

DHS is also making some minor, non-substantive revisions to 8 CFR 214.2(h)(4)(iii)(A), which include: changing the word ''are'' to ''is'' in 8 CFR 214.2(h)(4)(iii)(A)(*4*); revising 8 CFR 214.2(h)(4)(iii)(A)(*2*) from ''United States industry'' to ''industry in the United States''; and revising 8 CFR 214.2(h)(4)(iii)(A)(*2*) and (*3*) by adding ''to perform the job duties for'' rather than just the word ''position.''

2. Bar on Multiple Registrations Submitted by Related Entities

DHS will not finalize the proposed change at 8 CFR 214.2(h)(2)(i)(G) to expressly state in the regulations that related entities are prohibited from submitting multiple H–1B registrations for the same individual. On February 2, 2024, DHS published a final rule, ''Improving the H–1B Registration Selection Process and Program Integrity,'' 89 FR 7456 (Feb. 2, 2024), creating a beneficiary-centric selection process for registrations by employers and adding additional integrity measures related to the registration process to reduce the potential for fraud in the H–1B registration process. In that final rule, DHS states that it ''intends to address and may finalize this proposed provision [expressly stating in the regulations that related entities are prohibited from submitting multiple registrations for the same individual] in a subsequent final rule,'' but that ''[m]ore time and data will help inform the utility of this proposed provision.'' 89 FR 7456, 7469 (Feb. 2, 2024). Initial data from the FY 2025 H–1B registration process show a significant decrease in the total number of registrations submitted compared to FY 2024, including a decrease in the number of registrations submitted on behalf of beneficiaries with multiple registrations.[1] This initial data indicate that there were far fewer attempts to gain an unfair advantage than in prior years owing, in large measure, to the implementation of the beneficiary-centric selection process.[2] Under the beneficiary-centric selection process, individual beneficiaries do not benefit from an increased chance of selection if related entities each submit a registration on their behalf. As such, DHS has decided not to finalize the proposed change pertaining to multiple registrations submitted by related entities.

3. Contracts

In response to stakeholder comments, DHS is revising 8 CFR 214.2(h)(4)(iv)(C) to state that USCIS may request contracts or similar evidence ''showing the bona fide nature of the beneficiary's position,'' rather than ''showing the terms and conditions of the beneficiary's work'' as stated in the NPRM. This revision is intended to clarify that USCIS will review contracts or similar evidence to determine if the position is bona fide.

[1] USCIS, ''H–1B Electronic Registration Process,'' *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process.*

[2] USCIS, ''H–1B Electronic Registration Process,'' *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process.*

4. Non-Speculative or Bona Fide Employment

In response to a number of comments expressing concern with the term ''non-speculative,'' DHS is replacing ''non-speculative'' with ''bona fide,'' so that new 8 CFR 214.2(h)(4)(iii)(F) will state, in relevant part, ''[a]t the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.'' This is not intended to be a substantive change, but to clarify what DHS meant by ''non-speculative.'' This provision is also consistent with current policy guidance that an H–1B petitioner must establish that the purported employment exists at the time of filing the petition and that it will employ the beneficiary in a specialty occupation.

DHS is also adding to this provision, ''A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.'' While this was previously noted in the preamble to the NPRM, DHS believes adding this clarification to the regulatory text will help allay commenters' concerns and avoid future confusion.

5. Beneficiary-Owners

In response to commenters' concerns about the term ''controlling interest'' in the regulatory text for beneficiary-owners, DHS is clarifying the term by defining it in the regulatory text, rather than only in the preamble. Specifically, DHS is adding to new 8 CFR 214.2(h)(4)(ii) and (h)(9)(iii)(E), that a controlling interest means that the beneficiary owns more than 50 percent of the petitioner or that the beneficiary has majority voting rights in the petitioner.

6. Additional Changes

Additionally, in 8 CFR 214.1(c)(1), DHS is revising the reference to the fee regulation from 8 CFR 103.7 to 8 CFR 106.2, to align with the updated regulatory changes made by the USCIS Fee Schedule Final Rule.[3]

II. Background

A. Legal Authority

The authority of the Secretary of Homeland Security to make these regulatory amendments is found in various sections of the Immigration and Nationality Act (INA or the Act), 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 and establish such regulations as the Secretary deems necessary for carrying out such authority, 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.[4] Further authority for these regulatory amendments is found in:

- Section 101(a)(15) of the INA, 8 U.S.C. 1101(a)(15), which establishes classifications for noncitizens who are coming temporarily to the United States as nonimmigrants, including the H–1B classification, *see* INA sec. 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b);
- Section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe, by regulation, the time 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 employer may petition for nonimmigrant workers, including certain nonimmigrants described at sections 101(a)(15)(H), (L), (O), and (P), 8 U.S.C. 1101(a)(15)(H), (L), (O), and (P); the information that an employer must provide in the petition; and certain fees that are required for certain nonimmigrant petitions;
- Section 214(e) of the INA, 8 U.S.C. 1184(e), which provides for the admission of citizens of Canada or Mexico as TN nonimmigrants;
- Section 214(g) of the INA, 8 U.S.C. 1184(g), which, *inter alia,* prescribes the H–1B numerical limitations, various exceptions to those limitations, and the period of authorized admission for H–1B nonimmigrants;
- Section 214(i) of the INA, 8 U.S.C. 1184(i), which sets forth the definition and requirements of a ''specialty occupation'';
- Section 235(d)(3) of the INA, 8 U.S.C. 1225(d)(3), which authorizes ''any immigration officer'' . . . ''to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of [the INA] and the administration of [DHS]'';
- Section 248 of the INA, 8 U.S.C. 1258, which authorizes a noncitizen to change from any nonimmigrant classification to any other nonimmigrant classification (subject to certain exceptions) if the noncitizen was lawfully admitted to the United States as a nonimmigrant and is continuing to maintain that status, and is not otherwise subject to the 3- or 10-year bar applicable to certain noncitizens who were unlawfully present in the United States;
- Section 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), which recognizes the Secretary's authority to extend employment authorization to noncitizens in the United States;
- Section 287(b) of the INA, 8 U.S.C. 1357(b), which authorizes the taking and consideration of evidence ''concerning any matter which is material or relevant to the enforcement of the [INA] and the administration of [DHS]'';
- Section 402 of the HSA, 6 U.S.C. 202, which charges the Secretary with ''[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States'' and ''[e]stablishing national immigration enforcement policies and priorities''; *see also* HSA sec. 428, 6 U.S.C. 236; and
- Section 451(a)(3) and (b) of the HSA, 6 U.S.C. 271(a)(3) and (b), transferring to USCIS the authority to adjudicate petitions for nonimmigrant status, establish policies for performing that function, and set national immigration services policies and priorities.

B. The H–1B 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 secs. 101(a)(15)(H)(i)(b) and 214(i), 8 U.S.C 1101(a)(15)(H)(i)(b) and 1184(i). Through the Immigration Act of 1990, Public Law 101–649, Congress set the current annual cap for the H–1B visa category at 65,000,[5] which limits the

[3] *See* ''U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,'' 89 FR 6194 (Jan. 31, 2024).

[4] Although several provisions of the INA discussed in the NPRM refer exclusively to the ''Attorney General,'' such provisions are now to be read as referring to the Secretary of Homeland Security by operation of the HSA. *See* 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1), (g), 1551 note; *Nielsen* v. *Preap,* 586 U.S. 392, 397 n.2 (2019).

[5] Up to 6,800 visas are set aside from the 65,000 each fiscal year for the H–1B1 visa program under terms of the legislation implementing the U.S.-Chile

Continued

number of beneficiaries who may be issued an initial H–1B visa or otherwise provided initial H–1B status each fiscal year.[6] Congress provided an exemption from the numerical limits in INA sec. 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A), for 20,000 initial H–1B visas, or grants of initial H–1B status, each fiscal year for foreign nationals who have earned a master's or higher degree from a U.S. institution of higher education (''advanced degree exemption'').[7] Congress also set up exemptions to the annual H–1B cap for workers who will be employed at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965, as amended) or a related or affiliated nonprofit entity, and workers who will be employed at a nonprofit or governmental research organization. These exemptions are not numerically capped. *See* INA sec. 214(g)(5)(A)-(B), 8 U.S.C. 1184(g)(5)(A)-(B).

C. The F–1 Program

Section 101(a)(15)(F)(i) of the INA, 8 U.S.C. 1101(a)(15)(F)(i), permits bona fide students to be temporarily admitted to the United States for the purpose of pursuing a full course of study at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or accredited language training program. Principal applicants are categorized as F–1 nonimmigrants and their spouses and minor children may accompany or follow to join them as F–2 dependents.

In 1992, legacy Immigration and Naturalization Service (INS) amended its longstanding regulations relating to an employment program for students called Optional Practical Training (OPT) such that students in F–1 nonimmigrant status who have been enrolled on a full-time basis for at least one full academic year in a college, university, conservatory, or seminary (which now must be certified by U.S. Immigration and Customs Enforcement's (ICE) Student and Exchange Visitor Program (SEVP)) are allowed up to 12 months of OPT to work for a U.S. employer in a job directly related to the student's major area of study.[8] 8 CFR 214.2(f)(10). Employers of F–1 students under OPT often file petitions to change the students' status to H–1B so that they may continue working in their current or a similar job after completion of OPT. Many times, however, an F–1 student's OPT authorization would expire prior to the student being able to assume the employment specified in the approved H–1B petition, creating a gap in employment. In order to remedy this, in 2008, DHS created the ''cap-gap'' extension to temporarily extend the period of authorized stay and work authorization of certain F–1 students caught in the gap between the end of their OPT and the start date on their later-in-time approved, cap-subject H–1B petition.[9] 8 CFR 214.2(f)(5)(vi)(A). The cap-gap extension provides a temporary bridge between F–1 and H–1B status, allowing students to remain in the United States between the end of their academic program and the beginning of the fiscal year, when the student's H–1B visa status commences. DHS subsequently amended the cap-gap provisions by extending the authorized period of stay and work authorization of any F–1 student who is the beneficiary of a timely filed cap-subject H–1B petition that has been granted by, or remains pending with, USCIS, until October 1 of the fiscal year for which H–1B visa classification has been requested.[10] 8 CFR 214.2(f)(5)(vi)(A).

D. NPRM and Final Rules

On October 23, 2023, DHS published an NPRM, ''Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers,'' 88 FR 72870. In the NPRM, DHS stated that it may publish one or more final rules to codify the proposed provisions after carefully considering public comments. On February 2, 2024, DHS published, ''Improving the H–1B Registration Selection Process and Program Integrity,'' which finalized provisions of the NPRM related to the H–1B registration process.[11] Specifically, the final rule established a beneficiary centric selection process for H–1B registrations and new integrity measures, and provided start date flexibility for certain H–1B cap-subject petitions. That rule took effect on March 4, 2024, prior to the beginning of the registration period for the FY 2025 H–1B cap year. Through this subsequent rulemaking, DHS is finalizing many of the remaining provisions of the NPRM with the revisions described above and in the relevant sections below.

III. Response to Public Comments on the Proposed Rule

A. Summary of Public Comments on the Proposed Rule

In response to the proposed rule, DHS received 1,315 comments during the 60-day public comment period. Of these, 510 comments were related to the H–1B registration process and were analyzed and addressed in the final rule published on February 2, 2024. There were 970 comments related to the remaining provisions that DHS is finalizing through this rule. Some comments included a discussion of both the registration process and the provisions being finalized through this rulemaking. Of the 970 comments analyzed for this rule, 17 comments were duplicate submissions, 1 comment was not germane to the rule, and approximately 83 were letters submitted through mass mailing campaigns.

Commenters included individuals (including U.S. workers), companies, law firms, a federation of labor organizations, professional organizations, advocacy groups, nonprofit organizations, representatives from Congress and local governments, universities, and trade and business associations. Many commenters expressed support for the rule or offered suggestions for improvement. Of the commenters opposed to the rule, many commenters expressed opposition to a part of or all of the proposed rule. Some just expressed general opposition to the rule without suggestions for improvement. For many of the public comments, DHS could not ascertain whether the commenter supported or opposed the proposed rule.

DHS has reviewed and considered all of the public comments received in response to the proposed rule. In this final rule, DHS is responding to public

and U.S.-Singapore free trade agreements. *See* INA secs. 101(a)(15)(H)(i)(b1), 214(g)(8), 8 U.S.C. 1101(a)(15)(H)(i)(b1), 1184(g)(8).

[6] The 65,000 annual H–1B numerical limitation was increased for FYs 1999 through 2003. *See* INA sec. 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A), as amended by section 411 of the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Public Law 105–277, div. C, tit. IV, 112 Stat. 2681, and the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106–313, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273, 116 Stat. 1758 (2002). Subsequent to IMMACT 90, Congress also created several exemptions from the 65,000 numerical limitation. *See* INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5).

[7] *See* INA sec. 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C). This rule also may refer to the 20,000 exemptions under section 214(g)(5)(C) from the H–1B regular cap as the ''advanced degree exemption allocation,'' or ''advanced degree exemption numerical limitation.''

[8] *See* ''Pre-Completion Interval Training; F–1 Student Work Authorization,'' 57 FR 31954 (Jul. 20, 1992).

[9] *See* ''Extending Period of Optional Practical Training by 17 Months for F–1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F–1 Students With Pending H–1B Petitions,'' 73 FR 18944 (Apr. 8, 2008).

[10] *See* ''Improving and Expanding Training Opportunities for F–1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F–1 Students,'' 81 FR 13040 (Mar. 11, 2016).

[11] *See* 89 FR 7456.

comments that are related to the provisions that DHS is finalizing through this final rule. DHS's responses are grouped by subject area, with a focus on the most common issues and suggestions raised by commenters.

B. DHS/USCIS Statutory and Legal Issues

Comment: A law firm wrote that the proposed rule reflects USCIS' commitment to seek opportunities within the bounds of the law to maximize flexibility for employers and beneficiaries. A joint submission by a professional association and an advocacy group commended USCIS for seeking to modernize the H–1B program by creating ''opportunities for innovation and expansion'' in alignment with the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the American Competitiveness in the Twenty-first Century Act of 2000 (AC21). The commenters articulated the importance of these statutes and the congressional intent behind them as multiple countries (*e.g.,* Canada, the United Kingdom (UK), Australia, and Germany) have implemented new immigration programs to attract high-skilled workers.

Response: DHS agrees with these commenters that this rule will, among other things, provide benefits and flexibilities for petitioners and beneficiaries.

Comment: Some commenters perceived certain aspects of the proposed rule to be unlawful or stated that the proposed provisions would undermine prevailing statutes or Executive orders (E.O.). For example, a professional association wrote that DHS's proposed revisions would ''fundamentally alter immigration laws that exceed [its] authority.'' Specifically, the association said that the proposed revisions would ''directly undermine INA sections 101(a)(15)(H) and 214(c)(1)(i) (sic) and 8 CFR 214.2(h)(4)(B) (sic) via changing the definition of who qualifies as an H–1B visa holder. . . .''

A business association asserted that certain proposed provisions in the NPRM are unlawful as written, including the proposed specialty occupation definition, non-speculative employment requirement, third-party placement provisions, site visit authorities, and USCIS' authority to review LCAs. The association further remarked that these provisions would hinder the objectives of E.O. 14410 to develop artificial intelligence (AI) capabilities in the United States. As such, the association urged DHS to issue supplemental notices to withdraw these provisions or propose substantial changes to address their legal deficiencies, providing the public with the opportunity to comment on the revisions to the proposed rule. A trade association wrote that the proposed changes to visa qualifications and review processes would undermine E.O. objectives to ''attract and retain talent in AI and other critical and emerging technologies in the United States economy'' by jeopardizing the ability of H–1B nonimmigrants to renew their visas.

A trade association wrote that DHS has neglected the congressional purpose of the H–1B program and has exceeded its statutory authority. Citing various examples found in statute and case law related to split enforcement powers and agency jurisdiction, the association stated that DOL has a greater share of authority and enforcement powers in the H–1B program compared to DHS's statutory carve-out. For example, the commenter asserted that while Congress delegated to DOL the authority to set wages, conduct investigations and enforcement actions, and protect U.S. labor interests (*e.g.,* through setting the prevailing wage and requiring the same conditions for H–1B workers and U.S. workers), DHS's authority, codified at 8 U.S.C. 1184(i), focuses on determining whether the petitioner seeks to employ a professional in a ''specialty occupation.'' The association concluded that the authority to regulate the area of employment and definition of employer belongs to DOL, not DHS, and suggested that DHS constrain its regulatory scheme to the areas intended by Congress, applying DOL's definitions of key terms associated with the H–1B program. A professional association generally encouraged DHS to improve the legal integrity of H–1B regulations and advance policy goals that align with congressional intent.

Response: DHS disagrees with the commenters' assertions that the proposed changes that are being finalized in this rule are ultra vires. DHS will not issue a supplemental notice to withdraw the proposed changes, or propose substantial changes as commenters suggested. The changes being made by this final rule are within the broad authority delegated to DHS by statute. The changes enhance the integrity of the H–1B program and provide needed clarification to existing rules, policies, and practices so that petitioners have greater clarity, transparency, and predictability as to the requirements for the H–1B classification.

DHS's authority to regulate in the H–1B context is not limited, as some commenters asserted, to INA section 214(i), 8 U.S.C. 1184(i). That section pertains solely to the definition of ''specialty occupation.'' Rather, as explained in the proposed rule and in this final rule, DHS's authority is also derived from various provisions in the INA and HSA, including, but not limited to: INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); INA section 103(a), 8 U.S.C. 1103(a); INA section 214(a)(1), 8 U.S.C. 1184(a)(1); INA section 214(c), 8 U.S.C. 1184(c); INA section 214(g), 8 U.S.C. 1184(g); INA section 235(d)(3), 8 U.S.C. 1225(d)(3); INA section 287(b), 8 U.S.C. 1357(b); HSA section 112, 6 U.S.C. 112; HSA section 402, 6 U.S.C. 202; and HSA section 451(a)(3) and (b), 6 U.S.C. 271(a)(3) and (b). Collectively, these various provisions provide DHS with broad authority to promulgate regulations to administer and enforce the H–1B nonimmigrant classification.

DHS disagrees with some commenters' assertions that the proposed changes to the definition of specialty occupation are ultra vires because the statute does not contain the term ''directly related.'' While commenters are correct that INA section 214(i), 8 U.S.C. 1184(i), does not use the term ''directly related,'' the statute does refer to 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. DHS interprets the ''specific specialty'' requirement in INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), to relate back to the body of highly specialized knowledge requirement referenced in INA section 214(i)(1)(A), 8 U.S.C. 1184(i)(1)(A), required by the specialty occupation in question. The ''specific specialty'' requirement is only met if the degree in a specific specialty or specialties, or equivalent, provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA section 214(i)(1)(A). Because an occupation may involve application of multiple bodies of highly specialized knowledge, ''specific specialty'' is not limited to one degree field, or its equivalent, but may include multiple degree fields, or equivalents, that provide the body of highly specialized knowledge to be applied when performing the occupation. The requirement that each degree field, or its equivalent, be directly related to the position is the best interpretation of the statutory text

and consistent with existing USCIS practice.[12]

DHS disagrees with the assertion of some commenters that USCIS does not have authority to review the contents of an LCA. The authority provided to DOL under INA section 212(n), 8 U.S.C. 1182(n), does not deprive DHS of authority to administer and enforce the H–1B nonimmigrant classification. Congress provided DHS with broad authority to administer and enforce the H–1B nonimmigrant classification, in addition to the authority provided to DOL to administer and enforce requirements pertaining to LCAs. *See ITServe Alliance, Inc.* v. *U.S. Dep't of Homeland Sec.,* 71 F.4th 1028, 1037 (D.C. Cir. 2023) (the authorities provided to DOL under 8 U.S.C. 1182(n) ''are not by their terms exclusive, so as to oust USCIS from its own authority over the H–1B petition process. And the INA strongly suggests that the agencies' respective authorities are complementary rather than exclusive. . . .''). As the U.S. Court of Appeals for the D.C. Circuit explained, INA section 103(a)(1), 8 U.S.C. 1103(a)(1), independently provides DHS with authority to administer and enforce the INA, including a petitioning employer's compliance with the terms of an LCA. *Id.*

Commenters' assertions that DHS does not have authority to regulate the area of employment and definition of employer are similarly misplaced. As explained in the preamble to the proposed rule and in this final rule, DHS's authority in the H–1B context is not solely derived from INA section 214(i), 8 U.S.C. 1184(i). That provision only addresses the definition of ''specialty occupation.'' But the broad authority delegated or otherwise provided to DHS, which includes the authority to regulate the area of employment and definition of employer for purposes of provisions enforced by DHS, is provided in various other provisions, including, but not limited to: INA section 103(a), 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws and establish such regulations as the Secretary deems necessary for carrying out such authority; INA section 214(a)(1), 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe, by regulation, the time and conditions of the admission of nonimmigrants; and INA section 214(c)(1), 8 U.S.C. 1184(c)(1), which authorizes the Secretary to prescribe how an employer may petition for an H–1B worker and to prescribe the form and information required in an H–1B petition. Commenters' assertion that DHS does not have the authority to regulate who may qualify as an H–1B employer because INA section 214(i), 8 U.S.C. 1184(i), does not include the term ''employer,'' is contrary to the express reference to ''employer'' in INA section 214(c)(1), 8 U.S.C. 1184(c)(1), and the authority delegated or otherwise provided to DHS therein.[13]

DHS disagrees with commenters' assertion that it lacks authority to conduct on-site inspections through the USCIS Fraud Detection and National Security Directorate (FDNS). In 2004, USCIS established FDNS in response to a congressional recommendation to establish an organization ''responsible for developing, implementing, directing, and overseeing the joint USCIS-Immigration and Customs Enforcement (ICE) anti-fraud initiative and conducting law enforcement/background checks on every applicant, beneficiary, and petitioner prior to granting immigration benefits.'' [14]

The site visits and inspections conducted by FDNS are authorized through multiple legal authorities. Congress delegated to the Secretary of Homeland Security the authority to administer and enforce the immigration laws. INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1). The Secretary may confer this authority to any Department of Homeland Security (DHS) employee, including USCIS employees, to the extent permitted by law. INA sec. 103(a)(4), 8 U.S.C. 1103(a)(4); HSA sec. 102(b)(1), 6 U.S.C. 112(b)(1); 8 CFR 2.1.[15] Moreover, under 6 U.S.C. 112(a)(3), all functions of officers, employees, and organizational units of [DHS] are vested in the Secretary. The Secretary of Homeland Security delegated to USCIS the authority to administer the immigration laws, including the authority to investigate civil and criminal violations involving applications or determinations for benefits.[16] Following the dissolution of the INS and the creation of DHS on March 1, 2003, authority to ''administer the immigration laws'' was delegated to USCIS.[17]

USCIS was delegated the ''authority to investigate alleged civil and criminal violations of the immigration laws, including, but not limited, to alleged fraud with respect to applications or determinations within the USCIS, and make recommendations for prosecutions, or other appropriate action when deemed advisable.'' [18] USCIS also has the ''authority to interrogate aliens and issue subpoenas, administer oaths, take and consider evidence, and fingerprint and photograph aliens under sections 287(a), (b), and (f) of the INA, 8 U.S.C. 1357 and under 235(d) of the INA, 8 U.S.C. 1225(d).'' [19]

USCIS and ICE were granted concurrent authority to investigate immigration benefit fraud.[20] Through

[12] *See, e.g., Madkudu Inc.* v. *USCIS,* No. 5:20–cv–2653–SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4 (''[I]f the record shows that the petitioner would consider someone as qualified for the position based on less than a bachelor's degree in a specialized field directly related to the position (*e.g.,* an associate's degree, a bachelor's degree in a generalized field of study without a minor, major, concentration, or specialization in market research, marketing, or research methods . . ., or a bachelor's degree in a field of study unrelated to the position), then the position would not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. 1184(i)(1) and 8 CFR 214.2(h)(4)(ii).''), *https://www.uscis.gov/sites/default/files/document/legal-docs/Madkudu-settlement-agreement.pdf* (last visited Oct. 23, 2024).

[13] Other H–1B related provisions in the statute also refer specifically to the petitioning employer, employment, or being employed as an H–1B worker. *See, e.g.,* INA secs. 214(c)(9), (10), (12), and (g)(5) and (6); 8 U.S.C. 1184(c)(9), (10), (12), and (g)(5) and (6).

[14] *See* Conference Report to accompany H.R. 4567 [Report 108–774], ''Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2005,'' p. 74 (Oct. 9, 2004), *https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt774/pdf/CRPT-108hrpt774.pdf.*

[15] Pursuant to 8 CFR 2.1, all authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security, including delegation through successive redelegation, or to any employee of the United States to the extent authorized by law. Also, because INA sec. 103(a)(4) refers to ''Service'', *i.e.* Legacy INS, see also 8 CFR 1.2 which defines Service as ''U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and/or U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears.''

[16] Delegation to the Bureau of Citizenship and Immigration Services, Department of Homeland Security Delegation Number 0150.1, Issue Date: 06/05/2003. The Bureau of Citizenship and Immigration Services was the initial name for USCIS following the dissolution of the Immigration and Naturalization Service.

[17] *See* Delegation 0150.1(II)(H) (June 5, 2003).

[18] *See* Delegation 0150.1(II)(I) (June 5, 2003).

[19] *See* Delegation 0150.1(II)(S) (June 5, 2003).

[20] In section (II)(I) of DHS Delegation Number 0150.1, Delegation to the Bureau of Citizenship and Immigration Services, and in section 2(I) of DHS Delegation Number 7030.2, Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement, USCIS and ICE received concurrent authority to investigate fraud involving immigration benefits available under the INA. In their respective delegations, USCIS and ICE were further directed by the Secretary of Homeland Security to coordinate the concurrent responsibilities provided under these Delegations. A memorandum of agreement was undertaken to advance the coordination between USCIS and ICE, as authorized by these Delegations. The Secretary of Homeland Security has properly delegated authority to immigration officers, including immigration officers who work for FDNS.

written agreement, ICE agreed to take the lead on criminal and other enforcement investigations and USCIS agreed to focus on detecting and combating fraud associated with adjudicating applications and petitions.[21] The Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, granted the Secretary of Homeland Security the authority to administer and enforce provisions of the INA, as amended, INA sec. 101, 8 U.S.C. 1101 *et seq.* The Secretary, in Homeland Security Delegation No. 0150.1, delegated certain authorities to USCIS. FDNS's activities fall squarely within this delegation.

Further, regulations support the FDNS activities that are described in this rule. For example, 8 CFR 1.2, defines ''immigration officer'' to include a broad range of DHS employees including immigration agents, immigration inspectors, immigration officers, immigration services officers, investigators, and investigative assistants. As duly appointed immigration officers, FDNS immigration officers may question noncitizens based on the authority delegated to them by the Secretary of Homeland Security. Furthermore, INA sec. 287(a)(1), 8 U.S.C. 1357(a)(1), provides any officer or employee of the Service with the authority (pursuant to DHS regulations) to, without warrant, ''interrogate any alien or person believed to be an alien as to his right to be or remain in the United States.'' *See also* 8 CFR 287.5. The regulation at 8 CFR 287.8(b) specifically sets out standards for interrogation and detention not amounting to arrest, wherein immigration officers can question an individual so long as they do not restrain the freedom of the individual. Further, the Board of Immigration Appeals has recognized that the reports produced by FDNS based on site visits and field investigations are ''especially important pieces of evidence.'' [22] These investigations and resulting reports help ensure that adjudicative decisions are made with confidence by providing information that would otherwise be unavailable to USCIS.

Lastly, DHS disagrees that this final rule is inconsistent with the Executive Order on Artificial Intelligence.[23] That Executive order, among other things, directed DHS to ''continue its rulemaking process to modernize the H–1B program and enhance its integrity and usage, including by experts in AI and other critical and emerging technologies. . . .'' DHS satisfied this part of the Executive order through its continued work to complete and publish this final rule. As explained throughout this preamble, this final rule, along with the final rule published on February 2, 2024,[24] modernizes the H–1B program and enhances its integrity and use by, among other things, providing greater clarity, transparency, and predictability regarding eligibility for the H–1B classification. As explained further below, DHS disagrees that requiring a direct relationship between the required degree field(s), or their equivalents, and the duties of the position is inconsistent with E.O. 14110 or creates additional hurdles for foreign nationals seeking to work in AI or other science, technology, engineering, and math (STEM) fields. As stated previously, DHS is codifying and clarifying long-standing USCIS practice to provide greater clarity and predictability for employers and foreign nationals, including those seeking to work in AI or other STEM fields.

C. General Comments

1. General Support for the Rule

Comment: Several individual commenters expressed support for the proposed rule without rationale, with some expressing ''strong'' support. A couple of individual commenters thanked USCIS for modernizing the H–1B program. An individual commenter wrote that, ''this is life changing,'' and another commenter wrote that, ''this is a great and substantial improvement.'' Another commenter applauded various specific measures of the rule, including those pertaining to deference, evidence of job offers, oversight, and streamlining the H–1B process.

Response: DHS agrees that the provisions in this rule will modernize and improve the H–1B program.

Comment: Several commenters expressed general support for the proposed rule because of positive impacts on program operability, oversight, integrity, and government efficiency. Many commenters expressed support for the proposed rule, reasoning that it would foster fairness in the H–1B program, reduce abuse and promote program integrity, and create a more efficient system. A few commenters expressed support for the proposed rule, reasoning it would improve program efficiency and reduce administrative burdens, and could result in smoother, more streamlined procedures that are easier to follow. A commenter wrote that the proposed rule is a ''significant step towards creating a more inclusive and efficient immigration system.''

Response: DHS agrees with these commenters that the provisions in this rule will have positive impacts on program operability and integrity. Many of the provisions being finalized through this rule are intended to promote program integrity and create a more efficient system.

Comment: Several commenters, including a joint submission, expressed support for the proposed rule on the basis that it would have positive impacts on prospective beneficiaries. A commenter wrote that the proposed rule has the potential to provide highly skilled professionals with the chance to secure employment in and make meaningful contributions to the United States. A commenter said that it is crucial to protect nonimmigrant workers' rights and ensure that they are treated fairly, and that this proposed rule is a ''significant step in the right direction.'' The commenter urged USCIS to fully implement the proposed rule. Another commenter expressed their agreement with the proposed changes, having seen their colleagues leave the United States every year due to losing their valid visa status. A commenter expressed support for the proposed rule, writing that providing greater flexibility for beneficiaries is a ''much-needed change.'' The commenter added making the visa renewal process easier could significantly reduce hurdles and uncertainties that foreign workers face.

Response: DHS agrees with these commenters that the provisions in this rule will have positive impacts on prospective beneficiaries and provide beneficiaries with greater flexibility. DHS's intent is to make the H–1B process more efficient and fairer by reducing administrative hurdles and uncertainties through this rulemaking, such as codifying USCIS' deference policy to make it clear that, if there has been no material change in the underlying facts, adjudicators generally should defer to a prior determination involving the same parties and underlying facts, and giving USCIS officers the discretion to issue RFEs to allow petitioners to request amended validity periods where the initial

[21] Memorandum of Agreement between USCIS and ICE on the Investigation of Immigration Benefit Fraud, September 25, 2008; see also Memorandum of Agreement between USCIS and ICE Regarding the Referral of Immigration Benefit Fraud and Public Safety Cases (Dec. 15, 2020).

[22] *Matter of P. Singh,* 27 I&N Dec. 598, 609 (BIA 2019) (''Detailed reports from on-site visits and field investigations are especially important pieces of evidence that may reveal the presence of fraud.'').

[23] E.O. 14110, ''Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.''

[24] ''Improving the H–1B Registration Selection Process and Program Integrity'', 89 FR 7456 (Feb. 2, 2024).

requested validity period expires before adjudication.

Comment: Many commenters, including a trade association, a company, and a joint submission, expressed support for the proposed rule, reasoning that it would strengthen the U.S. job market and economy. A trade association commented that streamlining the H–1B program requirements and improving program integrity would enable the United States to retain valuable international talent. A company said that they appreciate DHS's effort to improve the H–1B system, adding that a modern H–1B program that reflects today's economy would keep the United States attractive to global talent and ensure that U.S. employers can, ''maintain a comprehensive workforce.'' An advocacy group wrote that the proposed provisions aimed at modernizing and streamlining the H–1B program would ''strengthen the nation's capacity to attract and retain essential global talent'' in artificial intelligence and other fields in emerging technology.

A commenter expressed strong support for the proposed rule, writing that it would ''bolster the nation's competitive edge'' and promote economic growth. A couple of other commenters similarly wrote that the proposed changes to the H–1B program would give the United States a global competitive advantage and attract the brightest minds from around the world. One of these commenters added that streamlining the visa process could benefit the U.S. economy and encourage innovation. Another commenter also expressed their support for the proposed rule for similar reasons, writing that the proposed changes to improve the H–1B program would create jobs and benefit not only U.S. employers but also professionals who want to contribute to the United States' success. A few commenters expressed support for the proposed rule on the basis that, under the current H–1B policies, many talented individuals are leaving the United States, and the proposed rule would prevent this from continuing. One of these commenters wrote that modernizing the H–1B program is essential for retaining top talent and allowing the United States to become ''competitive once again on the global stage.''

Response: DHS agrees with these commenters that clarifying the H–1B program requirements and improving program integrity will help enable the United States retain valuable international talent. Through the provisions in this rulemaking, DHS's goal is to keep the United States attractive to global talent, benefit the U.S. economy, and encourage innovation.

2. General Opposition to the Rule

Comment: Several commenters, including an advocacy group, expressed opposition to the proposed rule on the basis that it would undermine the program's integrity and increase fraud. An individual commenter stated that the regulations do not satisfactorily address their perceived problems of the H–1B program.

Response: DHS disagrees with these commenters that the provisions in this rulemaking will undermine the H–1B program or increase fraud. DHS is finalizing several provisions that aim to increase program integrity, such as codifying its authority to request contracts, requiring that the petitioner establish it has an actual, bona fide position in a specialty occupation available for the beneficiary as of the requested start date, and codifying USCIS' authority to conduct site visits, to name a few.

Comment: Numerous commenters said the rule would negatively impact U.S. citizen workers by incentivizing the hiring of H–1B workers. In particular, commenters stated that the proposed rule would harm and undermine American workers, particularly those in the technology industry; does not adequately safeguard American workers and makes it easier for American companies to obtain foreign labor; would benefit large employers, while putting American job seekers at a disadvantage; and would incentivize employers to hire ''cheaper foreign labor'' and avoid taxes at the expense of U.S. citizens.

A commenter urged USCIS to make the H–1B program stricter, stating that the Federal Government should work towards improvements for U.S. citizens, rather than immigrant labor. A couple of commenters, including a professional association, wrote that American students that have graduated with specialty degrees are unable to gain employment.

Response: DHS disagrees that this rulemaking would undermine American workers or put American job seekers at a disadvantage. The existing H–1B statutory and regulatory requirements include protections for U.S. workers and this rulemaking does not remove or diminish any protections or place U.S. workers at a disadvantage in the job market. The goal of this rulemaking is to modernize and improve the integrity of the H–1B program. In fact, this final rule will improve H–1B integrity and build upon the existing protections for U.S. workers by clarifying that the LCA must properly correspond to the H–1B petition, and codifying the authority of USCIS to conduct site visits and take adverse action against employers who are not complying with the terms of the H–1B petition approval or who refuse to comply with a site visit.

Comment: A few commenters noted that the proposed rule could make it more difficult for small and medium-sized consulting companies to navigate the H–1B process. More specifically, a few commenters, including a couple of trade associations and a law firm, stated that the U.S. information technology (IT) industry's ability to hire reliable foreign talent would be negatively affected, which would harm the competitiveness of American businesses, research facilities, medical institutions, and other important economic drivers. A few commenters, including a company, remarked that the proposed rule would make it difficult for IT consulting companies to utilize the H–1B visa, which would cause the economy to suffer. A business association articulated concerns among its members that various proposals would cause significant disruptions to their operations across industries. In addition, a commenter stated that the proposed rule would hamper companies' ability to serve their customers given labor shortages, inflation, and budgetary constraints.

Response: DHS disagrees with these commenters that the provisions in this rulemaking will make it more difficult for certain companies to navigate the H–1B process or cause disruptions for certain industries. Through this rulemaking, DHS is codifying many policies and practices that are already in place, such as requiring that the LCA properly correspond to the petition and when to file an amended petition. Through this rulemaking, DHS's intent is to clarify current policy and add transparency and greater predictability to the adjudication process.

3. Other General Comments on the Rule

Comment: An individual commenter, while expressing support for ''the broad goal of modernization and program improvements,'' noted the importance of measures to prevent the exploitation of foreign workers and to ensure that they are provided fair wages and working conditions; prioritizing streamlining and efficiency in program administration, measures to protect and support international students, and data collection and analysis; and that DHS should actively engage with stakeholders to solicit input and feedback during the rulemaking process.

Response: While the commenter did not provide any specific feedback related to the provisions in the NPRM, DHS generally agrees with the considerations noted by the commenter. As stated previously, the purpose of this rulemaking is to modernize and improve the efficiency of the H–1B program, add benefits and flexibilities, and strengthen integrity measures. The modernization provisions will enhance efficiencies, and the integrity measures are intended to prevent exploitation of foreign workers and protect the interests of U.S. workers. Further, by finalizing the provision to expand cap-gap protection, this rule supports international students. DHS has also engaged in extensive data collection and analysis in this rulemaking, as detailed in the NPRM, the previously published final rule ''Improving the H–1B Registration Selection Process and Program Integrity,'' and this final rule. In addition, DHS has engaged with stakeholders by requesting public comments in response to the NPRM.

D. Modernization and Efficiencies

1. General Comments on the Proposed Modernization and Efficiencies Provisions

Comment: Many commenters supported the proposed modernization provisions, including a joint submission by commenters who stated general support for DHS's initiative to modernize the H–1B program. A couple of commenters regarded the modernization efforts as ''commendable,'' while another commenter said the modernization measures were ''long overdue.'' This commenter and another commenter reasoned that the modernization provisions would streamline administrative tasks and remove disruptions in the program. A commenter expressed support for the modernization provisions, stating that they would help prevent artificial manipulation of the job market.

Echoing support for the NPRM's modernization efforts, a company noted that the United States' outdated immigration laws must be updated to meet the needs of the economy. A different commenter applauded the modernization effort and urged its implementation in order to benefit U.S. economic competitiveness. A trade association similarly endorsed the H–1B modernization provisions as advancing the United States' global leadership in specialized fields, such as STEM. Specifically, the association reasoned that the sustainability of U.S. leadership depends on semiconductor companies having access to top domestic and global talent.

Some commenters offered mixed remarks on the modernization provisions. For example, a commenter urged policymakers to take immediate action to implement the modernization provisions while highlighting the importance of balancing between welcoming global talent and safeguarding the interests of U.S. citizen workers. Another commenter offered conditional support for the modernization provisions as long as there is no disruption to existing H–1B visa holders.

A few commenters expressed support for efficiency measures as part of the proposed rule. For example, a commenter expressed general approval of DHS's plans to improve clarity and efficiency. Another commenter said that streamlining the eligibility requirements, improving program efficiency, and providing greater benefits and flexibilities for both employers and workers are crucial steps toward creating a more efficient and responsive immigration system. Another commenter described the importance of the H–1B visa program to the U.S. economy and of increased program efficiency, and noted technology, medicine, and research as particular industries that could benefit from the modernization provisions.

Response: DHS agrees that modernizing the H–1B program and increasing program efficiency are important and may help to streamline administrative tasks. As explained in the NPRM, the purpose of this rulemaking is to modernize and improve the H–1B regulations by: (1) clarifying the requirements of the H–1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) strengthening H–1B integrity measures.

2. Specialty Occupation Definition and Criteria

i. General Comments on the Proposed Changes to ''Specialty Occupation''

Comment: Several commenters expressed support for the proposed changes to the specialty occupation requirements and standards. For example, a commenter said that the specialty occupation revisions are a ''good step'' for H–1B program modernization. Other commenters expressed general support for the specialty occupation requirements or specialized degree requirements for specialized work. Several commenters generally supported the proposed specialty occupation requirements noting that they would help curb fraud and abuse by certain types of companies. A university stated it was hopeful that the proposed modifications to the specialty occupation requirements would reduce the number of Requests for Evidence (RFE) that it receives when filing H–1B petitions for faculty and staff. In addition, a professional association expressed support for DHS's proposed changes to clarify the ''special occupation'' standard, codify existing practice, and align the regulations with the authorizing statute. The association said that the changes would avoid misapplication of the regulations in petitions involving new employment.

Response: DHS agrees that the specialty occupation revisions, as slightly modified from the NPRM to better reflect current practice, will be beneficial for H–1B program modernization and integrity. DHS also agrees that clarifying the specialty occupation standard and codifying existing practice may help reduce unnecessary RFEs, avoid misapplication of the regulations, better align the regulations with the authorizing statute, and provide H–1B petitioners with more certainty as to the applicable adjudication standards.

Comment: Several commenters expressed general opposition to the proposed specialty occupation changes. For example, a form letter campaign and another commenter generally stated that they did not support the proposed specialty occupation provisions, and other commenters suggested that DHS reconsider the specialty occupation requirements without providing further rationale. A few commenters requested that USCIS remove the definition of ''specialty occupation'' from the rule, reconsider its implementation, or modify the definition. A few other commenters stated that the ''specialty occupation'' definition should be broadened so that individuals are not limited to positions just within their field of study or degree.

Response: DHS declines to remove the definition of specialty occupation from the rule but is modifying the definition in response to comments received. These modifications include removing the references to general degree titles and defining the term ''directly related.'' DHS declines to broaden the definition of specialty occupation to specifically state that individuals are not limited to positions within their field of study, as such language conflates the issue of whether a position qualifies as a specialty occupation with the issue of whether the beneficiary is qualified to

perform the specialty occupation. Further, the proposed definition already states that a position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position.

Comment: Several commenters questioned whether the changes to the specialty occupation definition and criteria are consistent with DHS's stated intent to codify existing practices. For instance, an advocacy group expressed concern that, while the Department views the updated regulations as a codification of existing practices, the new definition and criteria could, in practice, change the way petitions are adjudicated. The group said that the strict application of the regulatory text, which in its view does not reflect the broader analysis described in the preamble, could result in an overly narrow application of the provisions. The group proposed that the Department either abandon the proposed changes or amend the regulatory text to reflect the analysis described in the preamble by stating explicitly that USCIS will conduct fair evaluations of specialized coursework and training.

Numerous other commenters also expressed concerns with respect to how USCIS will consider work experience, skills, and demonstrated competencies to fulfill the specialty occupation degree requirements. These commenters indicated that the consideration of work experience and skills would better ensure that USCIS determinations reflect evolving workforce realities of employer demands for individuals to fill specialized roles which require professionals to adapt and develop new skills. Commenters also said that consideration of experience and skills would accommodate new and emerging technologies and be consistent with the dynamic nature of industries. The commenters said that experience should be a factor in determining specialty occupations, as experience equips individuals with hands-on skills, industry insights, and problem-solving abilities that are often not fully captured by academic qualifications alone. A couple of the commenters added that experience frequently links theoretical and practical competence, serving as a trustworthy gauge of a candidate's ability to meet the demands of their line of work. Likewise, a company expressed support for the updates and simplification of the specialty occupation definition, but also expressed concern that the proposed changes would lead to a perfunctory assessment of the relatedness of a beneficiary's specialty to the position while neglecting the nuances of the educational backgrounds required for innovation in the technology sector. The company urged DHS to protect the individualized framework and improve it by enhancing clarity and preserving flexibility in the H–1B program, allowing for continual modernization in line with emerging technological developments.

Several commenters recommended DHS revise the regulatory text to clarify that USCIS will consider relevant coursework or courses of study alongside the degree field in its decision-making, consistent with established preexisting agency practices. A trade association recommended that DHS rescind the proposed changes or amend the regulatory text to better codify existing agency practices, for example, by expressly requiring adjudicators to consider the coursework underlying a particular degree as well as the petitioner's explanation as to why the degree is directly related to the relevant occupation. A company similarly encouraged DHS to revise its definition and criteria to focus on the courses completed in a degree program, and provided revised regulatory text to reflect this change.

Several commenters expressed general concern with the use of the terms ''degrees'' and ''positions'' in the specialty occupation definition and criteria, reasoning that the proposed language is misaligned with longstanding agency practices. For example, a Federal elected official, associations, and a joint submission, suggested alternative regulatory language, proposing that DHS use the term ''course of study'' instead of ''degree'' in the definition of ''specialty occupation'' at proposed 8 CFR 214.2(h)(4)(ii) and position criteria requirements at 8 CFR 214.2(h)(4)(iii)(*1*) through (*4*). These commenters also proposed that DHS substitute ''job duties of the position'' or ''job duties'' for references to ''the position'' in the specialty occupation definition at 8 CFR 214.2(h)(4)(ii) and position criteria requirements at 8 CFR 214.2(h)(4)(iii)(A)(*1*) through (*4*). Additionally, commenters claimed that DHS should use the terms ''degrees'' or ''positions'' in reference to the statutory standard, but the modernized regulations should reflect longstanding agency practices by omitting degree references (*e.g.,* business administration) and incorporating references to courses of study and job duties. A Federal elected official wrote that while the proposed rule seeks to clarify existing agency practices for specialty occupation adjudications, the use of the terms ''degrees'' and ''positions'' instead of ''courses studied'' and ''duties of the position'' fails to capture longstanding agency policy, creating unreasonable requirements for employers and professionals. The official warned that focusing on degree titles and positions would deviate from existing policy and preclude those who would otherwise qualify for H–1B classification. Another commenter expressed particular concern with the proposed rule's use of terms like ''degrees'' and ''positions'' and their view that the rule is misaligned with longstanding agency practices.

Additionally, commenters urged DHS to finalize the rule to better reflect longstanding agency practices by omitting references to particular types of degrees (*e.g.,* business administration) and incorporating references to courses of study and job duties within the specialty occupation definition and criteria. A few commenters wrote that, although DHS explains that referring to the degree title was for ''expediency'' and the agency separately evaluates the beneficiary's actual course of study, the ''binding'' regulatory language fails to capture the realities of preexisting agency practices. A trade association expressed concern that the proposed regulations, as written, could significantly narrow the types of degrees that USCIS would accept for a given occupation, and that the rule fails to codify existing practices that manufacturers use to demonstrate compliance.

Response: DHS agrees that it is important to improve the H–1B program by enhancing clarity and preserving flexibility to align with emerging technological developments and industry requirements. With this rulemaking, DHS seeks to create a more flexible definition of specialty occupation that can be adapted to occupations in new and emerging fields, such as STEM and AI, by clarifying that a position may allow for a range of qualifying degree fields. DHS also agrees that it is important to acknowledge the realities of the workforce and the evolving demands of specialized roles, accommodate new and emerging technologies, and be consistent with the dynamic nature of industries. As proposed and finalized, the definition of specialty occupation will make it clear that DHS will consider a range of qualifying degree fields and multiple bodies of highly specialized knowledge when assessing whether a position is a specialty occupation, and that 'normally'' does not mean ''always'' within the context of the specialty

occupation criteria. 88 FR 72870, 72871 (Oct. 23, 2023); new 8 CFR 214.2(h)(4)(ii). The changes made to the definition of specialty occupation and its criteria are intended to codify existing practices and, as such, are not expected to create new restrictions on eligibility or lead to significant changes in adjudications.

In response to stakeholder feedback, DHS is making some revisions to this final rule compared to the NPRM to better reflect DHS's original intent when proposing the specialty occupation changes. For example, DHS is not finalizing the sentence, ''The required specialized studies must be directly related to the position,'' as this sentence may have erroneously suggested that DHS would not look beyond the specialized studies or degree when assessing H–1B eligibility.[25] To address commenters' concerns about over-reliance on degree titles, DHS is removing the references to ''business administration'' and ''liberal arts'' in the final rule. DHS is also clarifying the level of connection needed to meet the ''directly related'' requirement by specifying in the final regulatory text that ''directly related'' means that there is a logical connection between the required degree, or its equivalent, and the duties of the position. Further, DHS is adding a reference to the ''duties of the position'' in the specialty occupation definition and ''job duties'' in the specialty occupation criteria in response to comments and to assure stakeholders that this practice has not changed.

DHS disagrees with comments claiming that the changes to the specialty occupation provisions are contrary to USCIS's stated commitment to utilize an individualized framework and allow adjudicators to discount a beneficiary's coursework, work experience, and specialized skills. DHS believes that these commenters have conflated the issue of whether a position qualifies as a specialty occupation with the issue of whether a beneficiary is qualified to perform the specialty occupation. The changes to the specialty occupation provisions do not impact how USCIS evaluates and will continue to evaluate a beneficiary's qualifications. *See* 8 CFR 214.2(h)(4)(iii)(C) and (D). DHS confirms that USCIS will continue to consider work experience, skills, and courses of study in determining whether a beneficiary meets the qualifications for a specialty occupation position. As stated in the NPRM, USCIS will continue to separately evaluate whether a beneficiary's actual course of study is directly related to the duties of the position, rather than merely looking at the title of the degree. USCIS will continue to make individualized determinations in each case, and will consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*), (h)(4)(iii)(D). As such, DHS will not adopt the suggestions to abandon or further amend the regulatory definition of specialty occupation to specify that ''specialized coursework and training will be fairly evaluated.'' Such amendments are unnecessary because of existing regulatory text pertaining to the beneficiary's qualifications and the other changes finalized in this rule.

Comment: Multiple commenters specifically discussed alternative training and certification programs as relevant to ''specialty occupation'' determinations. For example, a professional association recommended including alternative training programs, such as apprenticeships, in the specialty occupation determination, noting that this approach would better align H–1B rules with the growing importance of skills-based hiring. Citing a report, the professional association noted a trend towards ''holistic, well-rounded'' hiring practices beyond degree attainment. The association concluded that under a modernized U.S. immigration system, U.S. employers must be able to assess talent in ways that meet their needs, including by allowing them to employ nontraditional tactics, such as skills-based hiring and apprenticeship programs.

Several commenters, including an apprenticeship intermediary company, trade associations, a large company, and an advocacy group, expressed a common concern that a company's practice of hiring registered apprentices for entry-level positions could jeopardize its ability to obtain H–1B visas for related positions. The commenters wrote that ambiguity around current H–1B program requirements has deterred companies from participating in or initiating apprenticeship programs. The commenters acknowledged the NPRM's efforts to address this concern, including by clarifying the meaning of ''normally,'' but urged DHS to consider additional ways to support employers' efforts to explore apprenticeship programs. Some of the commenters asked DHS to clarify in the rule that the presence of an apprenticeship program in an occupation or the employment practices of a petitioner should not be taken as evidence that an occupation or employer does not normally require a degree in a specific specialty, or to establish explicit protections for companies that have engaged Registered Apprenticeship programs while also petitioning for H–1B beneficiaries.

Similarly, a few trade associations commended DHS for acknowledging the flexibility needed in making specialty occupation determinations, but added that DHS should do more to support skills-based hiring initiatives. The commenters asked that DHS recognize that an employer can implement a skills-based hiring program without undermining its ability to sponsor H–1B beneficiaries for the same or similar roles and encouraged DHS to consider ways to help employers distinguish skills-based hiring roles from degreed roles at all points in the employment ecosystem—from recruitment, onboarding, progression in career, and at the engagement level, stating that additional clarification will enable employers to broaden skills-based hiring initiatives while balancing the H–1B standards. One commenter also encouraged DHS to examine degree equivalency standards and consider new ways employees obtain needed skills outside the traditional 4-year degree paradigm, including employer certificate programs, apprenticeship programs, and college-level courses. A trade association suggested factoring in other ways that employers can upskill their workforces, such as certificate programs, reasoning that in not considering these factors, USCIS creates obstacles for employers who might otherwise expand skills-based employment practices.

Response: The revisions to the specialty occupation provisions are not intended to negatively impact skills-based hiring practices and alternative training programs. Conversely, several provisions, such as the new definition of ''normally,'' which clarifies that ''normally'' does not mean ''always,'' are intended to help support these programs and initiatives. As stated in the NPRM, DHS recognizes that as 21st

[25] While DHS is not finalizing this particular sentence, this does not indicate an intent to change current practice with respect to the ''directly related'' requirement. The ''directly related'' requirement will be finalized elsewhere in the specialty occupation definition and criteria, consistent with current practice and case law. *See, e.g., Caremax Inc* v. *Holder,* 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014) (holding that a position 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).

century employers strive to generate better hiring outcomes, improving the match between required skills and job duties, employers have increasingly become more aware of a skills-first culture, led by the Federal Government's commitment to attract and hire individuals well-suited to available jobs. 88 FR 72870, 72871 (Oct. 23, 2023). There is already flexibility inherent in H–1B adjudications that allows employers to explore where skills-based hiring is sensible. By definition, a specialty occupation is one which requires attainment of a bachelor's or higher degree ''or its equivalent.'' The allowance for the ''equivalent'' of a degree in a specific specialty recognizes that the requisite level of knowledge for a particular beneficiary may be gained through, among other things, additional coursework or training as suggested by the commenter. Further, the existing regulations at 8 CFR 214.2(h)(4)(iii)(C)(*4*), (h)(4)(iii)(D)—which are not being changed in this final rule—already allow USCIS to examine degree equivalency standards and consider a worker's training, experience, and skills outside of the traditional 4-year degree paradigm. DHS believes the finalized regulatory text is sufficiently flexible to allow employers to explore where skills-based hiring, apprenticeships, and alternative training programs are sensible, and declines to make the suggested regulatory text changes to specifically reference apprenticeships and training programs.

Comment: A few commenters voiced concern that the proposed specialty occupation provisions conflict with the INA. A form letter campaign said that DHS should not adopt the proposed revisions to the definition and criteria for ''specialty occupation,'' arguing that they conflict with the plain language of the statute and are based on a rescinded Executive order from the prior administration. A professional association and an individual commenter said they were disappointed to see DHS ''recycle'' the same language from the 2020 interim final rule (IFR) ''Strengthening the H–1B Nonimmigrant Visa Classification Program,'' 85 FR 63918 (Oct. 8. 2020). Some commenters, including an advocacy group, said that these changes attempt to ''revive'' or ''resurrect'' invalidated guidance and rules from a prior administration. The advocacy group referenced an attorney's argument from a lawsuit against the 2020 IFR, which was later blocked by courts, and claimed that the NPRM copied the prior rule's restrictive language which is inconsistent with the INA and current USCIS practice.

Response: DHS does not agree that the revisions to the definition and criteria for specialty occupation conflict with the plain language of the statute. As explained in the NPRM, the revised regulatory definition and standards for ''specialty occupation'' will better align the regulation with the statutory definition of that term. 88 FR 72870, 728714 (Oct. 23, 2023). For example, in determining whether a position is a 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. The ''specific specialty'' requirement is only met if the degree in a specific specialty or specialties, or its equivalent, provides a body of highly 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). Therefore, clarifying the definition of specialty occupation to state that ''each . . . qualifying degree field is directly related to the duties of the position'' more closely aligns the regulatory text with the statutory definition.[26]

Nor does DHS agree that the changes to the definition of and criteria for ''specialty occupation'' are based on a rescinded Executive order or the 2020 IFR. While some of the changes finalized here are similar to changes attempted through the 2020 IFR, neither this rule nor the IFR relied on a rescinded Executive order as authority for the changes. Rather, the IFR, similar to this rule, explained that the changes to the definition and criteria for specialty occupation were based on the INA and longstanding agency practice.[27] Further, there are some notable changes in the specialty occupation provisions finalized in this rule compared to those in the IFR, such as the addition and clarification of the word ''normally'' to the specialty occupation criteria and clarifying that a position may allow for a range of qualifying degree fields.

DHS also disagrees that the specialty occupation changes seek to ''revive invalidated guidance and rules.'' In June 2020, USCIS rescinded two policy memoranda that impacted certain computer occupations.[28] In February 2021, USCIS rescinded a 2017 policy memorandum relating to the December 22, 2000 guidance memo on H–1B computer-related positions.[29] These memoranda remain rescinded. In fact, the other changes to the specialty occupation provisions, including the clarification that ''normally does not mean always,'' are consistent with USCIS' rescission of those prior policy memoranda.

Comment: A trade association, citing the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence [30] and Executive Order 13932, Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates,[31] stated that several of the proposals relating to specialty occupation in the NPRM contradict executive branch policy directives to increase access to international talent by ''modernizing and streamlining visa criteria, interviews, and reviews'' and to give increasing preference and support to skills-based hiring. The association expressed concern that the proposed rule, including the specialty occupation definitions and requirements, would limit access to H–1B visas.

Response: DHS is cognizant of the goals of the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence and has taken a number of actions consistent with the executive order. These not only include publishing new web page content for noncitizen STEM professionals and entrepreneurs with guidance on both the nonimmigrant and immigrant options to work in the United

[26] *See Vision Builders, LLC* v. *USCIS,* No. 19–CV–3159, 2020 WL 5891546, at *4 (D.D.C. Oct. 5, 2020) (finding that USCIS logically read the regulatory criteria together with the statutory definition of specialty occupation ''to find that the term 'degree' in the specialty-occupation criteria, 8 CFR 214.2(h)(4)(iii)(A), means one 'in a specific specialty that is directly related to the proffered position.' '').

[27] ''Strengthening the H–1B Nonimmigrant Visa Classification Program,'' 85 FR 63918, 63925 (Oct. 8. 2020) (noting that the requirement of a ''direct relationship'' between the required degree fields and duties of the position was ''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)'').

[28] USCIS, Policy Memorandum PM–602–0114, Recission of Policy Memoranda, *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf* (June 17, 2020).

[29] USCIS, Policy Memorandum PM–602–0142.1, Rescission of 2017 Policy Memorandum PM–602–0142, *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0142.1_RescissionOfPM-602-0142.pdf* (Feb. 3, 2021).

[30] Executive Order 14110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 FR 75191 (Oct. 30, 2023).

[31] Executive Order 13932, Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates, 85 FR 39457 (June 26, 2020).

States, but also publishing updated policy guidance for the O–1A nonimmigrant classification for persons of extraordinary ability, the EB–1 extraordinary ability and outstanding professor or researcher immigrant classifications, EB–2 national interest waivers for advanced degree professionals or persons of exceptional ability, and the International Entrepreneur Parole.[32] The changes to specialty occupation finalized in this rule will also further the goals of the Executive order to ''attract and retain talent in AI and other critical and emerging technologies in the United States economy'' by clarifying that ''normally'' does not mean ''always'' within the criteria for a specialty occupation; clarifying that a position may allow for a range of qualifying degree fields, although there must be a direct relationship between the required field(s) and the duties of the position; and clarifying that ''directly related'' means a logical connection between the required degree (or its equivalent) and the duties of the position. These changes better align the regulatory definition of specialty occupation with the statutory definition of that term, and provide greater certainty by codifying current policy and practice into the regulation. Beyond the changes to specialty occupation, other provisions in this final rule also support the goals of the executive order, including the provisions relating to cap-exemption and the provisions relating to beneficiary-owners. Therefore, DHS disagrees that the changes in this final rule contradict executive branch policy directives.

Comment: A few commenters expressed concerns about administrative burdens resulting from the proposed changes to ''specialty occupation.'' For example, a form letter campaign said that the proposed revisions to the definition and criteria for ''specialty occupation'' add unnecessary burdens for employers. A couple of commenters wrote that the broad application of specialty occupation could lead adjudicators to overlook skills and experience, resulting in more RFEs. An advocacy group commented that the proposal could lead to unreasonable denials of H–1B visas and burdensome RFEs. A trade association agreed, adding that issuances of notices of intent to deny (NOIDs) would also increase administrative difficulties. Another commenter wrote that the proposed changes to ''specialty occupation'' would incentivize USCIS examiners to issue RFEs, creating burdens for employers.

Response: DHS disagrees that amending the definition of specialty occupation will add administrative burdens for employers. As discussed in the NPRM, these changes are largely a codification of existing policies and practice. 88 FR 72870, 72874 (Oct. 23, 2023). For example, it is the current practice of USCIS to require the petitioner to demonstrate that the required degree field(s) are directly related, as defined in this rule, to the duties of the position.[33] DHS does not expect that there will be an increase in RFEs or NOIDS as a result of codifying existing USCIS practices and providing clarification with respect to the definition of and criteria for a specialty occupation. It is also the current practice for USCIS to examine skills and experience in the course of determining a beneficiary's qualifications, and nothing in this rule changes this current practice. USCIS does not anticipate that these clarifications will cause changes for petitioners or add an administrative burden. Rather, codifying current practices adds transparency to the adjudication process and should help to prevent unnecessary evidence requests and delays.

Comment: Numerous commenters expressed concern about the potential negative economic impacts associated with the specialty occupation provisions. For instance, a joint submission reasoned that the proposed specialty occupation provisions could limit the available talent pool and negatively impact the innovation ecosystem by imposing more stringent degree requirements. Another commenter similarly wrote that letting the ''specialty occupation'' assessment be determined by the semantics of a degree specialization would hinder innovation, research, and business growth. The commenter said that the modern job market and education system have allowed for fluid specialties and learning opportunities, and the ''disruptive rate of technological advancement'' has changed the talent pool such that being an expert in one field leads one to become an expert in another.

Several commenters commented that the proposal could negatively impact industries' access to talent in emerging STEM fields, as multi-disciplinary educational backgrounds are common in these settings. An advocacy group referenced an attorney's argument that ''the narrowing of eligibility'' for specialty occupations would impact research positions in ''burgeoning cross-disciplinary fields.'' A professional association expressed concern with the ''cross-cutting impact'' of the proposed regulatory changes to 8 CFR 214.2(h)(4)(ii) and (iii), particularly on the science and technology sectors, which the commenter regarded as critical research areas for U.S. economic competitiveness and national security. A business association and a trade association commented that negative impacts to businesses' hiring would also contravene the administration's goals to strengthen the U.S. workforce and, in particular, to attract professionals in the AI field. Additionally, other commenters said the provision would not adequately deal with changes in technology, and could harm individuals in IT who contribute to the economy but have non-IT bachelor's degrees.

Response: DHS disagrees that codifying existing USCIS practices by revising the regulatory definition and standards for a ''specialty occupation'' to better align with the statutory definition of that term will have a negative effect on the economy or will hinder innovation, research, or business growth. DHS also disagrees that this provision will have a negative effect on various industries in the technology and

[32] *See* USCIS, Options for Noncitizen STEM Professionals to Work in the United States (last updated Aug. 27, 2024), *https://www.uscis.gov/working-in-the-united-states/options-for-noncitizen-stem-professionals-to-work-in-the-united-states;* USCIS, Options for Noncitizen Entrepreneurs to Work in the United States (last updated Aug. 27, 2024), *https://www.uscis.gov/working-in-the-united-states/options-for-noncitizen-entrepreneurs-to-work-in-the-united-states;* USCIS, Policy Alert, O–1 Nonimmigrant Status for Persons of Extraordinary Ability or Achievement (Jan. 21, 2022), *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220121-ExtraordinaryAbility.pdf*; USCIS, Policy Alert, Evaluating Eligibility for Extraordinary Ability and Outstanding Researcher Visa Classifications, Sept. 12, 2023, *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230912-ExtraordinaryAbilityOutstandingProfessor.pdf;* USCIS, International Entrepreneur Rule (last updated Oct. 11, 2024), *https://www.uscis.gov/working-in-the-united-states/international-entrepreneur-rule;* USCIS Policy Alert, International Entrepreneur Parole, Mar. 10, 2023, *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230310-InternationalEntrepreneurParole.pdf.*

[33] *See, e.g., Madkudu Inc.* v. *USCIS,* No. 5:20–cv–2653–SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4 (''if the record shows that the petitioner would consider someone as qualified for the position based on less than a bachelor's degree in a specialized field directly related to the position (*e.g.,* an associate's degree, a bachelor's degree in a generalized field of study without a minor, major, concentration, or specialization in market research, marketing, or research methods . . ., or a bachelor's degree in a field of study unrelated to the position), then the position would not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. 1184(i)(1) and 8 CFR 214.2(h)(4)(ii).''), *https://www.uscis.gov/sites/default/files/document/legaldocs/Madkudu-settlement-agreement.pdf* (last visited Oct. 23, 2024).

science sectors or limit these industries' access to talent trained in emerging STEM fields or possessing multi-disciplinary educational backgrounds. In clarifying the specialty occupation definition and criteria, DHS aims to add transparency and predictability to the adjudication process, not to impose more stringent degree requirements or standards. Overall, the changes to the specialty occupation provisions as revised from the proposed regulatory language—including clarifying the word ''normally,'' and codifying current practice to allow for a range of qualifying degree fields—recognize that there is ''flexibility inherent in H–1B adjudications'' [34] to accommodate emerging technological developments.

Comment: Some commenters noted concerns across industries that the proposed changes to the specialty occupation definition and criteria would create uncertainty for H–1B professionals and their dependent family members, international students at U.S. higher education institutions, and employers both in academia and industry. The commenters cited to DOL permanent labor certification (PERM) data from FYs 2019 to 2023 showing that a sizeable percentage of H–1B holders with employers sponsoring them for permanent residence hold jobs that USCIS has ''confirmed are specialty occupations'' where: (a) the minimum requirements are the type of knowledge obtained through completion of any engineering degree; or (b) they entail job duties for which a business administration degree is expected. Based on this data, the commenters concluded that these are among the beneficiaries that could be ''excluded'' under the proposed regulatory text, belying DHS's suggestion that it is merely codifying current practice through the proposed rule. Similarly, an advocacy group referenced the same PERM application data and stated that over 20 percent of employers seeking a permanent labor certification accepted either a business, liberal arts, social studies, or any kind of engineering degree. The commenter noted that because this data excluded EB–1 and EB–2 National Interest Waivers, this was likely an undercount; and, as a result, the actual impact of the proposed change would be larger than implied by the figures referenced. Based on this data, the group concluded that the proposed change ''would likely be a major deviation from current policy of USCIS.''

A union cited data from the 2021 National Survey of College Graduates and analysis by the National Foundation for American Policy showing that a notable percentage of U.S.-born individuals and temporary visa holders working in computer, biology, and mechanical engineering occupations have a degree other than in computer science or electrical engineering, health or biological sciences, and mechanical engineering, respectively. The union further noted a trend in academic departments and research centers, and in industry alike, to establish a diverse, interdisciplinary staff team that allows for a broad range of expertise and skills to pursue research projects and grants that cross traditional fields. A commenter urged DHS to continue to consider the combination of education and experience, even if the degree is not in a directly related field. Referencing the same data and a news article described above, a commenter said it was concerned with the ''directly related specific specialty'' requirement.

Response: DHS disagrees that these changes to the specialty occupation provisions would negatively impact or create uncertainty for H–1B petitioners, beneficiaries (and their families), and prospective beneficiaries. As stated in the NPRM and in this final rule, the changes to the specialty occupation definition and criteria are intended to capture current USCIS practices. For instance, it is the current practice for USCIS to examine skills and experience in the course of determining a beneficiary's qualifications and make individualized determinations in each case, and nothing in this rule changes this current practice.

With respect to the comments based upon DOL PERM data, DHS cannot speak specifically to the accuracy of the conclusions drawn by the commenters because the commenters did not provide the methodology used in examining the DOL PERM data. Further, DHS cautions against drawing broad conclusions about H–1B eligibility based on DOL PERM data, as such data are for immigrant-based classifications that have different eligibility criteria than H–1B specialty occupations and may be for different positions with different minimum requirements. For example, the commenters' references to positions where ''the minimum requirements are the type of knowledge obtained through completion of any engineering degree'' and positions that ''entail job duties for which a business administration degree is expected'' are unclear and do not necessarily speak to the degree requirements for the beneficiary's specialty occupation position nor support the commenters' assertion that these beneficiaries would be ''negatively impacted'' by the changes made in this final rule. Finally, DHS notes that the current practices codified by this rule were in place even during the period covered by the data reviewed by the commenters (FY2019–FY2023). There is no reason to think that codification of these practices would result in different adjudicative outcomes.

Regarding the commenter's concern that data show that workers in various computer, engineering, and science fields have degrees outside of these fields, DHS notes that it is USCIS' current practice to examine whether there is a direct relationship between the qualifying degree fields and the duties of the position when determining whether the position is a specialty occupation. This is separate from the determination of whether a beneficiary qualifies for the proffered position. As is currently the case, a beneficiary may qualify for the specialty occupation through a combination of education, training, and/or work experience. The changes to the specialty occupation provisions do not impact how USCIS evaluates and will continue to evaluate a beneficiary's qualifications. *See* 8 CFR 214.2(h)(4)(iii)(C) and (D).

Comment: Some commenters argued that the NPRM failed to address reliance interests that would be impacted by the proposed changes to the specialty occupation definition. For example, one commenter said the failure to address reliance interests is arbitrary and capricious. A trade association said that the proposed language would result in arbitrary and capricious adjudications, cause uncertainty for employers and beneficiaries, and prevent employers from obtaining needed talent and cross-training employees. Other commenters added that the rule would upset the reliance interests of IT consulting companies in particular and disrupt their ability to fill domestic labor shortages and meet technology needs.

Response: The finalized specialty occupation definition and criteria, as slightly modified from the NPRM, codify existing USCIS adjudication practices. Since these provisions are consistent with current USCIS practices, DHS does not agree that they will upset serious reliance interests.

ii. Amending the Definition of ''Specialty Occupation''

Comment: Several commenters provided general comments in support of the ''directly related'' requirement. For example, a union generally supported requiring a direct relationship between degrees and occupations, clarifying that general degrees are insufficient to support H–1B

[34] *See* 88 FR 72870, 72871 (Oct. 23, 2023).

petitions, and placing the burden on H–1B petitioners to demonstrate the relationship between degrees and occupations. A research organization wrote that the proposal that each qualifying degree be directly related to a proffered position is consistent with the INA and caselaw. A commenter expressed support for requiring a ''direct relation'' between a beneficiary's education and the occupation. Similarly, a commenter said that requiring a ''direct correlation'' between the position and degree would ensure a ''more precise match'' of position duties to the skills of candidates. Another commenter generally stated that stricter scrutiny is required to ensure that beneficiaries are working in fields matching their skills. Another commenter generally suggested that the job that an H–1B worker is doing should be relevant to the degree obtained.

A commenter expressed support for the ''directly related'' requirement, reasoning that it is necessary to ensure that individuals with specialized skills, such as those with degrees in pharmaceutical sciences, could work in the United States. The commenter said that the current ''high intake'' of individuals with undergraduate degrees in engineering and master's degrees in IT disadvantages these groups and that the proposed change would help address that disadvantage. Another commenter similarly stated that the ''directly related'' requirement would ensure that applicants with a degree that has a direct relationship to the position would have a chance to become employed, and that the requirement would regulate the job market and prevent applicants from trying to obtain an H–1B visa for work that is not related to their degree. A commenter expressed support for the ''directly related'' requirement, stating that it would ensure that foreign workers who intentionally choose to pursue a degree that is related to a specific occupation can fill employment gaps without disrupting the U.S. job market. The commenter added that the proposed requirement would further program integrity and ensure the H–1B program serves its statutory purpose.

Response: DHS agrees that requiring the degree field(s) to be directly related to the duties of the position is consistent with the INA and caselaw,[35] supports program integrity, and continues to ensure that the H–1B program serves its statutory purpose by providing a regulatory definition of specialty occupation that is consistent with the existing standard. While these changes are not intended to benefit a particular occupation or industry, DHS believes they are generally beneficial for all petitioners and beneficiaries.

Comment: Numerous commenters expressed concern that the proposed changes would be too restrictive by ignoring that individuals may have work experience in addition to their degree, and make it difficult for individuals with experience to qualify for H–1B status. A few commenters added that the proposed changes could discourage potential H–1B candidates from contributing their knowledge outside their field of study, noting that a highly qualified individual may have acquired skills through job experience outside his/her field of study/degree.

Several commenters expressed concern that the addition of the ''directly related'' requirement could narrow the eligibility of potential beneficiaries. Specifically, a commenter said that the proposed requirement could result in individuals with experience in a given field being deemed ineligible while new college graduates with degrees in relevant fields to qualify for H–1B status. While commenting on the impact of the proposed specialty occupation regulations on highly experienced individuals, a commenter urged DHS to leave the regulations in their current form.

Several commenters suggested that USCIS also consider work experience. These included recommendations to consider work experience as an equivalent to the degree name, and allowing experience as an alternative to the field of study. A couple of commenters were concerned that the proposed requirements would not provide sufficient flexibility for individuals who have acquired skills while on the job. A trade association and a few other commenters said that the ''directly related'' requirement would not provide leeway for individuals who are highly educated but want to change sectors in the middle of their careers. A commenter said that it understood the rationale behind the proposed requirement but suggested that USCIS take care in implementing it, as some individuals ''shine'' in positions not related to their educational backgrounds. A trade association referenced an example of a position that required expertise in programming languages but did not always require a specific degree, which the commenter said would likely make the position ineligible for H–1B initial approval or renewal, resulting in the position being sent ''offshore.'' Similarly, another commenter said that the requirement would ''stifle the diverse professional growth that fuels innovation,'' potentially diverting global talent to other destinations, as career flexibility is ''crucial.''

Response: Through this rulemaking, DHS is codifying existing USCIS practice requiring a direct relationship between the qualifying degree field(s) and the duties of the position. This is consistent with USCIS' long-standing practice and interpretation that the ''specific specialty'' requirement in section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), relates 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). DHS disagrees with the comments that these changes are overly restrictive and that they will negatively impact eligibility, whether for H–1B beneficiaries who are renewing their status or potential beneficiaries with specialized experience or skills, because the specialty occupation determination is separate from the determination of whether a beneficiary qualifies for the proffered position.

As discussed above, it is already current practice for USCIS to examine skills and experience in the course of determining a beneficiary's qualifications, and nothing in this rule changes this current practice. USCIS will continue to make individualized determinations in each case. As explained in the NPRM, USCIS will consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*).

After carefully considering the comments, DHS is not finalizing the proposed regulatory text of ''[t]he required specialized studies must be directly related to the position,'' as this language could be misread as stating that USCIS would only consider a beneficiary's specialized studies. The ''directly related'' requirement is, however, being retained in the definition of ''specialty occupation'' and in the criteria, as explained in more detail below.

Comment: Several commenters were concerned that the proposed rule might

[35] *Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007) (describing ''a degree requirement in a specific specialty'' as ''one that relates directly to the duties and responsibilities of a particular position''); *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.'').

render individuals currently eligible for H–1B classification ineligible under the new specialty occupation definition and requested clarification on when or to whom the new definition will apply. A group of Federal elected officials requested clarification on how the amended definition of specialty occupation will be implemented consistently with current practice to ensure that individuals who comply with current H–1B regulations can remain in compliance under the new definition. The commenters warned against changing the requirements on those already granted H–1B status, as such a change would create an unpredictable adjudication environment and could lead to foreign-born professionals having to leave the country and U.S. companies losing employees and talent. The commenters commended the codification of USCIS' deference policy, and urged DHS to clarify how it will apply its deference policy when adjudicating H–1B petitions moving forward, given the proposed rule's amended definition of specialty occupation. Alternatively, the commenters strongly recommended that, if the new specialty occupation definition does in fact represent a significant departure from current practice, any new H–1B eligibility requirements that result from the proposed rule's new amended definition of specialty occupation only apply to individuals whose initial H–1B petitions are filed after the proposed rule is finalized.

Multiple commenters, including a form letter campaign, suggested that DHS only apply the revised specialty occupation regulations to new petitions, or not apply the rule to current H–1B holders or extensions. Similarly, a few commenters articulated concerns about beneficiaries in the immigrant visa backlog who would no longer be able to continue their H–1B status, and others noted that it could displace individuals with H–1B status already in the United States. Several commenters expressed concern with the potential impact of the requirement on current H–1B beneficiaries who are already in the United States, in backlogs, and might experience denials as a result of not having a degree ''directly related'' to the position. Some commenters requested clarification about whether these individuals would be excluded from the application of the proposed requirement.

Response: The changes being finalized in this rule become effective 30 days after this final rule is published in the **Federal Register**. They will apply to any H–1B petition filed on or after this date, whether it is a petition seeking an initial grant of H–1B status or extension of H–1B status. Commenters did not specify why they think the changes to the specialty occupation definition and criteria would result in current H–1B nonimmigrants being unable to continue their H–1B status or otherwise negatively impact current H–1B nonimmigrants. As stated previously, the changes to the specialty occupation provisions codify existing practices; they are not intended or expected to result in current H–1B nonimmigrants no longer being eligible for H–1B status based on employment that has already been found to be a specialty occupation. They also do not narrow or otherwise change the existing standards for how a beneficiary may qualify for the specialty occupation through a combination of education, training, and/or work experience. To the extent there is concern about any changes to eligibility because of the inclusion of ''directly related'' in the new regulatory text, the new language added in this final rule further clarifies that USCIS is not changing eligibility standards for assessing whether a position is a specialty occupation. Therefore, DHS does not believe it is necessary to apply this final rule only to H–1B petitions requesting an initial grant of H–1B status that are filed on or after the effective date of this rule.

In addition, the codification of the deference policy should allay some of the commenters' concerns. By codifying the deference policy, USCIS will continue to defer to prior determinations involving the same parties and underlying facts, except in case of material error, material change in circumstances or eligibility requirements, or new material information adversely impacting eligibility. As stated, H–1B eligibility requirements, including the requirement to qualify as a specialty occupation, will apply to any H–1B petition filed on or after the effective date of this rule. However, DHS emphasizes again that the revisions to the regulatory language for the definition and criteria for a specialty occupation do not represent a change in policy, but rather codify existing adjudication practices and are intended to provide greater clarity and predictability to petitioners and beneficiaries. A position previously determined to meet the definition of a specialty occupation generally should continue to do so and a beneficiary previously determined to be qualified for such an occupation generally should remain so qualified, absent material error or a change in material facts.

To the extent that commenters are worried that current H–1B beneficiaries who were not eligible for H–1B status in the first place would no longer be eligible for an extension of status under this final rule, this is not persuasive. USCIS is not, and has never been, required to approve a petition ''where eligibility has not been demonstrated merely because of prior approvals that were erroneous.'' [36]

Comment: Several commenters discussed the potential negative impact of the ''directly related'' requirement on hiring practices, stating that it would likely ''aggravate'' and extend the hiring process, or even eliminate the ability of companies to consider employees with ''hands-on'' experience. A joint submission stated that the ''directly related'' requirement would prevent employers from establishing that an emerging body of knowledge was acquired through a degree in the ''specific specialty'' or ''its equivalent.'' The commenters stated that an interdisciplinary approach to hiring is often required to attain the necessary ''highly specialized knowledge'' associated with a position although that knowledge might not have a specific field of study associated with it. A trade association said that because most employers hire skilled workers based on their coursework and experience, it would be irrelevant to show a direct relationship between degree and job duties. Similarly, a commenter said that the requirement was illogical because there is no longer a relationship between degrees and job duties.

Some commenters discussed the impact on hiring practices in specific industries or fields, particularly in fields such as AI and IT. For instance, commenters stated that it is often ''indispensable'' to hire individuals with ''complementary specialties'' to ''form diverse, interdisciplinary teams.'' The joint submission added that employers would face additional hurdles when conducting on-campus recruitment as a result of the ''directly related'' requirement. A trade association noted that the specialized expertise required when hiring for roles that integrate AI across various sectors challenged USCIS' assumptions regarding the ''direct relevance'' of degrees. Another commenter stated that employers have trended towards hiring individuals with degrees and skills from various backgrounds, specifically for the AI workforce, because they need employees with industry knowledge,

[36] *Matter of Church Scientology Int'l,* 19 I&N Dec. 593, 597 (Comm'r 1988); *accord Ochoa-Castillo* v. *Carroll,* 841 F. App'x 672, 674–75 (5th Cir. 2021).

not just with the traditionally associated academic background. Other commenters expressed concern that the proposed requirement would limit the ability of IT consulting firms to fill certain roles and sponsor foreign workers, particularly workers with work experience but degrees in various fields.

A trade association expressed concern with the potential impact of the proposed changes to the definition of ''specialty occupation'' on the higher education community. The commenter stated that the proposed definition could hinder the ability of higher education institutions to hire faculty in broad departments that might include many subspecialties. The commenter also said that the proposed change would negatively impact the pipeline for growth in fields of emerging technology, education, research, and the economy, and deter students from studying in the United States. Similarly, another commenter expressed concern that the proposed requirement could force academic institutions to narrow their hiring scope, potentially diminishing their ability to recruit talented employees. Another trade association said the proposed provision would hinder the ability of educational institutions to hire faculty because universities organize their programs by broad disciplines which have departments with subdisciplines, and, as such, typically hire faculty that have broad training within a discipline in addition to knowledge across several subdisciplines.

Response: As stated previously, DHS is codifying existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position. As this is consistent with current USCIS practice, petitioners generally should not experience a major shift in hiring due to this rule. The specialty occupation changes are not intended to disadvantage any particular industry or occupation, nor any H–1B beneficiaries already authorized to work in a specialty occupation.

These provisions also should not hinder the ability of companies to consider employees with experience. USCIS analyzes whether the proffered position is a specialty occupation (including determining if there is a direct relationship between the required degree(s) and the duties of the position) separately from its analysis of a beneficiary's qualifications. The final regulations will maintain the flexibility of the H–1B program to adapt to new and emerging technologies, education, and research fields, and allow companies to recruit talented workers. As noted in the NPRM, when applicable, USCIS also will consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*), (h)(4)(iii)(D). The changes to codify the ''directly related'' requirement do not, in any way, preclude petitioners from recruiting workers to form a diverse, interdisciplinary team.

Comment: Several commenters expressed concerns that the ''directly related'' requirement would require an exact match between degree and occupation titles. A commenter requested removing the ''specifically related'' term that requires a match between the job title and degree name. Similarly, a couple of commenters said that there is never a direct match between degree names and the skills required to perform the duties of a position. A company stated that the ''directly related'' section of the proposed rule assumes a level of uniformity in naming degree fields across colleges and universities that does not exist. Another commenter stated that it would be ''highly subjective and dangerous'' to include the requirement, as names of degrees are ''archaic in nature'' compared to current job titles because degree names do not evolve as fast as certain fields. The commenter said that this could result in the disqualification of certain individuals despite their possession of specialized knowledge. A professional association commented that the proposed definition would impose a faulty process of matching educational qualifications to occupations, reasoning that educational qualifications and occupations rarely have direct matches. The professional association stated that because colleges and universities have autonomy over naming and criteria, basing an evaluation on the name of a degree could minimize the qualifications of knowledgeable graduates. The commenter noted that these ''matching exercises'' between degrees and occupations would be arbitrary because they would not reflect the reality of skills required for positions. Other commenters stated that because the proposal would allow adjudicators to use their discretion to determine an exact match between job position and degree, many current H–1B workers might not meet the new criteria. A company added that adjudicators might look exclusively for a one-to-one match between the degree listed on a diploma and the relevant occupation without considering a beneficiary's underlying studies.

Response: There is no requirement for a direct, exact, or one-to-one match between the degree field(s) and job titles now, or with respect to this final rule. DHS acknowledges that degree field names may change over time and differ between universities and emphasizes that USCIS does not look merely at the name of the degree field. The changes to the definition of specialty occupation codify current practices and do not impose a new requirement for an ''exact match'' between degree field(s) and job titles or otherwise narrow eligibility for a specialty occupation.

DHS further reiterates that the requirement of a direct relationship between a degree in a specific specialty, or its equivalent, and the duties of the position should not be construed as requiring a singular field of study. As explained in the NPRM, these changes merely codify existing practices. 88 FR 72870, 72874 (Oct. 23, 2023). In some cases, the direct relationship between the degree field(s) that would qualify someone for the position and the duties of the position may not be apparent, and the petitioner may have to explain and provide documentation to meet its burden of demonstrating the relationship. As in the past, to establish a direct relationship, the petitioner would need to provide information regarding the course(s) of study associated with the qualifying degree field(s), 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. Under new 8 CFR 214.2(h)(4)(ii), as amended, the petitioner will continue to have the burden of demonstrating that there is a direct relationship between the required degree in a specific specialty and the duties of the position. DHS is also adding regulatory text to clarify the level of connection needed to meet the ''directly related'' requirement.

Comment: A few commenters expressed concern with language in the NPRM which referred to ''educational credentials by the title of the degree for expediency.'' Referencing this language, which was contained in footnote 25 of the NPRM, a professional association and a law firm stated that USCIS' explanation that the use of degree titles was a matter of ''expediency'' and that adjudicators would still evaluate the relationship between the course of study and the duties of the position was of ''little comfort.'' The commenter reasoned that the proposed rule does not reflect this clarification or direct

adjudicators to look at the relationship between the duties of the position and the course of study, which the commenter stated ''includes the classes taken, skills and training acquired, and knowledge obtained.'' An advocacy group similarly expressed concern that, despite the NPRM's acknowledgment in footnote 25, the ''binding regulation'' fails to conform with current USCIS policy and include correct references to courses of study and job duties, instead referring to degree labels and names of positions. An advocacy group and company stated that USCIS' proposal to disqualify positions that require a ''general degree'' based on the title of the position and degree program, without further consideration of job duties or course of study content, would be inconsistent with the agency's acknowledgment in footnote 25 of the NPRM. Another advocacy group also referenced footnote 25 and suggested that the clarification be reflected in the regulatory language.

Response: DHS acknowledges the commenters' concerns about referring to ''the title of the degree for expediency.'' In recognition that the title of a degree is not determinative, and to be responsive to these comments, DHS is not finalizing the phrase ''such as business administration or liberal arts'' from the proposed regulatory text. While this rule finalizes the regulatory text stating that, ''A position is not a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position,'' the deletion of the specific references to ''business administration or liberal arts'' signals that USCIS will continue to separately evaluate whether the beneficiary's actual course of study is directly related to the duties of the position, and will not merely look to the title of the degree, consistent with current practice. When applicable, USCIS also will consider whether the beneficiary has the 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, consistent with current practice and regulations. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*) and (*5*).

Comment: Multiple commenters stated that it would be difficult to show an ''exact correspondence'' between degree fields and occupations in emerging technical fields, such as AI and cybersecurity. Similarly, an advocacy group and a law firm said that focusing on degree titles alone would not account for all of the skills that are needed to work in new and emerging technology fields. The commenters said that this could limit employers' ability to fill positions and remain competitive in the global marketplace. A few commenters further stated that new occupations or areas of study might be created as a result of innovation that could lead to an unclear consensus on how to classify a role or determine what field of study a role might require.

Response: As with any industry, not every position in emerging fields will meet the definition of a specialty occupation. However, DHS believes that the specialty occupation provisions codified in this rule sufficiently accommodate emerging fields, including AI and cybersecurity. DHS understands that many occupations, including those in new and emerging fields, may not always have a singular degree requirement to meet the needs of the position. As stated in 8 CFR 214.2(h)(4)(ii), a position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position. The petitioner is not required to show an ''exact correspondence'' between degree field(s) and the occupation. As finalized in this rule, ''directly related'' means that there is a logical connection between the degree, or its equivalent, and the duties of the position. *See* new 8 CFR 214.2(h)(4)(ii). Furthermore, as stated above, DHS agrees that the title of a degree is not determinative. Rather than looking only to the title of the degree, USCIS will continue to separately evaluate whether the underlying course of study is directly related to the duties of the position. The regulatory text, as finalized, offers flexibility to the specialty occupation determination, including to occupations in emerging fields, while better aligning with the statutory requirements for a specialty occupation.

Comment: An advocacy group disputed the NPRM's assertion that an engineering degree field's title must exactly match the title of an engineering position for the two to be related. The commenter reasoned that companies hire individuals with STEM degrees based on the knowledge and skill sets gained through the STEM programs. A law firm stated that computer science and computer engineering courses are an essential component of every engineering field of study. As such, the commenter suggested that any engineering degree that included computer science or computer engineering courses be considered ''directly related'' to a software developer occupation.

Response: Regarding the commenter's concern about employers accepting engineering degrees, DHS is not suggesting that employers cannot accept any engineering degree for their positions. Rather, DHS is clarifying that a petition listing a requirement of any engineering degree in any field of engineering for a position such as a software developer would generally not satisfy the statutory requirement, as it is unlikely the petitioner could establish how the fields of study within any engineering degree provide a body of highly specialized knowledge directly relating to the duties and responsibilities of the software developer position. This is because an 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 seemingly unrelated fields. If an individual could qualify for a petitioner's software developer position based on having a seemingly unrelated engineering degree, then it generally 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.[37] Similarly, assertions that a position can be satisfied based on studies in any STEM degree field would generally indicate that the position does not require a ''body of highly specialized knowledge'' but, rather, general mathematical or analytical skills. In such scenarios, the requirements of INA sections 214(i)(1)(A) and (B), 8 U.S.C. 1184(i)(1)(A) and (B), would not be satisfied. The critical element is not the title of the position, but whether the position requires the 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, as the minimum for entry into the occupation as required by the INA.

Comment: Several commenters discussed the proposed ''directly related'' requirement's relationship with the INA, stating that the requirement defies the INA because the INA does not include any mention of the degree being

[37] These examples refer to the educational credentials 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 also will consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*).

''directly related'' to the position. An attorney stated that there were no ambiguities within the statutory definition of ''specialty occupation'' that has been in use since 1990 that necessitated the addition of a ''direct relationship'' element to the definition.

A few commenters stated that the proposed requirement did not ''faithfully interpret'' the INA. A couple of trade associations and a joint submission stated that the ''directly related'' requirement would not be in alignment with longstanding USCIS practices. An advocacy group stated that the requirement that a beneficiary's degree be related to the position was not equivalent to the ''long-established'' interpretation of the INA, which the commenter said has been focused on adjudicating H–1B petitions based on skills and knowledge gained from courses of study and the job duties of the position, not the name of their degree, or the name of the position.

Another advocacy group referenced an attorney's argument that expressed concern with the proposed definition of ''specialty occupation,'' reasoning that there was no requirement in INA sec. 214(i)(1) that specialized studies must be directly related to the position. The attorney added that while a lawyer would qualify as a specialty occupation under the proposed language, that INA section reads more broadly, and as such, a marketing analyst should also qualify despite the occupation requiring degrees in more diverse fields. Referencing the same argument, another commenter stated that no requirement under the INA matches the new definition of specialty occupation. An advocacy group and another commenter stated that requiring a degree to be in a ''directly related specific specialty'' was absent from the INA. Another professional association specifically stated that the ''directly related specific specialty'' standard rewrote the authorizing statute through regulation by calling for a precise match between the degree and the occupation that is not found in statute.

A joint submission expressed opposition to the NPRM's use of the undefined terms ''specialized studies'' and ''directly related,'' stating that the ''directly related'' requirement would exceed the statutory authority provided in the definition of a ''specialty occupation'' in INA sec. 214(i)(1). Specifically, the commenters stated that Congress created the ''body of highly specialized knowledge'' requirement when defining the H–1B category, and when doing so, also limited the fields of study that comprise the ''specific specialty'' or its ''equivalent.'' The commenters said that in practice, occupations that do not have degrees typically associated with them instead accept a variety of different fields of study that all provide the ''highly specialized knowledge'' required by the occupation.

A trade association and a law firm stated that the ''directly related'' requirement in the proposed definition of ''specialty occupation'' exceeds the statutory requirements of the INA. Specifically, the commenters stated that the INA definition provides a ''substantially broader standard'' by stating that the requirement of a degree in the specialty or ''its equivalent'' can form the basis of a specialty occupation. The commenters added that ''equivalent'' was interpreted by a district court in *Tapis Int'l* v. *INS* [38] to encompass ''various combinations of academic and experience-based training'' and that it ''defies logic'' to limit the degree requirement of ''specialty occupation'' to only positions where a specific degree is offered. Therefore, the commenters stated that *Tapis* precludes the ''impermissible limitations'' that USCIS seeks to impose through the ''directly related'' requirement in the NPRM and that the statutory language permits a position to qualify as a specialty occupation when it requires a non-specialized degree combined with specialized experience, training, or coursework that is ''the equivalent'' of a specialized degree. The commenters concluded that the ''directly related'' standard contradicts the ''clear language of the statute'' and is, thus, *ultra vires,* impermissible, and must be removed to ensure that the regulatory language remains consistent with INA sec. 214(i)(1). Similarly, several commenters referenced INA sec. 214(i)(1) and said that the phrase ''or its equivalent'' broadens the requirement for a bachelor's degree to also encompass ''not only skill, knowledge, work experience, or training . . . but also various combinations of academic and experience-based training,'' and thus an occupation that requires a generalized degree but also specialized experience or training should be considered a specialty occupation. Similarly, a professional association and a law firm stated that the ''directly related specific specialty'' requirement contradicted the INA, reasoning that the INA does not specify that a degree must be directly related to a specific specialty. As such, the commenters stated that the proposed language ''impermissibly narrows'' the language of ''specialty occupation'' under INA sec. 214(i)(1). Referencing *Tapis Int'l* v. *INS,* the commenters stated that the knowledge and skills obtained through the degree, not the title of the degree, is what is important in the consideration of a ''specialty occupation,'' but that the language of the proposed rule fails to consider the skills that beneficiaries gain through the attainment of a bachelor's degree and industry experience. The professional association concluded that the proposed language would narrow the types of positions that can qualify as a specialty occupation, including positions currently held by H–1B workers, potentially nullifying the proposed deference provisions.

Response: DHS disagrees that the ''directly related'' requirement is inconsistent with or exceeds the statutory requirements of the INA. DHS further disagrees that this requirement would be inconsistent with longstanding USCIS practice. While INA section 214(i)(1) does not contain the exact phrase ''directly related,'' consonant with INA section 214(i)(1), USCIS has consistently interpreted the term ''degree'' to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007) (describing ''a degree requirement in a specific specialty'' as ''one that relates directly to the duties and responsibilities of a particular position''). To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by INA section 2l4(i)(l), a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS has long required there to be a close correlation between the required specialized studies and the position.

The ''directly related'' requirement does not mean that a specialty occupation position cannot accept degrees in a variety of different fields of study, provided that each field of study provides the ''highly specialized knowledge'' required by the occupation. While the statutory ''the'' and the regulatory ''a'' are both interpreted to denote a singular ''specialty,'' this should not be misconstrued with necessarily requiring a singular academic major or field of study. In cases where the petitioner lists multiple disparate fields of study as the minimum entry requirement for a position, the petitioner must establish how each field of study is in a ''specific specialty'' that is directly related to the duties and responsibilities of the

[38] 94 F. Supp. 2d 172, 175–76 (D. Mass. 2000).

particular position (*i.e.,* the applied body or bodies of highly specialized knowledge), consistent with the statutory definition.

Further, DHS disagrees that the ''directly related'' requirement conflicts with *Tapis Int'l* v. *INS*.[39] It appears the commenters have conflated the issue of a position's qualification as a specialty occupation with the issue of a beneficiary's qualification for the position. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.,* 19 I&N Dec. 558, 560 (Comm'r 1988) (''The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].'').

Comment: Several commenters discussed USCIS' consideration of specialized experience, skills, and training in addition to degree requirements with respect to the ''directly related'' requirement. Many commenters suggested that rather than focusing on degree titles alone, USCIS should evaluate potential beneficiaries on their overall education, including course of study, extracurricular, and skill development. A couple of commenters suggested that instead of requiring a ''direct relationship'' between the degree and position, USCIS should ensure that individuals have the required skill set for the job. Many commenters stated that the definition should be expanded to include consideration of direct work experience. Similarly, many commenters urged DHS to consider adding language that allows USCIS to consider coursework and ''courses of study,'' along with an employer's explanation of how a degree is directly related to a position. Another commenter requested that USCIS clarify that ''courses of study'' are relevant rather than the degree field, and that ''job duties'' are relevant rather than the job title of the position. Other commenters urged USCIS to consider the candidate's certifications as a better indicator of their skill level instead of relying on the degree obtained.

A law firm expressed concern that the proposed ''direct relationship'' requirement might cause adjudicating officers to exercise ''unintended'' discretion in their willingness to look at the totality of a beneficiary's educational studies. The commenter suggested that the Department could codify existing practice and eliminate future ambiguity by modifying the proposed definition of ''specialty occupation'' to include a provision at the end that states, ''The relatedness of specialized studies may be established through an evaluation of the coursework (and applications of that coursework) that comprise the degree.''

Response: DHS is codifying existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position. Codifying the ''direct relationship'' requirement does not impact existing current practices that already allow for consideration of a beneficiary's coursework, experience, and skills, which is a separate issue pertaining to a beneficiary's qualifications for a specialty occupation. As explained above, USCIS will continue to separately evaluate 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. USCIS also will continue to consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*), (h)(4)(iii)(D).

That said, DHS recognizes that the proposed regulatory text may have been confusing in some regards and is making some changes to address these concerns. First, DHS will not finalize the sentence, ''The required specialized studies must be directly related to the position,'' as this particular sentence may have incorrectly suggested that USCIS would only look to the degree even when evaluating a beneficiary's qualifications to perform the specialty occupation instead of considering a beneficiary's experience, training, and other pertinent skills.[40] *See* new 8 CFR 214.2(h)(4)(ii). DHS is also deleting references to ''business administration'' and ''liberal arts'' so as to not suggest that degree titles are determinative in the specialty occupation assessment. *See id.* DHS is also incorporating language to refer to the ''duties of the position'' to allay commenters' concerns about the importance of examining the job duties of the position in addition to the degree title. *Id.* Consistent with current practice, USCIS will continue to separately evaluate 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 also will continue to consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*). Further, DHS is amending the proposed sentence, ''A position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields is directly related to the position,'' to state that ''A position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position.'' New 8 CFR 214.2(h)(4)(ii). This revision is intended to better codify longstanding USCIS practice of interpreting the degree requirement ''in a specific specialty'' as ''one that relates directly to the duties and responsibilities of a particular position.'' [41] DHS is also adding regulatory text to clarify the level of connection needed to meet the ''directly related'' requirement.[42]

Comment: Several commenters asked DHS to clarify the standard for ''directly related,'' or alternatively, recommended that USCIS remove the ''directly related'' requirement from the ''specialty occupation'' definition altogether. A joint submission expressed concern that the proposed regulatory text would change adjudications such that the agency would no longer focus on job duties and courses of study as required by statute. One commenter suggested that either the Department issue a supplemental notice withdrawing the ''directly related'' provision from the revised definition of ''specialty occupation,'' or, at a minimum, that it issue a supplemental notice that ''cur[es] the specific identified deficiencies'' and provides the public with adequate time to submit additional comments. Similarly, a legal services provider stated that while it accepted the requirement that a degree be ''related'' to the position, the inclusion of ''directly'' as a qualifier might limit eligibility for H–1B petitions, introduce more subjectivity among adjudicators, and lead to a rise in RFEs and denials. As such, the

[39] In any event, USCIS is not bound to follow the published decisions of a district court, even in cases arising in the same judicial district. *See, e.g., Matter of Rosales Vargas,* 27 I&N Dec. 745, 749 n.7 (BIA 2020); *Matter of K–S-,* 20 I&N Dec. 715, 718–19 (BIA 1993).

[40] Not finalizing this sentence, however, does not indicate a change to deviate from current practice, and the ''directly related'' requirement will be finalized elsewhere in the specialty occupation definition and criteria, consistent with current practice and case law.

[41] *See Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007) (describing ''a degree requirement in a specific specialty'' as ''one that relates directly to the duties and responsibilities of a particular position'').

[42] *See id.*

commenter concluded that USCIS should remove ''directly'' from the definition, as maintaining the requirement that a degree be ''related'' would be sufficient.

Some commenters provided alternative language to better clarify the standard for ''directly related.'' A professional association suggested that if USCIS were to include a term to dictate the level at which a degree must be related to the duties of the position, it should use ''rationally related'' instead of ''directly related.'' The commenter reasoned that the flexibility provided in the term ''rationally related'' is needed to adapt to today's environment where occupations for certain specialties require diverse sets of expertise. An attorney also said that the proposed rule does not precisely define ''direct relationship.'' Referencing the NPRM's text on page 72875 describing how petitioners would establish a ''direct relationship,'' the commenter requested that DHS clarify what ''connection'' means in the text. Referencing the sentence ''The 'specific specialty' requirement is only met if the degree . . . provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position'' on page 72875 of the NPRM, a professional association suggested USCIS replace ''degree'' with ''education'' and remove the word ''directly'' from the sentence. The commenter stated that these suggestions would be more consistent with the statutory definition of ''specialty occupation'' found in INA secs. 101(a)(15)(H)(i)(b) and 214(i)(l).

Response: To provide clarity on the level of connection needed to meet the ''directly related'' requirement, DHS is adding regulatory text to state that, '' '[d]irectly related' means that there is a logical connection between the degree, or its equivalent, and the duties of the position.'' New 8 CFR 214.2(h)(4)(ii).

Considering this explanation, DHS declines to remove the ''directly related'' requirement from the specialty occupation definition. Moreover, the requirement to show that there is a direct relationship between the required degree in a specific specialty and the duties of the position is not a new requirement. Rather it is consistent with USCIS' long-standing practice. This requirement helps maintain program integrity and DHS believes that reducing this to a lower standard by removing the ''directly related'' standard altogether could open loopholes in the program.

Comment: Several commenters discussed the evidentiary requirements associated with the ''directly related'' requirement for petitioners. A company said DHS should clarify how an employer can demonstrate the beneficiary would fill a specialty occupation. Another company urged DHS to clarify the types of evidence that could be used to establish how a degree relates to an occupation. A few commenters similarly stated that the final rule should detail what additional evidence—such as coursework, transcripts, explanations of job duties, records of practical training, and credentials—could be submitted to demonstrate that beneficiaries are sufficiently qualified to complete the duties of the position. A company stated that the proposed rule provides no specific detail or criteria related to the level of connection that would be sufficient to demonstrate a direct relationship between the required degree field(s) and the duties of the position. The commenter asked DHS a variety of questions about the information that petitioners would be required to provide related to core coursework, technical skills and proficiencies, electives, and other topics. Specifically, the commenter asked if the connection is established by showing foundational relevance of coursework to the occupation's duties, or if it requires connecting a specific set of technical skills and proficiencies gained from coursework to those used in day-to-day responsibilities. The commenter further asked if is appropriate to show coursework in technical skills and proficiencies that are essential precursors to those used on the job, whether the connection is relevant only if it involves the core curriculum, or whether electives carry equal weight. The commenter also asked what percentage of the beneficiary's coursework must have the requisite connection, and how much explanation is necessary to properly establish any of these potential dimensions of connection.

A commenter expressed concern that the proposed requirement would incentivize USCIS adjudicators to issue additional RFEs, thus increasing the burden on employers. An attorney expressed similar concern that the ''direct relationship'' requirement would make the H–1B program more burdensome and inefficient by creating an additional evidentiary element. The commenter stated that certain occupations are open to individuals with various degrees, but that the ''direct relationship'' requirement would require employers to both show that the beneficiary possesses a relevant degree and provide documentation of how each degree field relates to the proposed job. The commenter said USCIS did not explain how this would increase efficiency or how employers could meet this requirement. An attorney said that instead of requiring petitioners to show a ''direct relationship'' between the degree and duties of the position, USCIS should accept attestations from employers that a beneficiary's skill set was obtained through their education. The commenter reasoned that the proposed requirement would create an additional burden on employers and waste USCIS time by requiring adjudicators to verify the connection between the job duties and the degree attained. The commenter concluded that USCIS should keep the current policy in place or provide more flexibility to employers.

Response: As noted above, DHS is adding regulatory text to clarify that ''directly related'' means ''a logical connection between the degree, or its equivalent, and the duties of the position.'' The burden of proof remains on the petitioner to demonstrate, by a preponderance of the evidence, a logical connection between the qualifying degree field(s) and the duties of the position. As in the past, the petitioner would need to provide information regarding the course(s) of study associated with the required degree(s) (or its equivalent), and the duties of the proffered position, and demonstrate the connection between the course of study and the duties of the position. Relevant supporting evidence could include, but is not limited to, information about the established curriculum of courses leading to the specified degree(s), course descriptions or syllabi, and information explaining how such a curriculum and coursework is necessary to perform the duties of the position. DHS reiterates that each petition is reviewed on a case-by-case basis taking into consideration the totality of the evidence, and, therefore, DHS will not require any specific type of evidence or an exact percentage of coursework to establish the requisite connection.

Commenters also asked whether relevant evidence of whether a position is a specialty occupation could include transcripts listing the beneficiary's coursework, records of the beneficiary's practical training, professional certificates, and other credible evidence demonstrating the beneficiary's technical skills and proficiencies. USCIS may consider such evidence relevant if the petitioner were able to demonstrate that the submitted evidence were representative of the typical coursework, skills, and/or proficiencies needed to attain the required degree(s). Generally, however,

these types of evidence are more relevant to the determination of the beneficiary's qualification for the offered position, which is a separate issue from whether the petitioner's offered position qualifies as a specialty occupation. Further, a general attestation from the employer that a beneficiary's skill set was obtained through their education, without any additional evidence, may be insufficient to establish that a beneficiary is qualified to perform the duties of the position.

Comment: Several other commenters expressed concern with the ''directly related'' requirement because it would effectively require a degree in a further ''subspecialty'' (such as chemical engineering) rather than a degree within a broader specialty field (such as engineering). The commenters stated that this change would not be supported by the INA, as the ''directly related'' requirement does not exist within the statutory text of the INA, as reaffirmed in *InspectionXpert Corp.* v. *Cuccinelli,* 2020 WL 1062821 (M.D.N.C. Mar. 5, 2020). In that case, the commenters stated, the court held that the INA defines ''professions,'' which are the basis of the specialty occupation requirement, at the ''categorical level'' rather than the subspecialty level and ''specifically includes'' that ''an engineering degree requirement meets the specialty occupation requirement.'' The commenters said that the proposed rule repeats the same error as the previous rule, specifically in its treatment of engineering degrees. As a result, the commenters concluded that the proposed rule conflicts with the INA. One of the commenters added that the proposed rule's ''caution'' that the ''directly related'' requirement is not construed as ''requiring a singular field of study'' did not align with *InspectionXpert Corp.,* as it ''does not cure the error of imposing a subspecialty requirement in the first place.''

A trade association and a law firm had significant concerns with the NPRM's discussion of engineering degrees, saying such language was ''impermissibly narrow'' and inconsistent with *InspectionXpert Corp.'s* holding ''that the statute does not require specialty occupations to be subspecialties.'' These commenters urged USCIS to recognize ''the long-standing practice of allowing employers to build a record to establish the specialized needs of their positions to qualify as specialty occupations, including those where the employer believes that the requirements of a particular position include a number of engineering degrees or a non-specified engineering degree.''

Response: With this final rule, DHS is adding language to the definition of ''specialty occupation'' clarifying that the required specialized studies must be directly related to the position. While commenters are correct that INA section 214(i), 8 U.S.C. 1184(i), does not use the term ''directly related,'' the statute does refer to 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. DHS 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. The ''specific specialty'' requirement is only met if the degree in a specific specialty or specialties, or equivalent, provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA 214(i)(1)(A). *See Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007) (describing ''a degree requirement in a specific specialty'' as ''one that relates directly to the duties and responsibilities of a particular position''); *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.''). Because an occupation may involve application of multiple bodies of highly specialized knowledge, ''specific specialty'' is not limited to one degree field, or its equivalent, but may include multiple degree fields, or equivalents, that provide the body of highly specialized knowledge to be applied when performing the occupation. The requirement that each degree field, or its equivalent, be directly related to the position is the best interpretation of the statutory text and consistent with existing USCIS practice.[43]

DHS does not agree with commenters that the requirement that the specialized studies must be directly related to the position is inconsistent with the district court's unpublished decision in *InspectionXpert* v. *Cuccinelli.*[44] In that case, the court found that USCIS' interpretation of the term ''degree'' in 8 CFR 214.2(h)(4)(iii)(A)(*1*) as ''requiring a degree in one singular subspecialty'' was not entitled to deference. Again, this final rule revises 8 CFR 214.2(h)(4)(iii)(A)(*1*) so that it no longer ambiguously refers to ''a . . . degree'' and codifies that a position may allow for a range of qualifying degree fields, which is consistent with the court's holding in *InspectionXpert.*[45] DHS acknowledges that the district court in *InspectionXpert* also held that ''in contrast to a liberal arts degree, which the Service deemed ''an [in]appropriate degree in a profession'' because of its ''broad[ness],'' . . . an engineering degree requirement meets the specialty occupation degree requirement.''[46] DHS is not suggesting that engineering, or any of the various fields of engineering, are not specific specialties. Nor is DHS suggesting that employers could never establish that ''any engineering degree'' is sufficient to qualify for some positions. But DHS is revising the regulation to clarify that the petitioner must establish how each qualifying degree field provides a body of highly specialized knowledge that is directly related to the position. In some instances, such as the quality engineer position in *InspectionXpert,* it may be that any engineering degree provides the body of highly specialized knowledge needed to perform the job. But that does not mean that in all cases, accepting ''any engineering degree'' as sufficient to qualify for the position would provide a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA 214(i)(1)(A). Where a petitioner will accept a range of qualifying degree fields, the petitioner must establish that each of those fields is directly related to the duties of the position. This final rule balances the District Court for the

[43] *See, e.g., Madkudu Inc.* v. *USCIS,* No. 5:20–cv–2653–SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4 (''if the record shows that the petitioner would consider someone as qualified for the position based on less than a bachelor's degree in a specialized field directly related to the position (*e.g.,* an associate's degree, a bachelor's degree in a generalized field of study without a minor, major, concentration, or specialization in market research, marketing, or research methods . . ., or a bachelor's degree in a field of study unrelated to the position), then the position would not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. 1184(i)(1) and 8 CFR 214.2(h)(4)(ii).''), *https://www.uscis.gov/sites/default/files/document/legal-docs/Madkudu-settlement-agreement.pdf* (last visited Oct. 23, 2024).

[44] 2020 WL 1062821 (M.D.N.C. Mar. 5, 2020), *report and recommendation adopted,* 2020 WL 3470341 (Mar. 31, 2020).

[45] *InspectionXpert,* 2020 WL 1062821, at *26 (noting ''the Agency's longstanding construction, which recognizes that a position can qualify as a specialty occupation even if it permits a degree in more than one academic discipline''), *report and recommendation adopted,* 2020 WL 3470341 (Mar. 31, 2020).

[46] *Id.*

Middle District of North Carolina's unpublished decision in *InspectionXpert* with other court decisions, including those of the District Court for Northern District of California in *Caremax* and the First Circuit Court of Appeals in *Royal Siam,* to revise the criteria at 8 CFR 214.2(h)(4)(iii)(A) so that it reflects the best interpretation of the statute and provides greater clarity, transparency, and predictability for petitioners and USCIS officers.

Comment: A commenter stated that additional emphasis should be given in the final regulation for beneficiaries with degree minors (or other equivalents) in the subject matter to qualify for H–1B status, as allowed by the ''Madkudu settlement.'' Specifically, the commenter expressed concern that the reference to the ''Madkudu settlement'' in footnote 18 was a negative remark from the settlement agreement. The commenter concluded that it appeared as if USCIS wanted to ''bury the implications of Madkudu.''

Response: DHS declines to codify an additional emphasis for degree minors. However, this does not mean that a minor cannot serve as further specialization for a general degree or in other circumstances. As stated in the *Madkudu Inc.* v. *USCIS* settlement agreement, if the record shows that the petitioner would consider someone as qualified for the position based on less than a bachelor's degree in a specialized field directly related to the position (*e.g.,* an associate's degree, a bachelor's degree in a generalized field of study without a minor, major, concentration, or specialization in market research, marketing, or research methods, or a bachelor's degree in a field of study unrelated to the position), then the position would not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. 1184(i)(1) and 8 CFR 214.2(h)(4)(ii).[47] Conversely, if the petitioner identifies a general degree with an official major, minor, concentration, or specialization, and establishes how that general degree plus the major, minor, concentration, or specialization equates to a bachelor's degree in a specific specialty directly related to the duties and responsibilities of the position, the position may qualify as a specialty occupation. Further, DHS is finalizing regulatory text stating that, ''a position is not a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position.'' 8 CFR 214.2(h)(4)(ii). As this additional regulatory text is in line with the *Madkudu* settlement agreement,[48] DHS disagrees with the commenter's allegation that it is ''burying the implications of Madkudu'' or that further revisions are needed.

Comment: Numerous commenters discussed the ''directly related'' requirement's relationship with E.O. 14110, ''Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.'' A commenter stated that the ''directly related'' requirement was a ''direct violation'' of E.O. 14110, and suggested USCIS needed to instead expand the definition to achieve the goals of the E.O. A professional association expressed concern that while the E.O. calls for ''modernizing immigration pathways for experts in AI,'' the proposed rule would potentially exclude experts from H–1B eligibility by focusing on the name of their degree and not the ''sum total of their courses of study and experience.'' The commenter referenced an article stating that adjudicators could deny H–1B petitions where the degree does not match what adjudicators believe is required to perform the role, but that in ''fast-evolving jobs like those in AI,'' the requirements to perform the role could change quickly. The professional association concluded by referencing examples of how these issues ''have already been highlighted in previous litigation involving similar regulatory proposals.'' A Federal elected official also expressed concern that the requiring proof that a degree is ''directly related'' to the duties of a position created unnecessary hurdles for employers that contradicted trends in hiring across emerging technology fields, and thus, would contravene the directive of E.O. 14110. Another commenter added that this provision would deprive the economy of the AI, technology, and national security talent that E.O. 14110 aimed to attract.

An advocacy group stated that the proposed language violated E.O. 14110 by limiting what degrees and positions could qualify for specialty occupations, preventing individuals from working in the United States, and therefore making it less likely the United States could remain a top destination for the world's talent. The commenter stated that the proposed rule could have the ''exact opposite effect'' of E.O. 14110 by allowing adjudicators to deny H–1B petition where the degree field does not ''precisely match'' what adjudicators believe is required to perform the role. The commenter added that currently USCIS often looks at actual coursework rather than the degree field, which would likely change if the proposed language took effect in its current form. Similarly, a trade association stated that the ''directly related specific specialty'' language ran counter to E.O. 14110 and would encourage adjudicators to deny H–1B petitions where the degree field does not match what they believe is required to perform the role.

A company stated that the proposed ''directly related'' requirement would not allow a path for skills or relevant coursework to supplement what the specific degree title might be missing. The commenter stated that this seems to run counter to E.O. 14110, as employees seeking to fill positions in emerging technology, and specifically AI, may not have a degree with a ''directly related'' name if they have completed extensive coursework that has resulted in the acquisition of highly specialized knowledge. A professional association and a joint submission expressed concern with the ''directly related'' degree requirement on the basis that it would make it ''less likely, if not impossible'' for E.O. 14110 to be satisfied. Both commenters also expressed opposition to the proposed rule's ''cautioning'' to employers about ''requiring the type of quantitative and problem-solving skills developed in an engineering degree as unlikely to be 'directly related' to a qualifying H–1B position.'' The joint submission further stated that because ''emerging technologies change much faster than degree programs'' and the primary degrees typically required for core AI job duties are business administration, computer science, engineering, mathematics, and statistics, the proposed change might result in individuals who are hired to integrate AI into other fields not having degrees that adjudicators presume to be ''directly related'' to their offered position. As a result, the professional association and the joint submission said the ''directly related'' proposals in both the definition and criteria would make it difficult for DHS to achieve section 5.1 of E.O. 14110's goal of attracting and retaining foreign-born STEM experts working in emerging technologies. A company similarly stated that the Department's ''insistence'' on a ''direct relationship'' appeared to contradict the directives of section 5.1 of E.O. 14110. Another

[47] *See Madkudu Inc.* v. *USCIS,* No. 5:20–cv–2653–SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4, *https://www.uscis.gov/sites/default/files/document/legal-docs/Madkudu-settlement-agreement.pdf* (last visited Oct. 23, 2024).

[48] *See Madkudu Inc.* v. *USCIS,* No. 5:20–cv–2653–SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4, *https://www.uscis.gov/sites/default/files/document/legal-docs/Madkudu-settlement-agreement.pdf* (last visited Oct. 23, 2024).

commenter expressed concern that adjudicators would deny H–1B petitions in situations where an individual's degree does not match what the adjudicators think are the requirements to perform the position. The company added that because emerging technologies might not yet have a degree program in existence, the ''direct relationship'' requirement might create uncertainty for employers in these fields when deciding whether to sponsor individuals for H–1B status.

Similarly, a law firm stated that the proposed language would make it more difficult for foreign nationals seeking to be employed in STEM fields to qualify for an H–1B visa. Specifically, the commenter said that it was a common industry standard for most occupations in STEM fields to consider specialized experience or training in addition to a generalized degree, which would not be permitted under the proposed rule. The commenter stated that this would undermine the administration's efforts to attract and retain foreign talent in STEM fields.

A law firm and another commenter referenced an attorney's argument that the ''direct-relatedness requirement'' requirement would force the company to ''elevate form over substance'' and inhibit their company's recruitment for multi-disciplinary teams, such as those in AI, resulting in a loss of productivity, creativity, and innovation. The commenters stated that this outcome would be ''precisely opposite'' of the administration's goals as stated in E.O. 14110 because they would restrict an immigration program that would attract global talent in the AI space. The commenters further stated that the provision was incompatible with the business model of the IT consulting industry and would negatively impact American businesses. Similarly, a professional association stated that the mandate of E.O. 14110 for DHS to update the H–1B program could be obstructed by the ''direct relationship'' requirement. The commenter concluded that such a requirement would impede not only the AI initiatives outlined in E.O. 14110 but also other initiatives needed to ensure ''American competitiveness and security.'' A business association said that the proposed language would prevent employers from obtaining needed talent and cross-training employees and undermine the goal of attracting and retaining talent in AI and other emerging technologies.

Response: DHS disagrees that requiring a direct relationship between the required degree field(s) and the duties of the position would violate E.O. 14110 or create additional hurdles for foreign nationals seeking to work in the AI or STEM fields. As stated previously, and further clarified with additional regulatory text in this final rule, DHS is codifying and clarifying long-standing USCIS practice. Regarding the specific degrees, the examples in the NPRM referred to the educational credentials by the title of the degree for expediency. However, USCIS will continue to make individualized determinations in each case. Furthermore, this rule does not change current USCIS practice to examine skills and experience in the course of determining a beneficiary's qualifications. USCIS will continue to evaluate 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 also will consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*), (h)(4)(iii)(D).

Comment: Multiple commenters said that the regulatory text regarding a ''general degree'' would lead USCIS to not evaluate the actual coursework and other specializations that underlie degrees and instead exclude many degrees based solely on their titles, contradicting current USCIS practices. For instance, a multi-association submission stated that the proposed regulation fails ''to accurately capture the contours of preexisting agency practices'' and urged DHS to revise the regulatory text to ensure that adjudicators ''examine the job duties of the position offered by the employer and the courses completed in a degree-granting program (U.S. baccalaureate or higher, or equivalent) to confirm that a specific body of knowledge is required to perform the job duties and that the beneficiary has attained that body of knowledge.''

A law firm stated that due to specialized concentrations and relevant coursework, degrees like business administration that might appear as a ''general degree'' could contain highly specialized coursework that should be deemed directly related to a position. The commenter added that there should be explicit guidance recognizing that specialized knowledge for a specialty occupation is obtained from coursework, as shown in a transcript, and might not be obvious from the face of the degree itself. Specifically, the commenter suggested that DHS allow certain positions to accept and require that ''highly specialized knowledge'' can be attained from general degrees through specialized coursework, so long as the knowledge is ''directly relevant'' to the specific job requirements. Similarly, a law firm suggested that petitioners be provided the opportunity to establish a relationship between the duties of the position and the beneficiary's course of studies or work experience. An advocacy group stated that implementing the proposed change without directly clarifying this relationship could establish a confusing legal standard.

Several commenters concluded that USCIS should allow for the demonstration of specialized knowledge through coursework, skills, experience, and other means. A union stated that if an occupation requires a generalized degree in addition to specialized experience or training it should still qualify as a specialty occupation. Similarly, an advocacy group referenced an attorney's argument, which stated that an occupation requiring ''a generalized degree but specialized experience or training'' should still qualify as a specialty occupation. An individual commenter additionally encouraged DHS to clarify the extent to which coursework can count toward equivalence to a degree in a specific specialty, reasoning, for example, that degrees in math, physics, chemistry, biology, or social sciences may involve courses found in computer science programs. The commenter said that these courses should be considered when determining whether a beneficiary meets the specialty occupation requirements.

A trade association stated that many degree programs do not allow for a specific specialization to be declared, and thus, demonstrate through coursework and other means their level of specialization. Another commenter suggested that USCIS consider accepting on-the-job training and clarify whether petitioners have to seek a combination of education and experience to meet the ''general degree'' requirement.

Response: DHS is finalizing the regulatory text to state that, ''A position is not a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position.'' New 8 CFR 214.2(h)(4)(ii). In response to comments, DHS has decided not to finalize the references to ''business administration'' and ''liberal arts'' so as not to suggest that a degree's title is determinative. However, USCIS will continue to analyze the ''specific specialty'' requirement to determine if the proffered position is a specialty occupation. If the minimum entry

requirement for a position is a general degree without further specialization (such as a major, minor, concentration, or specialization) or an explanation of what type of degree is required, the ''degree in the specific specialty (or its equivalent)'' requirement of INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), would not be satisfied. The opposite is also true: if a position requires a general degree with specialization, the position may qualify as a specialty occupation.

DHS disagrees with the comments that codifying the regulatory text regarding a ''general degree'' would lead USCIS to ignore coursework and other means to demonstrate specialization and instead exclude degrees based solely on their titles. As with current practice, USCIS will not rely on a degree title and will continue to consider coursework in determining if a degree is a specialized degree and if the position is a specialty occupation. USCIS will also consider coursework to evaluate whether the beneficiary is qualified for the position, which is a separate determination from the specialty occupation determination.

Comment: A commenter stated that the ''general degree'' language could become problematic in situations where professionals in emerging technologies, such as AI, have general degrees that are not specialized in the emerging field. Similarly, a trade association suggested that the proposed exclusion of general degrees be adjusted to accommodate situations where a person's general degree does in fact qualify them for a specialty occupation. The commenter stated that almost half of individuals with STEM degrees work in non-science and engineering occupations, and it is thus apparent that STEM expertise is prevalent across various job types. A different trade association suggested that USCIS include language in the final rule emphasizing that maximum flexibility should be applied in cases where the petitioner intends to employ an individual involved in AI or other emerging technologies.

A law firm stated that the definition of ''specialty occupation'' must account for the rise of interdisciplinary programs that are augmenting traditional degrees and fields of study. The commenter suggested that USCIS should recognize these programs are also ''specialized.''

Response: DHS declines to create a carve out or regulatory language to ''emphasize maximum flexibility'' specifically for AI and emerging technologies. As stated previously, if the minimum entry requirement for a position is a general degree without further specialization or an explanation of what type of degree is required, the ''degree in the specific specialty (or its equivalent)'' requirement of INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), would not be satisfied.

USCIS separately evaluates the beneficiary's qualifications, including 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 also will consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*). Therefore, if a petitioner can demonstrate that the beneficiary has specialized experience and training in the specific specialty, such as AI or STEM fields, then the petitioner may be able to demonstrate that the beneficiary qualifies for the proffered position.

Comment: A trade association said the ''general degree'' language would lead to inconsistent adjudications, higher rates of RFEs, and a potential increase in denials. The commenter suggested that USCIS clarify in the final rule that the revised language should not result in a narrowing of eligibility.

Response: Since this language merely codifies current practice and longstanding case law, DHS does not anticipate that the revised language will significantly impact or restrict who is eligible for an H–1B or result in an increase in RFEs or denials.

Comment: Numerous commenters discussed the inclusion of specific references to ''business administration or liberal arts'' degrees in the proposed definition of ''specialty occupation.'' Several commenters requested that USCIS remove references that identify particular types of degrees or courses of study. A law firm and a professional association stated that the final rule should not single out any degree type. Similarly, a university stated that because colleges and universities have autonomy in the naming of degree programs and their curricula, it would be problematic and unnecessary to name specific fields of study as too broad or general to qualify for a position in a specialty occupation.

Numerous commenters expressed concern with the classification of a business administration degree as a ''general degree.'' A few commenters suggested that DHS remove the reference to ''business administration'' in the proposed ''general degree'' requirement. An advocacy group expressed concern that the proposed language would disqualify individuals with a Master of Business Administration (MBA) for ''arbitrary and capricious'' reasons.

Numerous commenters said that business degrees should not be considered ''general'' because they include specialized coursework and provide individuals with skills that are sought after by employers and required to perform job duties. A commenter requested that USCIS clarify that a degree in ''business administration'' could be sufficient for a specialty occupation, as companies need certain skills, such as business strategy, that can only be obtained through a business degree. A legal services provider recommended against a blanket stance on degree requirements in the proposed definition, citing the potential for ''multi-faceted'' positions that may call for a broad-based business administration degree rather than a more specialized degree. A university stated that the ''general degree'' language drew a ''false equivalenc[y]'' between liberal arts degrees and business administration degrees. The commenter said that while positions that require liberal arts degrees could be reasonably argued to seek a level of general intellectual skill, the same could not be said of positions that require a degree in business administration. The commenter added that the proposed rule includes ''business specialties'' within the list of ''[bodies] of highly specialized knowledge in fields of human endeavor,'' and, thus, it would be inconsistent to suggest that a degree in business administration was not sufficient to qualify for a specialty occupation.

A few commenters said that the exclusion of business degrees from the ''specialty occupation'' definition was misguided and based on outdated notions of business degrees being too generalized to qualify for H–1B classifications. A couple of these commenters suggested that USCIS allow employers to establish that a beneficiary's qualifications meet the specialty occupation standards by maintaining a business degree with a formal concentration, specialized coursework, or professional experience. A professional association said that degrees such as business administration should not be excluded from the definition of a ''specific specialty,'' as business administration degrees are generally characterized by depth and complexity, which provide their graduates with relevant specialized knowledge and are highly sought-after by U.S. employers. The association expressed concern that the proposed language was not in conformity with

how employers view degrees when assessing applications.

Some commenters, including a joint submission, a law firm, and an advocacy group, stated that the characterization of business administration degrees as a ''general degree'' would be inconsistent with trends in MBA recruitment and employment. Referencing data, the commenters said that 94 percent of individuals with MBAs work in management or management-related occupations related to their degree. As such, the commenters stated that business administration is a specialized field of study, and thus, it is incorrect to consider business administration a ''general degree.'' A couple of these commenters added that the proposed language would cause economic harm by removing the ability for companies to hire these individuals and by discouraging foreign nationals from attending MBA programs in the United States.

Referencing the proposed rule's example that a ''general business degree for a marketing position would not satisfy the specialty requirement,'' a company said that this example offers an incorrect assessment of how a business degree and the coursework entailed ''directly relates'' to a marketing position. The commenter further noted that employers typically view a business degree as a normal requirement for a marketing position, universities offer business degrees with core requirements that are directly related to marketing roles, and occupation guides reference marketing jobs as potential careers for individuals with business degrees.

A law firm stated that numerous district court decisions have held that a bachelor's degree in business administration was a ''general-purpose degree that did not satisfy the ''specialty occupation'' definition. However, the commenter stated that because an MBA is a graduate degree, MBA holders should not be required to document ''further specialization.''

A joint submission suggested that DHS not codify the presumption against business administration degrees because the statutory definition covers the attainment of a ''body of highly specialized knowledge'' through a major, minor, concentration, or coursework, and as such, business administration degrees should be treated the same as other degree programs.

Response: In response to these comments, DHS has decided not to include the references to ''business administration'' and ''liberal arts'' in the final regulatory text regarding generalized degrees. These changes recognize that degree titles may change over time and singling out specific degrees by their title alone may cause confusion.

DHS confirms that it does not consider a master's degree in business administration (MBA) generally to be a general degree, and DHS does not equate a master's degree in business with a general degree in business administration. When DHS referenced business administration and liberal arts degrees in the NPRM this was meant to reference a bachelor's degree in business administration, not a master's degree. Note, however, that even though DHS is not codifying ''business administration'' in the final regulatory text, this does not mean that DHS views an unspecified bachelor's in business administration degree as a specialized degree. Instead, the decision not to codify ''business administration'' as an example of a general degree represents DHS's acknowledgement that the title of the degree alone is not determinative and that titles may differ among schools and evolve over time. This is also reflected in the regulatory text and the inclusion of ''without further specialization,'' as that language is intended to reflect that some degrees that may otherwise be considered as a general degree could rise to the level of a specialized degree if the course of study includes a major, minor, concentration, or other specialization in a specialized field of study and the petitioner establishes how that general degree plus the major, minor, concentration, or specialization equates to a bachelor's degree in a specific specialty, and how each identified specialization provides a body of highly specialized knowledge that is directly related to the duties and responsibilities of the position.

Comment: A few commenters discussed the ''general degree'' requirement in relation to engineering degrees. Citing a case as indicating that engineering requires ''a body of highly specialized knowledge,'' a trade association concluded that general engineering degrees should be sufficient to support H–1B petitions. The commenter stated that Congress intended H–1B visas to be responsive and flexible to accommodate industry needs and that the proposal would be unduly restrictive.

A few commenters referenced the example in the proposed rule that ''any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement.'' Some commenters stated that this language was inconsistent with the INA, which defines the term ''profession'' to include ''engineers'' at a ''categorical level.'' A law firm said that the U.S. Bureau of Labor Statistics Occupational Outlook Handbook (OOH) references an engineering degree as a degree in a related field for a software developer position. The commenter stated that although universities offer distinct engineering majors, and, thus, it would be unlikely for employers to consider an applicant with a general engineering degree for a software developer (or other specialized role), depending on the coursework and other knowledge attained by the applicants, an individual with a general engineering degree could meet the requirements of the position. The commenter concluded that possession of a general degree in engineering should not automatically be deemed insufficient for a specialty occupation.

A trade association suggested that USCIS issue guidance confirming that any engineering degree would support any engineering position in meeting the definition of ''specialty occupation.'' The commenter reasoned that this would reduce the monetary costs and time associated with RFEs. The commenter further stated that employers of engineers are aware of the requirements needed for the roles for which they are hiring, that these roles are specialty occupations, and that, without this guidance, employers would not be able to find the talent they require.

Response: USCIS regularly approves H–1B petitions for qualified beneficiaries who are to be employed as engineers. However, DHS declines to codify or otherwise state that any position requiring any engineering degree or what the commenter describes as ''a general engineering degree'' will generally qualify as a specialty occupation. In explaining in the NPRM that the requirement of any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement, DHS is not saying that engineering degrees are not acceptable for specialty occupations. Rather, DHS is explaining that the petitioner would have the burden to establish how the fields of study within any engineering degree provide a body of highly specialized knowledge directly relating to the duties and responsibilities of a software developer position. This is because 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

seemingly unrelated fields. Conversely, if the petition requires an engineering degree with a specific specialty, such as a major, minor, concentration, or specialization, that is directly related to the duties of the position, the petitioner may be able to satisfy the statutory and regulatory requirement.

DHS acknowledges that INA section 214(i) includes ''engineers'' as one of the occupations listed as requiring the theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor. However, this does not mean that all positions that state that any engineering degree would be acceptable to qualify for the position means that the position is an engineer. DHS is not suggesting that engineering, or any of the various fields of engineering, are not specific specialties. Nor is DHS suggesting that employers could never establish that ''any engineering degree'' is sufficient to qualify for some positions. Rather, DHS acknowledges that an engineering degree is a specialized degree. However, just because an engineering degree is a specialized degree does not mean that it is always directly related to the position, which is a different issue. DHS is revising the regulation to clarify that the petitioner must establish how each qualifying degree field provides a body of highly specialized knowledge that is directly related to the position. In some instances, such as the quality engineer position in *InspectionXpert,* it may be that any engineering degree provides the body of highly specialized knowledge needed to perform the job. But that does not mean that in all cases, accepting ''any engineering degree'' as sufficient to qualify for the position would provide a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA 214(i)(1)(A). The critical element is whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the INA.

Comment: Several commenters discussed the legal authority of naming specific degrees, such as business administration or liberal arts degrees, as insufficient for H–1B status. A law firm and trade association added that disfavoring specific degrees would contradict the administration's National Security guidance, strategy, and E.O. 14110. A university stated that singling out business administration as a degree that is insufficient to qualify for a specialty occupation contradicts the statutory definition of ''specialty occupation'' in section 214(i) of the INA and the purpose of the NPRM.

A law firm stated that specifically referencing business administration or liberal arts degrees by name as insufficient to qualify for a specialty occupation violates precedent case law. The commenter referenced *Residential Finance Corporation* v. *USCIS,* which held that degree field names could not control whether an individual qualifies for H–1B status, and that USCIS must consider the ''highly specialized knowledge'' obtained through the courses taken to earn the degree. A joint submission stated that none of the cases referred to throughout the NPRM to justify the inclusion of ''business administration'' in the ''general degree'' language serve as the precedent case for this assertion or explain its origin. A law firm and joint submission stated that the cases cited by USCIS can be traced to *Matter of Ling,* 13 I&N Dec. 35 (Reg. Comm'r 1968), but noted that both *Ling* and *Matter of Michael Hertz Assocs.,* 19 I&N Dec. 558, 560 (Comm'r 1988) preceded the development of the ''specialty occupation'' concept and that neither decision references the terms ''H–1B'' or ''specialty occupation.'' The commenters further stated that *Ling* does not state that a business administration degree is a ''generalized degree,'' but instead that the profession of business administration is a generalized field that must be analyzed by the ''*Ling* test''—that the degree is a ''realistic prerequisite'' for entry into that field. The commenters concluded that a business administration degree could act as a ''realistic prerequisite'' for a position and, thus, that the proposed rule's provision that a business administration degree could not support H–1B eligibility was not found in legal precedent.

Response: In response to commenters' concerns, DHS is not finalizing the specific references to ''business administration and liberal arts'' in the regulatory text. The decision not to finalize this language recognizes the commenters' concerns about not relying on a degree's title, consistent with the District Court for the Southern District of Ohio's observation in *Residential Finance Corporation* v. *USCIS* that ''[t]he knowledge and not the title of the degree is what is important.'' [49] However, the decision not to finalize the references to ''business administration and liberal arts'' should not be misinterpreted as indicating a change in USCIS' longstanding practice not to recognize a bachelor's degree in business administration or liberal arts, without further specification, as a specialized degree.[50] Consistent with longstanding agency practice and legal precedent, although a general-purpose bachelor's degree, such as a degree in business or business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a conclusion that a particular position qualifies for classification as a specialty occupation. *See, e.g., Royal Siam Corp.,* 484 F.3d 139, 147 (1st Cir. 2007) (''The 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.''); *Shanti, Inc.* v. *Reno,* 36 F. Supp. 2d 1151, 1162–1164 (D. Minn. 1999) (the former INS did not depart from established policy or precedent when concluding that a general degree, such as a business administration degree, without more, does not constitute a degree in a specialized field); *Raj & Co.* v. *USCIS,* 85 F. Supp. 3d 1241, 1246 (W.D. Wash. 2015) (it is ''well-settled in the case law and USCIS's reasonable interpretations of the regulatory framework'' that ''a generalized bachelor['s] degree requirement is [in]sufficient to render a position sufficiently specialized to qualify for H–1B status.''); *Vision Builders, LLC* v. *USCIS,* No. 19–CV–3159, 2020 WL 5891546, at *6 (D.D.C. Oct. 5, 2020) (citing *Raj*).

Further, these cases are consistent with *Matter of Ling,* 13 I&N Dec. 35, 36 (Reg'l Comm'r 1968) (characterizing ''business administration'' as ''a broad field'') and *Matter of Michael Hertz Assocs.,* 19 I&N Dec. 558, 560 (Comm'r 1988) (recognizing a bachelor's degree in business administration, without further specialization, as ''a degree of generalized title.''). Although these cases predate the current specialty occupation framework enacted by the Immigration Act of 1990 (IMMACT), Public Law 101–649 (Nov. 29, 1990), they are relevant to the extent that they demonstrate the agency's longstanding view that ''business administration'' is a generalized field, which has since been reaffirmed in numerous court cases as cited above.[51]

[49] 839 F. Supp. 2d 985, 997 (S.D. Ohio 2012).

[50] Note, however, that USCIS generally recognizes a master's or higher level of degree in business administration as a specialized degree.

[51] With respect to *Matter of Michael Hertz Assocs.,* INS' prior requirements for members of the professions that were in effect at the time of that

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Comment: Multiple commenters suggested that USCIS remove the ''general degree'' requirement in its entirety from the proposed definition of ''specialty occupation.'' An advocacy group stated that the Department should abandon narrow regulatory language asserting that generalized degrees are insufficient to qualify for a specialty occupation.

A trade association suggested that the language within the ''specialty occupation'' definition that restricts qualifications to specific degrees or specialties be removed and updated with language that requires ''general degrees'' to be accompanied by documented experience. Similarly, an advocacy group suggested DHS add language codifying current practices, including requiring adjudicators to consider the underlying coursework of a degree along with an employer's explanation of how a degree is directly related to a position. Another trade association expressed concern with the impact of the proposed ''general degree'' requirements on educational institutions. Specifically, the commenter said that USCIS' proposal to exclude ''general'' programs from H–1B eligibility would devalue institutions' degree programs and harm students who have diversified their studies through course selection and other opportunities. The commenter suggested that, alternatively, USCIS could codify existing practices that allows for generalized degrees in addition to specialized experience and training in order to qualify for specialty occupations.

Response: In response to commenters' concerns, DHS is not finalizing the reference to the specific degrees of ''business administration and liberal arts'' in the regulatory text. However, DHS declines to adopt the other suggested revisions, such as removing the ''general degree'' regulatory text in its entirety.

Regarding the suggestions that the regulation allow USCIS to consider coursework or allow for generalized degrees in addition to specialized experience and training in order to qualify for specialty occupations, DHS reiterates that the changes to the specialty occupation definition do not impact how USCIS evaluates a beneficiary's qualifications for a specialty occupation. USCIS will continue to consider the underlying coursework of a degree, as well as specialized experience and training, along with the employer's explanation of how a degree is directly related to a position.

Comment: Several commenters expressed support for allowing a broad range of degrees, but also expressed concern about the requirement to demonstrate that each of those qualifying degree fields must be directly related to the proffered position. An advocacy group recommended that the proposed provision require that the range of degrees supporting an H–1B position be directly related to the occupation through the coursework involved in obtaining the degree, rather than simply by the degree itself. A law firm agreed, stating that particular coursework within a business degree, for example, could provide the specialized knowledge sufficient to support an H–1B petition. A research organization likewise stated that particular coursework could be especially relevant to occupations within AI development because of the relevance to AI of disciplines outside of computer science such as physics, philosophy, and linguistics.

Response: In explaining that a range of qualifying degrees in multiple disparate fields of study may be listed as the minimum entry requirement for a position, DHS did not intend to discount coursework that may have been involved in obtaining the degree. DHS again reiterates that USCIS will continue to separately evaluate 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 also will consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*), (h)(4)(iii)(D). The petitioner has the burden of establishing 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.

Comment: Several commenters stated that requiring petitioners to delineate how multiple degrees may support a specialty occupation is overly burdensome. The commenters recommended that petitioners only be required to justify why the degree of a potential beneficiary in a particular case relates to the occupation at issue.

Response: In requiring that the petitioner demonstrate that the required specialized studies are directly related to the position, DHS is further clarifying the definition of specialty occupation to better align with the statutory definition of that term. As explained in the NPRM, a position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position. 88 FR 72870, 72876 (Oct. 23, 2023).

Determining whether the position is a specialty occupation is a separate analysis from determining whether the beneficiary is qualified for the position. The petitioner is required to do both. To only require the petitioner to justify that the degree of the beneficiary relates to the occupation conflates these two requirements. DHS does not agree that it is overly burdensome for the petitioner to establish how each field of study is in a specific specialty providing ''a body of highly specialized knowledge'' directly relates to the duties and responsibilities of the particular position, as is current agency practice, and as required by the INA and the regulatory definition.

iii. Amending the Criteria for ''Specialty Occupation''

Comment: A commenter voiced appreciation for clarifying the specialty occupation criteria, which will alleviate confusion among U.S. employers and their employees. A company expressed general support for several modifications to 8 CFR 214.2(h)(4)(iii)(A). Another company also expressed support for clarifying the four regulatory prongs found at 8 CFR 214.2(h)(4)(iii)(A), writing that the proposed text eliminates redundancy between the second and fourth prongs.

Response: DHS appreciates the feedback and agrees that these revisions will provide clarity on the criteria for ''specialty occupation,'' alleviate confusion for many petitioners, and eliminate redundancy between the second and fourth prongs.

Comment: A trade association said that stringent criteria for evaluating specialty occupations could result in increased documentary burdens for petitioners and employers. A law firm generally stated that the proposed

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case mirrors the current definitions and standards for specialty occupation. *See* ''Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,'' 56 FR 31553, 31554 (July 11, 1991) (proposed rule) (proposing to change all references from ''profession'' to ''specialty occupation,'' but explaining that ''the same standards'' will apply and that ''[t]he definition and standards for an alien in a specialty occupation mirror the Service's current requirements for aliens who are members of the professions''); *see* also ''Temporary Alien Workers Seeking H–1B, O, and P Classifications Under the Immigration and Nationality Act,'' 57 FR 12179 (Apr. 9, 1992) (interim final rule) (finalized the current definition of ''specialty occupation'' at 8 CFR 214.2(h)(4)(ii)).

amendments to the specialty occupation criteria would reduce H–1B approval rates and negatively impact the biotechnology, information technology, space technology, and financial services sectors.

Response: Since DHS is codifying current practice through this provision, DHS does not anticipate that amending the criteria for specialty occupations will create additional documentary burdens for employers, reduce approval rates, or negatively impact particular industries or sectors. The revisions are intended to codify and clarify current practices and provide H–1B petitioners with more certainty as to the adjudication standards that apply to their petitions.

Comment: Several commenters expressed general support for the proposed definition of ''normally.'' A couple of law firms cited *Innova Sols., Inc* v. *Baran,* in supporting the proposed definition of ''normally.'' An advocacy group commented that the proposed definition of ''normally'' would be an improvement and cited the previous definition of ''normally'' to mean ''always'' as a misinterpretation of the term that the proposal would guard against. A company agreed and stated that it has received numerous RFEs regarding H–1B petitions based on the misinterpretation of ''normally'' to mean ''always.'' A trade association supported the proposal as establishing a clear guideline for adjudicators, aligning the regulations with current agency practices and legal precedents, and ensuring a ''more nuanced approach'' for when the variety and complexity of the roles do not fit within a rigid framework for specific degrees. The trade association noted that change would be especially beneficial to higher education institutions.

Response: DHS agrees that the new definition of ''normally'' to clarify that ''normally'' does not mean ''always'' [52] is an improvement that helps to ensure flexibility in adjudications. DHS also agrees that this change will help establish a clear guideline for adjudicators and align the regulations with current agency practices and legal precedents.

Comment: Several commenters expressed support for the change to clarify ''normally,'' particularly as employers increasingly look to consider skills-based hiring practices without running the risk that such practices would negatively impact their ability to obtain H–1B workers. For example, while expressing support for the proposed definition of ''normally,'' a law firm expressed appreciation for USCIS' responses to its questions around recruitment documentation in a recent public engagement and requested that those responses also be included in the proposed rule. As part of its responses, the commenter stated that USCIS recognized ''that no one factor alone, such as formal recruitment documentation, is determinative as to whether or not a particular position qualifies as a specialty occupation.'' A commenter from academia agreed and requested that the definition of ''normally'' specify that ''[n]o one factor alone, such as formal recruitment documentation, is determinative as to whether a particular position qualifies as a specialty occupation.'' Another law firm agreed and recommended several other changes to the proposed definition of ''normally'' to ensure that skills-based hiring initiatives and H–1B employment do not conflict.

Response: DHS agrees that the clarification of ''normally'' will allow petitioners to explore skills-based hiring programs and apprenticeship programs, where appropriate. As mentioned in the NPRM, DHS understands the importance of attracting and hiring individuals who possess certain skills. 88 FR 72870, 72871 (Oct. 23, 2023). The flexibility inherent in H–1B adjudications to identify job duties and particular positions where a bachelor's or higher degree in a specific specialty, or its equivalent, is normally required allows employers to explore where skills-based hiring is sensible. Further, DHS recognizes that an employer that has adopted skills-based hiring initiatives may, depending on the particular facts, still be able to establish that the particular position in which the beneficiary will be employed is a specialty occupation. DHS also agrees that no one factor alone, such as formal recruitment documentation, is determinative of whether a particular position qualifies as a specialty occupation but declines to codify this or similar language. By defining ''normally'' in the regulations, DHS's intent is to clarify that the petitioner does not have to establish that a bachelor's degree in a specific specialty or its equivalent is always a minimum requirement for entry into the occupation in the United States. DHS believes that defining ''normally'' in the regulations is sufficient to provide H–1B petitioners with more certainty as to the adjudication standards that apply to their petitions.

Comment: A professional association and a law firm expressed support for the proposed definition of ''normally'' but recommended, to improve clarity, that 8 CFR 214.2(h)(4)(iii)(A)(*1*) be amended to replace ''normally'' with ''usually'' or ''typically.'' The commenters cited a case as holding that ''normally'' and ''typically'' impose identical standards as used in regulations. A legal services provider requested that USCIS define ''normally'' to mean ''more often than not,'' writing that the agency could rely on ''O*Net'' data to demonstrate degree requirement rates for a position and improve clarity in the proposal.

Response: While DHS agrees that ''normally'' and ''typically'' impose identical standards as used in 8 CFR 214.2(h)(4)(iii)(A)(*1*), DHS declines to replace ''normally'' with ''usually'' or ''typically'' in this provision. As stated in the NPRM, for these purposes there is no significant difference between the synonyms ''normal,'' ''usual,'' ''typical,'' ''common,'' or ''routine,'' and DHS does not interpret these words to mean ''always.'' 88 FR 72870, 72876 (Oct. 23, 2023).

DHS further declines to define ''normally'' to mean ''more often than not.'' Such a change would essentially require the petitioner to demonstrate a specific percentage (more than 50%) of positions that require a bachelor's degree and could potentially make it more difficult for petitioners to demonstrate eligibility under this criterion if the evidence they submit for this criterion, such as the OOH, does not specify a percentage. DHS also declines to wholly rely on O*NET data to demonstrate a degree requirement. While O*NET can be an informative source of general occupational information and data,[53] there are gaps in the data, particularly as O*NET data does not provide information on whether the degrees required must be in a specific specialty directly related to the occupation. O*NET data may also be lacking for new and emerging fields of technology, or occupations not covered in detail. DHS again emphasizes that no one factor alone, including O*NET, is determinative as to whether or not a particular position qualifies as a specialty occupation.

Comment: An advocacy group recommended that the term ''normally'' be removed from 8 CFR 214.2(h)(4)(iii)(A) so as to require that H–1B specialized positions always require a degree, citing the INA in support of their position. A research organization agreed, citing the definition of a specialty occupation in INA sec. 214(i)(1) and the 2020 IFR as

[52] *See Innova Solutions, Inc.* v. *Baran,* 983 F.3d 428, 432 (9th Cir 2020) (''Normally does not mean always.'').

[53] DOL, ETA, O*NET, O*NET OnLine, *https://www.onetonline.org/* (last visited Dec. 9, 2024).

consistent with the commenter's interpretation. A union also stated that, for nursing in particular, only positions that always required a bachelor's degree should be eligible for H–1B classification. A commenter generally stated that stricter criteria for specialty occupation eligibility should be adopted and that many people who do not qualify for H–1B status are currently working on an H–1B visa.

Response: DHS declines to remove ''normally'' from new 8 CFR 214.2(h)(4)(iii)(A) so as to require that H–1B specialized positions always require a degree. DHS disagrees that this new definition is inconsistent with the INA and notes that the 2020 IFR was vacated. The inclusion of the word ''normally'' in the criteria for specialty occupations is not new. The specialty occupation criteria included ''normally'' prior to IMMACT90, which created the specialty occupation definition and did not change the criteria. Additionally, subsequent regulations implementing IMMACT90 did not change the criteria or remove the term ''normally.'' [54] DHS also declines to add additional requirements or scrutiny for particular occupations or adopt a stricter criterion for specialty occupation eligibility.

Comment: A trade association commented that defining ''normally'' in terms of ''usual, typical, common, or routine'' would retain vagueness and lead to RFEs, NOIDs, and denials. The commenter stated that this would have especially negative impacts in STEM fields.

Response: DHS disagrees that defining ''normally'' will lead to more RFEs and denials, or negatively impact certain industries. Defining ''normally'' to mean ''typical,'' ''common,'' or ''routine'' is consistent with both USCIS' current practice and, by codifying this practice, DHS seeks to provide H–1B petitioners with more certainty as to what adjudication standards apply to their petitions.

Comment: A company commented that the proposal could lead to confusion and inconsistent adjudications because, the commenter reasoned, the criteria under paragraph (h)(4)(iii)(A) operate to refine the definition at 8 CFR 214.2(h)(4)(ii). The commenter recommended deleting the term ''also'' from paragraph (h)(4)(iii)(A) to reduce confusion as to what is required to satisfy the standard at paragraph (h)(4)(ii). A couple of trade associations agreed that the proposed language for paragraph (h)(4)(iii)(A) would lead to an inconsistent application of regulatory standards with one trade association referring to the current ''one of the following'' standard as producing the same result and leading to confusion and administrative burdens. A trade association agreed and stated that the proposed standard would result in a ''totality of the circumstances'' test similar to one provided in *Kazarian* v. *USCIS,* 596 F.3d 1115 (9th Cir. 2010). A legal services provider also agreed and added that the proposal may effectively raise the standard for specialty occupations.

Response: DHS disagrees that the word ''also'' or the phrase ''one of the following'' in new 8 CFR 214.2(h)(4)(iii)(A) could lead to confusion and declines to make changes in response to these commenters. As explained in the NPRM, this language clarifies that meeting one of the regulatory criteria is a necessary part of—but not always sufficient for—demonstrating that a position qualifies as a specialty occupation. 88 FR 72870, 72876 (Oct. 23, 2023). In other words, to qualify as a specialty occupation, a position must meet one of the criteria at 8 CFR 214.2(h)(4)(iii)(A) and also must meet the definition of a specialty occupation as a whole. Furthermore, as pointed out in the NPRM, this is not new. 88 FR 72870, 72877 (Oct. 23, 2023). USCIS has a long-standing practice of reading and construing the criteria at 8 CFR 214.2(h)(4)(iii)(A) in harmony with and in addition to other controlling regulatory provisions and with the statute as a whole.[55] Therefore, DHS disagrees with the commenters that this change will somehow raise the standard or create a new standard for specialty occupation adjudications.

Comment: A professional association expressed particular concern about the proposed change at 8 CFR 214.2(h)(4)(iii)(A)(*3*), which would require that an H–1B employer normally require a ''U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, for the position.'' The commenter stated that this provision may not be in conformity with how hiring managers view those particular degrees when assessing a candidate's application. The commenter added that, because U.S. employers must show that its hiring practices for H–1B beneficiaries and American workers are identical, ''this restriction will impose artificial and unnecessary burdens on the hiring of both U.S. workers and H–1B beneficiaries.'' The commenter concluded that ''USCIS should not seek to restrict educational requirements beyond what was intended in the INA and in a manner that is inconsistent with specific content ordinarily included in these degree programs.'' A company stated, without elaboration, that ''USCIS should also consider the ''anti-discrimination impact'' on companies when drafting job descriptions.''

Response: In the NPRM, DHS proposed to add ''U.S.'' to ''baccalaureate'' to clarify that a baccalaureate degree must be a U.S. degree or its foreign equivalent, and that a foreign baccalaureate is not necessarily an equivalent to a U.S. degree. 88 FR 72870, 72877 (Oct. 23, 2023). DHS believes that these commenters misunderstood the proposed changes to mean that an individual must have earned a degree in the United States to be eligible for H–1B nonimmigrant classification. That is not the case. This revision reflects longstanding practice and a consistent standard that will better align the regulation discussing the position requirement at 8 CFR 214.2(h)(4)(iii)(A) with the statutory requirement 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'' at INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), as well as the regulatory requirement that an H–1B beneficiary must have a U.S. baccalaureate degree, or its equivalent, at 8 CFR 214.2(h)(4)(iii)(C)(*1*). Therefore, DHS declines to make any changes in response to these comments and will finalize the regulatory language as proposed.

Comment: A few commenters discussed the proposed criterion's references to the DOL's OOH. An attorney suggested that any reference to the OOH should be removed from the provisions since it never was meant to establish minimum requirements and should never be used for any legal purpose. The commenter stated that the information in the OOH should also not be used to determine if an applicant is qualified to enter a specific job in an occupation. A company similarly expressed their concern with the proposed changes and agency usage of

[54] *See* DOJ, INS, ''Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,'' 56 FR 61111–01 (Dec. 2, 1991); *see* also ''Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens,'' 84 FR 888 (Jan. 31, 2019).

[55] Numerous AAO non-precedent decisions spanning several decades have explained that the criteria at 8 CFR 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 CFR 214.2(h)(4)(ii), and that the regulatory criteria must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See, e.g., In Re.*—, 2009 WL 4982420 (AAO Aug. 21, 2009); *In Re.*—, 2009 WL 4982607 (AAO Sept. 3, 2009); *In Re. 15542,* 2016 WL 929725 (AAO Feb. 22, 2016); *In Re. 17442092,* 2021 WL 4708199 (AAO Aug. 11, 2021); *In Re. 21900502,* 2022 WL 3211254 (AAO July 7, 2022).

the OOH to determine if a position qualifies as a specialty occupation. The company reasoned that the OOH only provides a general description and is not intended to be used to define a specialty position. The company recommended a more flexible approach and also cited the OOH's statement that it should never be used for any legal purposes. A law firm suggested that the agency make it clear that the OOH is not the exclusive source of minimum education requirements and that expert opinions by professors in the field of study and by veterans in the particular occupation should be included as ''reliable and informative sources.''

Response: There is no reference to the DOL's OOH in either the proposed or the final regulatory text. DHS referenced this resource in the preamble of the NPRM when discussing how it reviews the specialty occupation criteria, noting that it will continue its practice of consulting the OOH and other reliable and informative sources, such as information from the industry's professional association or licensing body, submitted by the petitioner. 88 FR 72870, 72877 (Oct. 23, 2023). The OOH is not determinative. Rather, it is an informative source, that may be used among others, to analyze a position's duties and whether a position qualifies as a specialty occupation.[56]

Comment: A commenter expressed support for the addition of the ''degree in a directly related specific specialty'' language in 8 CFR 214.2(h)(4)(iii)(A)(*3*). The commenter reasoned that because H–1B visas are designed for individuals with specific specialty degrees, the requirement would ensure that H–1B visas are awarded to people who have chosen their degrees and studied for a specific occupation. The commenter further stated that USCIS should not be constrained in recognizing a position as a specialty occupation.

Conversely, several commenters discussed general concerns with the ''directly related specific specialty'' requirement in the specialty occupation criteria. A joint submission expressed opposition to the inclusion of a ''directly related'' requirement in the criteria for a ''specialty occupation.'' The commenters stated that it opposed the language for the same reasons described in its comment on the ''directly related'' requirement in the definition of ''specialty occupation.''

Response: Similar to the definition of ''specialty occupation'' that uses the term ''directly related,'' the addition of the phrase about a ''degree in a directly related specific specialty'' within the criteria merely reinforces 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. In determining whether a position involves a specialty occupation, USCIS currently 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. The ''specific specialty'' requirement is only met if the degree in a specific specialty or specialties, or its equivalent, provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA 214(i)(1)(A).

Comment: A couple of joint submissions and an advocacy group said that the proposed requirement of a ''directly related specific specialty'' degree would exclude those with relevant experience and coursework, restricting the pool of qualified candidates employers could consider. A joint submission from industry associations urged codifying existing practices that allow demonstrating how a degree or coursework relates to a position, in order to maintain U.S. leadership in emerging technologies and promote effective H–1B usage.

Response: Similar to the definition of ''specialty occupation'' that uses the term ''directly related,'' 8 CFR 214.2(h)(4)(iii)(A) should not hinder the ability of companies to consider employees with experience. USCIS analyzes whether the proffered position is a specialty occupation (including determining if there is a direct relationship between the required degree(s) and the duties of the position) separately from its analysis of a beneficiary's qualifications. When applicable, USCIS also will consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*), (h)(4)(iii)(D).

Comment: A professional association stated that the proposed changes to the criteria requiring a ''degree in a directly related specific specialty'' would restrict eligibility for H–1B status in a manner that was inconsistent with both statute and Federal court precedent. Specifically, the commenter referenced *Tapis Int'l* v. *INS, Residential Finance Corp. v. USCIS,* and *Raj & Co.* v. *USCIS,* which it said held that ''the body of specialized knowledge acquired pursuant to the degree,'' and not the degree itself, qualifies an individual for a specialty occupation. The commenter stated that despite this precedent, the NPRM focuses exclusively on the degree title and not on the underlying body of knowledge. Citing *Residential Finance,* the commenter added that while there is no requirement that specialized studies be in a single academic discipline, the NPRM does not consider the ''specialized course of study'' necessary to perform the job duties of a position and whether it could be obtained through degrees in a variety of fields. The commenter said that instead, the NPRM relies on *Caremax Inc.* v. *Holder,* which it said did not establish the complexity of the position or provide evidence of the beneficiary's qualifying body of specialized knowledge.

Response: DHS disagrees that requiring a ''degree in a directly related specific specialty'' will restrict eligibility for H–1B beneficiaries or that this is inconsistent with the statute. This provision codifies existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position. Further, this aligns with the statute, which states that attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) is the minimum for entry into the occupation in the United States. *See* section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1).

DHS also disagrees that this provision is contrary to case law. While the NPRM referred to degrees by their titles, it also explained that it was referring to the educational credentials 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 also will consider whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*). It appears the commenter may have conflated the issue of a position's qualification as a specialty occupation with the issue of a

[56] *See Royal Siam Corp.,* 484 F.3d at 146 (''In its review of petitions for nonimmigrant work visas, [US]CIS frequently—and sensibly—consults the occupational descriptions collected in the Handbook. Subject only to caveats at the outer fringes, the choice of what reference materials to consult is quintessentially within an agency's discretion . . . .'').

beneficiary's qualification for the specialty occupation. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether the beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed.[57] DHS referenced *Caremax Inc.* v. *Holder* in the NPRM because it discusses whether the position is a specialty occupation,[58] rather than beneficiary qualifications.

Comment: Several commenters discussed suggested revisions to the language of the ''directly related specific specialty'' requirement, with some recommending that USCIS remove it from proposed 8 CFR 214.2(h)(4)(iii)(A)(*1*) through (*4*). A professional association suggested that the ''directly related specific specialty'' language be replaced throughout the criteria with ''a body of specialized knowledge obtained pursuant to a U.S. baccalaureate or higher degree in a specific specialty, or its equivalent.'' The commenter reasoned that the language would be consistent with statute, affirm the importance of specialized courses of study, and eliminate the need to rely on the OOH.

Response: As previously stated, DHS is slightly revising its regulatory language in the definition of specialty occupation. The definition clarifies that a position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position. The regulatory language also includes a definition of ''directly related.'' DHS believes the regulatory language as revised in this final rule more clearly reflects and codifies current practice. As a result, DHS does not anticipate this provision will have a negative impact on any particular occupations and declines to make the suggested revisions to the regulatory text.

Comment: An advocacy group expressed their support for the need to amend the criteria for a specialty occupation but also provided recommended changes to the criteria. Specifically, the advocacy group suggested the inclusion of an acknowledgment of ''modern education which includes multidisciplinary majors and minors'' where the criteria reference a ''U.S. baccalaureate'' degree. The group also suggested recognition of the value of industry experience by including industry experience in the specialty occupation consideration.

Response: DHS declines to make the suggested changes because the regulatory provisions as finalized sufficiently address the commenter's concerns. The criteria for determining whether a position qualifies as a specialty occupation allow for the equivalent of a U.S. baccalaureate or higher in a directly related specialty. The petitioner bears the burden to demonstrate equivalency. More importantly, it appears the commenter may be conflating beneficiary qualifications, enumerated at 8 CFR 214.2(h)(4)(iii)(C), with the standards for specialty occupation positions, enumerated at 8 CFR 214.2(h)(4)(iii)(A). When assessing a beneficiary's qualifications, USCIS also will consider, as applicable, whether the beneficiary has the 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. *See* 8 CFR 214.2(h)(4)(iii)(C)(*4*), (h)(4)(iii)(D).

Comment: A company highlighted the use of the word ''are'' and recommended changing it to ''is'' in 8 CFR 214.2(h)(4)(iii)(A)(*4*). The company also recommended changing the term ''United States industry'' to ''industry in the United States'' at 8 CFR 214.2(h)(4)(iii)(A)(*2*) for improved clarity.

Response: DHS agrees that the word ''are'' should be ''is'' in 8 CFR 214.2(h)(4)(iii)(A)(*4*), and will make this non-substantive revision in the final regulatory text. DHS also agrees that ''industry in the United States'' is clearer than ''United States industry'' and will make this non-substantive revision in the final regulatory text at 8 CFR 214.2(h)(4)(iii)(A)(*2*). Additionally, DHS is revising 8 CFR 214.2(h)(4)(iii)(A)(*2*) and (*3*) by adding ''to perform the job duties'' to qualify the requirements of the position and clarify that DHS looks not just at the title of the position, but at the position's duties.

Comment: In the criteria at 8 CFR 214.2(h)(4)(iii)(A)(*2*), a legal services provider disagreed with the proposal to change the current wording ''in parallel positions at similar organizations'' to ''in parallel positions at similar organizations *within the employer's industry in the United* States.'' The commenter stated that this proposed change would narrow the focus more than is necessary or relevant. The commenter emphasized the importance of focusing on the specific duties of the position instead of the industry in which the petitioner operates, as this important distinction would make adjudications more efficient. The commenter cited an example where the agency determined that a small information technology company was not a ''similar organization'' to a 1,000-employee information technology company through numerous RFEs, negatively impacting all parties.

Response: DHS disagrees that the revisions to 8 CFR 214.2(h)(4)(iii)(A)(*2*) will narrow or otherwise limit the focus of this criterion. The regulatory text of 8 CFR 214.2(h)(4)(iii)(A)(*2*) prior to this final rule has always focused on the employer's industry; that version of the regulatory text specifically stated, ''The degree requirement is common 'to the industry' in parallel positions among similar organizations.'' The change to add a reference to the employer's industry in the United States is a non-substantive change and is not expected to increase RFEs and denials.

Comment: A joint submission voiced specific concern about the inclusion of the word ''staffed'' in the third prong of the regulatory criterion, stating that, in the ''overwhelming majority'' of circumstances, where H–1B petitioning employers place their beneficiary employees at third party sites, they are—by the terms and definition of the proposed regulation itself—not staffing companies. The commenters said that they are instead corporate entities with which another entity has engaged for the delivery of professional/specialty occupation services. The commenters acknowledged that USCIS in the preamble expressed its intent to narrow the definition of ''staffed'' to apply only where a beneficiary employee would be employed at a third-party worksite ''to fill a position in the third party's organization'' but said that the wording of the proposed criterion does not sufficiently narrow the definition to achieve the professed intent.

Response: DHS declines to strike the language at 8 CFR 214.2(h)(4)(iii)(A)(*3*) relating to a beneficiary staffed to a third party. This language provides necessary guardrails to ensure that beneficiaries who provide staffing to a third party sufficiently meet the specialty occupation requirements. As clarified in

[57] *Cf. Matter of Michael Hertz Assocs.,* 19 I&N Dec. 558, 560 (Comm'r 1988) (''The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]'').

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

the NPRM, a beneficiary who is ''staffed'' to a third party becomes part of that third party's organizational hierarchy by filling a position in that hierarchy, even when the beneficiary technically remains an employee of the petitioner. 88 FR 72870, 72908 (Oct. 23, 2023). By contrast, for example, a beneficiary would be providing services to a third-party where they were providing software development services to a third party as part of the petitioner's team of software developers on a discrete project, or employed by a large accounting firm providing accounting services to various third-party clients. In these examples, USCIS would generally not consider the beneficiary to be ''staffed'' to the third-party because the third-party does not have employees within its organizational hierarchy performing those duties in the normal course of its business and does not have a regular, ongoing need for the work to be performed.

d. Equivalencies

Comment: Several commenters suggested DHS consider 3 years of experience as equivalent to 1 year in college, stating that experience should be considered valuable for a job. Some of the commenters wrote that under the current definition of ''specialty occupation,'' 12 years of work experience in an occupation equates to a bachelor's degree in that occupation but expressed that the proposed rule is ambiguous as to whether this standard would still apply.

Another commenter recommended ''a more flexible analysis'' to consider whether a noncitizen is qualified for a specialty occupation. A commenter said that the current 8 CFR 214.2(h)(4)(iii)(D)(*5*) is ''overly restrictive'' in requiring 3 years of work experience to substitute for every 1 year of college-level training lacking. The commenter said a more flexible analysis would recognize the reality that some individuals, despite not possessing a degree in the specific specialty and not having 12 years of experience, may be able to perform a specialty occupation at the same level as someone who has the normally required a 4-year degree and would take into account the rigor of the noncitizen's past work experience.

Response: DHS did not propose changing 8 CFR 214.2(h)(4)(iii)(D) or any other provisions with respect to how USCIS determines whether the beneficiary possesses the equivalent to the required degree and any suggestions to change this standard are beyond the scope of this rule. For purposes of determining equivalency to a baccalaureate degree in the specialty under 8 CFR 214.2(h)(4)(iii)(D), USCIS will continue to require 3 years of specialized training and/or work experience to be demonstrated for each year of college-level training the noncitizen lacks.

Comment: A commenter suggested that USCIS allow individuals with a degree and 5 or more years of work experience to qualify for a specialty occupation, noting that many of these individuals face long waits for immigrant visas. Another commenter suggested that USCIS consider individuals that have 10 or more years of experience as a computer programmer or software engineer as eligible under the ''specialty occupation'' definition. Other commenters suggested carve outs for individuals, such as allowing an individual with a master's degree in telecom networks to qualify for software engineering roles inside networking companies, or establishing a different definition of ''specialty occupation'' for new H–1B petitions for individuals who have spent years working while waiting for an immigrant visa to become available.

Response: DHS declines to create specific clauses or carve-outs (such as those with 5 or 10 years of experience or with a master's degree, or for individuals waiting for an immigrant visa to become available) for beneficiaries to qualify for a specialty occupation. As with current practice, USCIS will continue to make individualized determinations of whether a beneficiary is qualified to perform the specialty occupation offered by the employer.

Comment: A commenter said that ''the proposed changes relative to the college degree requirement'' are important and that USCIS should explicitly describe the meaning and requirements of these provisions as it relates to foreign equivalent degrees.

Response: 8 CFR 214.2(h)(4)(iii)(A), enumerating standards for a specialty occupation, adds ''U.S.'' to baccalaureate, which clarifies that a baccalaureate degree must be a U.S. degree or its foreign equivalent and that a foreign baccalaureate is not necessarily equivalent to a U.S. baccalaureate. Furthermore, existing 8 CFR 214.2(h)(4)(iii)(C), enumerating beneficiary qualification criteria, indicates in part that the individual may ''[h]old a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.'' DHS believes these provisions sufficiently clarify that a position must require a U.S. baccalaureate or its equivalent, which may include a foreign degree that is equivalent to the required U.S. degree, and that a beneficiary may qualify based on possession of a foreign degree determined to be equivalent to a U.S. baccalaureate degree.

Comment: A nonprofit legal organization suggested that DHS incorporate an ''objective threshold'' into the definition of a ''specialty occupation'' that 75 percent of U.S. workers in that occupation must have a college degree. The commenter suggested that if an occupation did not meet this threshold, it should not be considered a specialty occupation.

Response: DHS declines to add a threshold to the definition of a ''specialty occupation'' that a certain percentage of U.S. workers in the occupation must have a college degree. There is no statutory requirement for such threshold. DHS also notes that the commenter did not provide supporting data or rationale to explain how it came to a 75% threshold. Establishing a threshold of U.S. workers in an occupation with a college degree is not necessary to meet the statutory definition of ''specialty occupation.'' The regulatory provisions as finalized in this rule sufficiently outline requirements to meet the specialty occupation definition.

Comment: A research organization suggested that DHS further strengthen the definition of ''specialty occupation'' by requiring that a noncitizen have at least a bachelor's degree that meets the statutory requirement from a single education institution, rather than having multiple, lesser degrees that USCIS might cumulatively consider to be equivalent to the required bachelor's degree. The commenter reasoned that this would conform more closely to the requirement in the statute and ensure that H–1B workers with qualifying levels of education are more likely to access the program, benefiting employers and the economy. Similarly, an advocacy group proposed that DHS include a provision in the final rule requiring a single source degree, as opposed to the current practice of allowing a combination of lesser degrees to qualify as ''equivalent to a U.S. bachelor's degree.''

A commenter advocated requiring that H–1B beneficiaries earn degrees in the United States as a way to promote development at U.S. educational institutions and social integration of H–1B beneficiaries. Another commenter endorsed the idea that H–1B recipients should have obtained their degrees in the United States, which the commenter

said would incentivize international students to pursue their education within the United States, promoting growth for American educational institutions and facilitating integration into American society, as well as ''guarantee[ing]'' that the H–1B program benefits individuals who are well-acquainted with the American academic and professional environments.

Response: DHS declines to require a single source degree, *i.e.,* requiring that a beneficiary must possess a bachelor's degree from a single educational institution. DHS also declines to require a beneficiary to possess a degree obtained in the United States. The commenters have not explained how such requirements would be more consistent with the statute, given that INA sec. 214(i)(1), 8 U.S.C. 1184(i)(1), expressly allows for a bachelor's or higher degree in the specific specialty ''or its equivalent,'' and INA sec. 214(i)(2), 8 U.S.C. 1184(i)(2), expressly allows for ''experience in the specific specialty equivalent in the completion of such degree, and [] recognition of expertise in the specialty through progressively responsible positions relating to the specialty'' in lieu of completion of the degree described in INA sec. 214(i)(1), 8 U.S.C. 1184(i)(1).

e. Applicability of Proposed Changes to Specialty Occupation to Specific Industries or Fields

Comment: Several commenters offered recommendations to further restrict specialty occupation requirements with respect to certain industries. For example, a commenter supported the proposed changes but said that ''specialty occupation'' needs to be stricter, particularly for technology occupations. An individual commenter said that software developer positions must require a graduate degree in computer science or computer applications/information systems. This commenter said that making education requirements stringent would make international students more attractive to the United States and provide them a greater opportunity to find employment. A couple of commenters requested that DHS exclude IT positions from the specialty occupation classification and Schedule A, with one commenter reasoning that it is challenging for U.S. citizens to obtain an IT job.

Response: DHS declines to revise the provisions to make the specialty occupation criteria more restrictive in general. The purpose of the revisions to the definition and criteria of specialty occupation are to codify current practice and better align the regulatory definition with the statutory definition.

DHS will not adopt the suggestions to require a graduate degree for certain IT positions. There is no statutory support for such a requirement, as the statutory definition of ''specialty occupation'' is based on a minimum requirement of ''a bachelor's or higher degree in the specific specialty (or its equivalent).'' Section 214(i) of the INA, 8 U.S.C. 1184(i). DHS will not adopt the suggestion to exclude IT positions from qualifying as specialty occupations as there is no statutory support for such a broad exclusion.

Comment: A commenter recommended DHS consider providing ''dedicated resources for noncitizens specializing in AI and other strategic fields, such as a 'concierge service' or fast-track process,'' in order to inform adjudicators about the particularities of AI jobs, employers, and degree programs and reduce processing delays.

Response: DHS declines to create a ''concierge service'' or ''fast-track process'' for noncitizens specializing in any given field. USCIS officers are trained to adjudicate petitions for all industries. Additionally, DHS believes it would be unfair to prioritize any specific field over others. Petitions for individuals in AI and other ''strategic fields'' will continue to be processed through standard adjudication channels.

Comment: Several commenters opposed the ''directly related'' language, citing negative impacts on start-ups and beneficiary-owners. For instance, an advocacy group expressed concern that the proposed language could impact startups because many startups exist in ''new and burgeoning fields'' that do not have ''directly related'' degrees. The commenter said that the proposed definition change would cause talent, research, and development activities to leave the United States. A joint submission expressed concern that the ''directly related'' requirement would require beneficiary-owners to prove that their ''majority of the time'' duties are ''directly related'' to their specific specialties and that this change would lead to beneficiary-owners encountering more RFEs and increasing the likelihood of denial for founders. Another joint submission expressed opposition to the codification of the ''directly related specific specialty'' requirement within the specialty occupation criteria, reasoning that beneficiary-owners who have degrees in a technical field but whose role evolves into an executive role might not be able to qualify for specialty occupation visa categories under the new criterion. This joint submission said there might be a potential for disagreements among adjudicators over duties considered to be ''directly related'' to owning or directing a start-up and requested additional guidance be provided through regulation or the USCIS Policy Manual to facilitate consistent decision-making by adjudicators.

Response: The changes to the specialty occupation definition are not intended to disadvantage start-ups and beneficiary-owners. DHS believes that specialty occupation provisions codified in this rule sufficiently accommodate start-ups and beneficiary-owners. DHS understands that, as in many positions, many beneficiary-owners and those in start-up companies may seek positions in new or emerging fields for which there may not be a singular degree requirement to meet the needs of the position. As stated in new 8 CFR 214.2(h)(4)(ii), a position may allow for a range of qualifying degree fields. The petitioner must demonstrate how each of those degree fields is directly related to the duties of the position. The petitioner is not required to show an ''exact correspondence'' between degree field(s) and the occupation; as finalized in this rule, ''directly related'' means there is a logical connection between the degree, or its equivalent, and the duties of the position.

For beneficiary-owners, it is true that, while the beneficiary may perform duties directly related to owning and directing the petitioner's business, the beneficiary must perform specialty occupation duties authorized under the petition a majority of the time. *See* new 8 CFR 214.2(h)(4)(ii). The burden is on the petitioner to demonstrate that the qualifying degree field(s) is or are directly related to those specialty occupation duties of the position. Codifying this requirement affords petitioners with greater clarity on the documentation necessary to include with their petitions, thereby reducing the likelihood of RFEs. DHS believes the regulatory text as finalized accommodates start-ups and beneficiary-owners while aligning with the statutory requirements for a specialty occupation.

Comment: A couple of commenters expressed the need to consider physicians in the specialty occupation requirements. For example, a professional association wrote that H–1B physicians deserve the specialty occupation designation, as they require education and training that ''far exceeds an undergraduate degree.'' The commenter cautioned USCIS to ensure that the ''directly related'' requirement is not interpreted in a way that would disadvantage physicians, who graduate with a general Doctor of Medicine (MD) or a Doctor of Osteopathic Medicine

(DO) degree and then specialize during their residency. The commenter added that physicians meet the education requirements of the proposed rule and the statutory ''highly specialized knowledge'' requirement, and as such, deserve the specialty occupation designation. Additionally, the association reasoned, that physicians undergo years of residency to expand their knowledge in a specialized area of medicine. The association cautioned the Department against construing ''specialty occupation'' too narrowly in a way that would disqualify physicians, who are critical to filling U.S. workforce gaps. A joint submission, echoing the statements on the educational and experiential qualifications of physicians, recommended that DHS clarify in the final rule that the amended requirements do not disadvantage or change physicians' specialty occupation status.

Response: DHS confirms that the regulatory text regarding ''a general degree'' does not refer to a Doctor of Medicine or a Doctor of Osteopathic Medicine and should not impact higher-level degrees. While specialty occupation determinations are made on a case-by-case basis, the regulatory text regarding ''a general degree'' generally applies to four-year bachelor-level degrees, because higher-level degrees require more specialization than those at a bachelor's level.

Comment: A professional association urged the Department to accept as precedent that pilots are not a ''specialty occupation.'' The association expressed concern that U.S. air carriers have increasingly misused H–1B, E–3, and H–1B1 visas to fill pilot positions, raising concerns about wage distortion in the U.S. pilot labor market. Thus, the association said that adopting the interpretation that this profession does not qualify as a ''specialty occupation,'' would facilitate the consistent application of the standard across agencies, serve the Department's interests in fidelity to the statutory and regulatory standard, allow for fair program administration, and reduce administrative burdens from meritless petition filings. The professional association also urged DHS to limit the proposed specialty occupation regulations to petitions for new employment only, citing the ''critical fairness and reliance interests'' that would be at stake for existing pilot visa holders, their employers, and crewmembers should DHS disrupt prior eligibility determinations. Specifically, the commenter suggested that the changes should not be used to revoke or reconsider the eligibility of existing H–1B, E–3, or H–1B1 pilot visa holders, or deny petitions or applications for existing pilot visa holders to continue their current employment, make changes to their previous employment with their current employer, obtain concurrent employment, or change employers. Conversely, a commenter suggested that the H–1B program should permit professional certifications outside of a bachelor's degree, including certifications for commercially rated pilots. The commenter reasoned that there are trained, experienced pilots in other countries who could address the U.S. shortage of commercially rated pilots in rural regions for charter and agricultural applications.

Response: DHS declines to create separate criteria for particular industries or occupations, or to declare through this rulemaking that certain occupations are or are not specialty occupations. The revisions to the definition and criteria for specialty occupations are not intended to disadvantage or advantage any particular groups.

f. Other Comments on Specialty Occupation

Comment: A commenter said it was unclear how the changes to the specialty occupation definition would add protections for U.S. workers, as employers demonstrate there are no U.S. workers with relevant skills in the LCA.

Response: DHS did not state that changing the definition of specialty occupation would add protections for U.S. workers, but DHS believes that better aligning the regulatory definition and standards for a ''specialty occupation'' with the statutory definition will improve program integrity by providing added clarity on which positions meet eligibility requirements. DHS also highlights that matters of H–1B program integrity are directly addressed and enhanced by other provisions of this rule, including provisions on the bona fide job offer requirement, non-speculative employment, and site visits. Furthermore, DHS notes, while deferring to Department of Labor (DOL) authority, that the LCA process generally does not include a showing that there are no qualified U.S. workers for the position. Nor does the LCA process serve as a guardrail to ensuring that a position qualifies as a specialty occupation and is not determinative of such qualification.[59]

Comment: A joint submission suggested adding ''a comparable evidence criterion'' (similar to the concept for EB–1 outstanding researchers) so that, if none of the listed regulatory criteria clearly apply to the evidence the petitioner intends to submit, the petitioner could submit comparable evidence to establish that the offered job is a specialty occupation. The commenter stated that that this alternative would allow petitioners to submit alternate, but qualitatively comparable, evidence where evidence does not fit neatly into the enumerated list. The commenters emphasized the importance of this recommendation by highlighting the proposed change in 8 CFR 214.2(h)(4)(iii)(A)(*3*), where petitioners are limited to showing evidence of an established recruiting or hiring practice. Similarly, an advocacy group expressed their support for the need to amend the criteria for a specialty occupation to give due consideration to research or publications.

Response: As part of qualifying as a specialty occupation, the position must meet one of the criteria enumerated at 8 CFR 214.2(h)(4)(iii)(A)(*1*) through (*4*). DHS declines to add regulatory language stating that the petitioner may submit ''comparable evidence'' to establish that a position qualifies as a specialty occupation in lieu of meeting one of the criteria, and also declines to amend the criteria to consider research or publications. Meeting one of the enumerated criteria is necessary to ensure the position satisfies the definition of a specialty occupation.[60] Additionally, DHS notes that a beneficiary's research or publications are likely applicable in determining beneficiary qualifications to perform the occupation, rather than determining whether a position qualifies as a specialty occupation. Petitioners may submit any evidence to demonstrate that the position satisfies one of the criteria at 8 CFR 214.2(h)(4)(iii)(A)(*1*) through (*4*). As noted by a commenter, and as acknowledged in the NPRM, petitioners might not be able to demonstrate eligibility under 8 CFR 214.2(h)(4)(iii)(A)(*3*) when seeking to fill a position for the first time. However, as stated in the NPRM, first-time hirings are not precluded from qualifying under one of the other criteria listed at 8 CFR 214.2(h)(4)(iii)(A). DHS believes the criteria finalized in this rule, in

[59] *See, e.g., Xpress Grp., Inc.* v. *Cuccinelli,* 2022 WL 433482, at *5 (W.D.N.C. Feb. 10, 2022) (''DOL certification of a LCA is not determinative as to whether the position is in fact a 'specialty occupation.' Rather, the specialty occupation determination is made by USCIS in accordance with section 214(i)(1) of the INA. . . .'' (citation omitted)).

[60] While meeting one of the criteria stated in 8 CFR 214.2(h)(4)(iii)(A) is necessary, it is not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation.

conjunction with the revised definition of specialty occupation, afford petitioners sufficient flexibility while adhering to statutory requirements.

3. Amended Petitions

Comment: Several commenters, including a trade association and a company, expressed support for DHS's clarification related to amended petitions. The trade association said that it would enhance processing efficiency and an individual commenter said it would reduce administrative uncertainties and complexities. The company said that stakeholders would benefit from the clarity provided by codifying and consolidating several sources of guidance and practices, and that the simplification would alleviate administrative burdens by reducing the frequency of RFEs and NOIDs.

Response: DHS agrees that codifying and consolidating requirements on when an amended or new H–1B petition must be filed due to a change in an H–1B worker's place of employment will offer clarity and reduce uncertainty. Existing requirements on the need to file an amended or new H–1B petition due to a change in work location appear in various sources, including DHS regulations, a precedent decision interpreting the existing DHS regulation, USCIS policy guidance, DOL regulations, and DOL guidance. DHS agrees that codifying and consolidating existing requirements for amended or new petitions will better serve petitioners in complying with these requirements. DHS also agrees that the clear standard reflected in this provision may mitigate the need for RFEs and NOIDs, particularly on H–1B petitions filed subsequent to the change in work location. DHS agrees that providing a clear, codified standard will further alleviate administrative burdens for employers when contemplating a new work location that may impact H–1B eligibility.

Comment: A few commenters, including trade associations and a joint submission, expressed opposition to requiring an amended or new petition when a worker's place of employment is changed. The commenters elaborated that it would add an unnecessary burden for both the petitioner and USCIS, thus impeding the goals of increasing efficiency, filling labor shortages, and creating opportunities for innovation and expansion of the economy.

Response: This rule does not create new filing requirements for petitioners. New 8 CFR 214.2(h)(2)(i)(E)(*2*) codifies current USCIS practice as articulated in its policy memorandum ''USCIS Final Guidance on when to File an Amended or New H–1B Petition After *Matter of Simeio Solutions, LLC,*'' which implemented a precedent decision, *Matter of Simeio Solutions, LLC,* 26 I&N Dec. 542 (AAO 2015).[61] DHS generally recognizes the additional procedures and cost incurred by employers in filing amended petitions. However, these are existing requirements, and DHS is not increasing petitioners' filing burdens through this provision. Providing clearer regulations on when a new work location requires the filing of an amended H–1B petition, in line with existing requirements, reduces uncertainty on whether the ''material change'' threshold requiring an amended filing has been met. With this clearer standard, employers can better plan accordingly to ensure they and their employees remain in compliance, thereby potentially preventing further administrative burdens.

Comment: A few trade associations and a business association recommended clarifying that a change in geographic worksite or end-client does not constitute a ''material change'' that necessitates an amended petition. Another trade association stated that the regulatory definition of a ''material change'' should be limited to the matters delegated to DHS by Congress in the INA. According to the commenter, such delegated powers limit the definition of a ''material change'' to the factors in section 1184(i), which do not include the term ''area of employment.'' The trade association also indicated that DHS has a different view of the meaning of ''area of employment'' from that of DOL.

Response: DHS disagrees with the comment that a change in geographic location requiring a new LCA does not constitute a ''material change.'' As noted in the NPRM and as held in *Matter of Simeio Solutions,* a change in the place of employment of a beneficiary to a geographical area requiring a corresponding LCA may affect eligibility for H–1B status, and is therefore a material change for purposes of 8 CFR 214.2(h)(2)(i)(E) and (h)(11)(i)(A). For example, the geographic location of employment may impact the prevailing wage for the occupational classification, as the new employment location may be in a Metropolitan Statistical Area (MSA) with higher wage requirements. Per DOL regulations at 20 CFR 655.731, an employer seeking to employ an H–1B worker in a specialty occupation must attest on the LCA that it will pay the H–1B worker the higher of either the prevailing wage for the occupational classification or the actual wage paid by the employer to similarly situated employees in the geographic area of intended employment. H–1B petitions for a specialty occupation worker must include a certified LCA from DOL, and failure to comply with DOL's LCA requirements may impact eligibility for H–1B status.

DHS also disagrees with the assertion that a material change should be limited to the factors delineated in section 214(i) of the INA, 8 U.S.C. 1184(i). 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.* Notably, section 103(a) of the INA, 8 U.S.C. 1103(a), authorizes the Secretary to administer and enforce the immigration and nationality laws and delegates to the Secretary the authority to establish such regulations as the Secretary deems necessary for carrying out these duties. Section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), establishes the H–1B nonimmigrant classification, section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), authorizes the Secretary to prescribe, by regulation, the time and conditions of the admission of nonimmigrants, and section 214(c) of the INA, 8 U.S.C. 1184(c), authorizes the Secretary to prescribe how an importing employer may petition for H–1B nonimmigrant workers and the information that an importing employer must provide in the petition. Section 214(i) of the INA, 8 U.S.C. 1184(i), however, merely sets forth the definition and requirements of a ''specialty occupation.'' Meeting the statutory definition and requirements of a specialty occupation is only one component of establishing H–1B eligibility. Limiting the definition of material change to factors in section 1184(i) of the INA would significantly hinder USCIS' ability to administer and enforce the INA, including adherence to the terms of an approved H–1B petition.[62]

DHS further disagrees with the claim that DHS's view does not align with DOL's definition of ''area of intended employment.'' DHS directly cited DOL's definition of ''area of intended employment'' in the NPRM. 88 FR

[61] The D.C. Circuit Court of Appeals rejected a challenge to the lawfulness of *Matter of Simeio Solutions* in *ITServ All., Inc.* v. *DHS,* 71 F.4th 1028 (D.C. Cir. 2023).

[62] *See ITServe All., Inc.* v. *DHS,* 71 F.4th 1028, 1037 (D.C. Cir. 2023) (''[P]olicing compliance with the terms of an LCA plainly constitutes 'administration and enforcement' of the INA, which section 1103(a)(1) independently authorizes.'').

72870, 72878 n.40 (Oct. 23, 2023). DOL regulations govern the determination of whether a new work location is in a different area of intended employment as that included on the LCA. DHS is not deviating from DOL's definition or creating a new definition of this term. Under new 8 CFR 214.2(h)(2)(i)(E)(*2*), USCIS will require the petitioner to submit an amended or new H–1B petition if a new work location requires a new LCA, as determined by DOL's definition of ''area of intended employment.''

Comment: A few commenters recommended alternative procedures for notifying USCIS of a change to an H–1B worker's job location. A trade association recommended that USCIS obtain a copy of the LCA from the Department of Labor, or in the alternative, implement a mechanism for notification of a change of employment location similar to Form AR–11, Alien's Change of Address Card, without requiring petitioners file a formal amended petition. One commenter, while expressing opposition to this provision, suggested that if USCIS will require an amended petition in the case of a new work location requiring a new LCA, it should only require submission of Form I–129 with limited evidentiary requirements. This commenter further suggested there should be presumptive and automatic approval of the location change and that USCIS issue an RFE if questions on H–1B eligibility arise. While discussing situations in which there is no material change in job duties and requirements after a job location change, a joint submission proposed that USCIS defer to the prior adjudicator's finding that the specialty occupation requirements were satisfied, thereby presuming continued eligibility for H–1B status. The submission proposed that, in these scenarios, a petitioning employer would provide advance notification to USCIS of a new work location via a ''new, simplified online form'' and would include proof of a newly certified LCA and certain attestations related to the employment. Upon filing of this form with USCIS, the employee could begin working at the new location, ''consistent with H–1B portability provisions.'' Under this proposal, USCIS would review the form to determine whether the LCA properly corresponds with the new location, the wage requirements would be satisfied, and the job duties remain the same, and an adjudicator could issue a RFE or NOID if questions of continuing H–1B eligibility arise. If the petitioner would be deemed by USCIS to have satisfied these requirements, the beneficiary would be considered to have maintained nonimmigrant status and continue to be employed with authorization. If the request is denied, then USCIS would require a new Form I–129, with fees, to be filed within the 60-day grace period.

Response: DHS declines to adopt these recommendations at this time. DHS did not propose in the NPRM to adopt new procedures or methods of evidence submission to notify USCIS of material changes to the conditions of H–1B employment. As previously established and discussed in the NPRM, a change in work location requiring a new LCA is a material change potentially impacting H–1B eligibility, and therefore requires petitioners file an amended or new petition, with all evidentiary requirements, under 8 CFR 214.2(h)(2)(i)(E). Submission of a complete petition allows USCIS adjudicators to conduct a thorough review of the material change to ensure continued eligibility for H–1B status.

Comment: A professional association urged DHS to make an additional exception at 8 CFR 214.2(h)(2)(i)(E)(*2*), where the source of the prevailing wage in the initial labor certification is a collective bargaining agreement governed by the Railway Labor Act, which sets wage rates nationwide.

Response: DHS recognizes the unique employment circumstances of workers under collective bargaining agreements. However, DHS declines to create an exception for positions where the source of the prevailing wage is a collective bargaining agreement. If a change in employment location requires a new LCA per DOL standards, then, under 8 CFR 214.2(h)(2)(i)(E), the employer will also be required to submit a new or amended H–1B petition to USCIS.

Comment: A trade association recommended amending the regulation so that ''a minor reduction in hours'' does not require a new filing.

Response: DHS declines to amend the regulations to allow for a certain reduction in hours that would not rise to the level of a material change. The NPRM did not propose to provide such an amendment. While the commenter did not define what it considers as a ''minor reduction,'' the regulated public should have an opportunity to comment on any such framework.

Comment: Some commenters suggested modification to the required timeframe for employers submitting amended petitions to reflect a new place of employment. A trade association, noting the unpredictable nature of job changes and the rapid response required to ensure that qualified employees are present where needed, suggested USCIS create a grace period for employers to file amended petitions following a ''sudden or urgent change in a beneficiary's role,'' coupled with requiring evidence of increased pay in the interim if the material change results in a higher required wage. A university recommended revising the requirement that petitions must be filed before the change takes effect while leaving in place the ''post-*Simeio*'' guidance on changes in employment location, adding specific language allowing for a grace period after a material change takes place, or allowing for adjudicatory discretion on the level of material change involved with a location change. They commented that requiring an amended petition be filed before the material change takes effect contradicts 8 CFR 214.2(h)(11)(i)(A), which requires that a petitioner ''immediately notify'' USCIS of changes in the terms and conditions of employment which may affect eligibility for H–1B classification. They stated that the requirement to provide immediate notification is more reasonable than the requirement to file an amended petition before a change takes effect.

Response: DHS declines to provide a grace period for petitioners to file new or amended H–1B petitions reflecting material changes after they occur. Requiring amended petitions be filed before material changes occur is consistent with statutory and regulatory requirements that beneficiaries maintain status by only working in accordance with their approved petition. *See, e.g.,* 8 CFR 214.2(h)(2)(i)(H) (describing the requirements to qualify for H–1B portability, to include not previously working without authorization); 8 CFR 274a.12(b)(9) (stating that an H–1B nonimmigrant may only be employed by the employer through whom the status was obtained, unless authorized to work based on a pending petition based on H–1B portability). As explained in existing USCIS policy, petitioners are already required to notify USCIS of material changes before they occur. USCIS articulated this policy in its policy memorandum ''USCIS Final Guidance on When to File an Amended or New H–1B Petition After *Matter of Simeio Solutions, LLC,*'' which discusses the ''USCIS position that H–1B petitioners are required to file an amended or new petition before placing an H–1B employee at a new place of employment not covered by an existing, approved H–1B petition.'' [63] Working in

[63] *See* USCIS, Policy Memorandum, PM–602–0120 USCIS Final Guidance on When to File an Amended or New H–1B Petition After Matter of

Continued

a manner or location not previously authorized before submission of a new or amended petition may constitute a violation of status.

DHS disagrees with the comment that this requirement is inconsistent with 8 CFR 214.2(h)(11)(i)(A), under which a petitioner must ''immediately notify'' USCIS of changes which may affect H–1B eligibility. Rather, new 8 CFR 214.2(h)(2)(i)(E)(*2*) adds needed specificity to this requirement, which may otherwise be unclear as to what ''immediately'' means. Further, 8 CFR 214.2(h)(11)(i)(A) is a broader provision that applies to situations other than when an amended or new petition must be filed, such as when the petitioner no longer employs the beneficiary. Thus, new 8 CFR 214.2(h)(2)(i)(E)(*2*) adds specificity in the narrower context of where there is a material change requiring an amended or new petition.

Comment: A legal services provider recommended clarifying that workers may continue to work after the filing, and they do not have to wait for approval to take effect. The commenter recommended the following regulatory language: ''The beneficiary may begin working under the materially changed terms and conditions of employment upon the filing of the amended or new petition, assuming all other requirements and terms of eligibility are met.''

Response: DHS declines to edit the proposed regulatory text as suggested by this commenter. However, DHS reiterates that if the beneficiary is eligible for H–1B portability pursuant to 8 CFR 214.2(h)(2)(i)(H), the beneficiary would not need to wait for a final decision on the amended or new petition to begin working at the new place of employment. Such change may occur upon the filing of an amended or new petition with USCIS. Under H–1B portability, if an employer is filing an amended petition for the same employee and that employee meets the definition of an ''eligible H–1B nonimmigrant'' under 8 CFR 214.2(h)(2)(i)(H)(*1*), then the eligible H–1B nonimmigrant is authorized to work for that same employer in the new employment until the petition is adjudicated. This approach aligns with and codifies current USCIS practice, as clarified in USCIS policy memorandum ''USCIS Final Guidance on When to File an Amended or New H–1B Petition After *Matter of Simeio Solutions, LLC.*'' [64]

Comment: A university proposed that USCIS address that hybrid work arrangements are included in the definition of peripatetic work or are otherwise excluded from the definition of ''worksite.'' According to the commenter, this would alleviate some privacy concerns associated with disclosing the address and compensation in the LCA notice of filing, assuming the remote work location is within normal commuting distance to the employer's office. Similarly, a form letter campaign recommended clarifying ''that a beneficiary's change of residential address that is unrelated to any business decision of the employer is not ''a new job location'' and would not trigger the requirement to file an amended petition.'' An individual commenter reasoned that a hybrid employee's personal decision to change locations is factually different from the situation in *Matter of Simeio Solutions* and should be recognized by USCIS as such.

Response: DHS acknowledges the concerns expressed by commenters related to remote and hybrid workers. However, DHS is not deviating from or expanding beyond DOL regulations through this rule. As noted in the NPRM, 20 CFR 655.715 includes definitions and examples of ''place of employment'' and ''worksite'' or ''non-worksite.'' 88 FR 72870, 72879 (Oct. 23, 2023). If an employee's home residence constitutes a worksite under DOL definitions, employer obligations related to the LCA apply. For example, if a beneficiary's home is their worksite as determined under DOL regulations, and they move to a new residential address in a different area of intended employment with higher wage obligations, whether at the employee's choice or that of the employer, the employer is obligated to meet those higher wage obligations. This move would constitute a material change requiring a new LCA and submission of an amended or new H–1B petition. DHS declines to promulgate a provision under which a beneficiary's remote work location is categorically excluded from the definition of a worksite, potentially conflicting with DOL regulations.

Comment: Some commenters suggested modifications related to proposed short-term placement provisions, under which H–1B workers may be placed at a worksite not listed on the approved petition or corresponding LCA for up to 30 or 60 days if certain conditions are met, without requiring an amended H–1B petition. At proposed 8 CFR 214.2(h)(2)(i)(E)(*2*)(*ii*) and (*iii*), a healthcare provider urged DHS to clarify and define the terms ''substantial'' and ''employee development'' so organizations can ensure compliance with the rule. A professional association and a joint submission urged DHS to allow temporary, short-term placements for physicians beyond 30 or 60 days, thereby allowing physicians to provide care during public health emergencies such as natural disasters.

Response: DHS declines to adopt these suggestions. As stated in the NPRM, new 8 CFR 214.2(h)(2)(i)(E)(*2*) does not codify all relevant considerations related to when to file an amended petition, and stakeholders should still consult DOL regulations and policy when considering if a new LCA is required. 88 FR 72870, 72879 (Oct. 23, 2023). New 8 CFR 214.2(h)(2)(i)(E)(*2*) is consistent with DOL regulations at 20 CFR 655.735, under which short-term placements of less than 30 days, or in some cases 60 days, do not require a new LCA or an amended or new petition, provided there are no material changes. Regarding the request to clarify and define specific terms, DHS also reiterates that existing DOL regulations set forth criteria and guidance in connection with short-term placements. For example, as noted in the NPRM, 20 CFR 655.715 defines what would constitute an ''employee developmental activity'' and what would constitute a ''place of employment'' or ''worksite'' for purposes of requiring a new LCA. 88 FR 72870, 72879 (Oct. 23, 2023). As an additional example, 20 CFR 655.735(e) clarifies when it may be inappropriate to use the short-term placement provisions in lieu of filing a new LCA, and also clarifies when these provisions may offer flexibility in assignments to afford enough time to obtain an approved LCA for an area where an employer intends for H–1B nonimmigrants to have a continuing presence. In proposing new 8 CFR 214.2(h)(2)(i)(E)(*2*), DHS did not purport to expand or further define short-term placement requirements as they exist in DOL regulations. Rather, this rule confirms that changes in work locations that meet DOL definitions of short-term placement do not on their own require

Simeio Solutions, LLC (July 21, 2015), available at *https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf.*

[64] *See* USCIS, Policy Memorandum, PM–602–0120 USCIS Final Guidance on When to File an Amended or New H–1B Petition After Matter of Simeio Solutions, LLC (July, 21, 2015), available at *https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf.*

an amended or new H–1B petition be filed with USCIS.

4. Deference

Comment: A couple of commenters expressed opposition to the proposal to codify USCIS' existing deference policy. An advocacy group expressed concern that codifying deference to prior petition approvals would allow USCIS adjudicators to ''cut corners'' and appease employers by approving petitions faster. The group cited remarks from a 2017 USCIS Policy Memorandum, which rescinded the deference policy on the basis that continued scrutiny of H–1B petitions was warranted, as the burden of proof in establishing eligibility lies with the employer, not the government. The advocacy group echoed USCIS' previous position that deference was impractical and costly to implement, and the agency's authority should not be constrained by prior approvals but, rather, based on the merits of each case.

A research organization similarly voiced concern that the codification of deference would constrain USCIS officers' fact-finding authority. The organization said that, under the proposed regulations, an officer would either have to assume no material error, change, or new information, or ''merely take an applicant or petitioner's word.'' The organization wrote that this ''leap of faith'' would be unnecessary and constitute ''a reckless abdication of authority.'' Furthermore, while citing *Matter of Church Scientology International,* 19 I&N Dec. 593, 597 (Comm'r 1988), the organization said that adjudicators are not bound to approve subsequent petitions where eligibility has not been demonstrated, merely because of a prior, potentially erroneous, approval. The organization also concurred with USCIS' concern expressed in a 2017 policy memorandum [65] that the deference policy would shift the burden of proof for establishing eligibility from the petitioner to the government. Therefore, the organization urged DHS to rescind the NPRM's proposed deference codification and the corresponding 2021 USCIS Policy Manual update and require USCIS officers to confirm all material facts before granting any request filed on Form I–129. The organization reasoned that such an approach would serve as a fraud detection mechanism and deterrent, and officers should not be constrained in requesting additional evidence in the adjudication process, consistent with existing USCIS policy.

Response: DHS disagrees with these commenters. Deference to prior approvals involving the same parties and the same underlying facts does not equate to a lack of USCIS review of the petition. Petitioners continue to have the burden to present all required and relevant evidence to USCIS and to establish eligibility for the requested classification. DHS, however, agrees with the commenters that officers are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated strictly because of a prior approval, and USCIS decides each matter according to the evidence of record on a case-by-case basis.[66] USCIS will give close consideration before deviating from a prior approval involving the same parties and the same underlying facts. In exercising deference, adjudicators will not defer to prior approvals if: there was a material error involved with the prior approval; there has been a material change in circumstances or eligibility requirements; or there is new, material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility. *See* new 8 CFR 214.1(c)(5). If USCIS discovers that the petitioner or beneficiary engaged in fraud or willful misrepresentation of a material fact, the petition would not receive deference as that is new material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility.

DHS further disagrees that the deference policy is costly and impractical. Since the rescission of the deference policy in 2017, which some commenters suggested DHS reinstate, technological advancements—such as electronic filing and enhancements to the USCIS Electronic Immigration System (ELIS)—have improved ease of access to case records such that the pulling and reviewing of prior petitions is not an added burden in exercising deference. Additionally, commenters should note that through this rule, DHS is removing the sentence: ''Supporting evidence is not required unless requested by the director'' from 8 CFR 214.2(h)(14) and from 8 CFR 214.2(o)(11) and (p)(13). Petitioners have the burden to present required evidence with each filing, even with deference in place. As such, DHS does not agree that deference is a costly and impractical policy.

Comment: Numerous commenters expressed support for DHS's codification and clarification of its existing deference policy on prior determinations. A couple of commenters stated general approval of the codification of USCIS' deference policy. Other commenters supported deference to a prior decision when the underlying facts of a filing are unchanged and regarded this as a ''smart,'' ''sensible,'' and ''common-sense'' approach.

Many commenters regarded the codification of the deference policy as a positive development for upholding predictability, reliable and fair outcomes, consistent adjudications, and efficiency. For example, a joint submission concurred with DHS's statement that deference has ''helped promote consistency and efficiency for both USCIS and its stakeholders,'' while an advocacy group said that deference reduces the Department's workload and ensures consistent and fair adjudications. A few companies welcomed the codification of USCIS' deference policy, reasoning that it would bring stability and ''peace of mind'' to employers and employees. One of the companies added that deference promotes consistency and efficiency for both the agency and petitioners, while another company reasoned that ''predictability of outcomes is a fundamental aspect of the rule of law.'' Another company supported the codification on the basis that this measure, in concert with other proposed provisions, would improve the availability of H–1B visas, support innovative companies, provide greater certainty, and reduce burdens in the visa process.

A joint submission added that the proposed language would add clarity regarding the application of deference for petitioners, legal services providers, and adjudicators, which may be relied upon for personal and business planning purposes. A trade association additionally reasoned that codifying the deference policy would provide certainty to employers and reduce the need for extensive RFEs. Moreover, in addition to providing predictability and ameliorating inconsistencies in adjudications, a form letter campaign said that the codification of deference would close the officer training gap that further exacerbates disparities between decisions. Echoing the above remarks, a company regarded the proposed codification of the existing deference policy as a ''key lever of efficiency'' as USCIS focuses on sustaining operational effectiveness, achieving reasonable processing times, and upholding the

[65] *See* USCIS, ''Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status,'' PM–602–0151 (Oct. 23, 2017).

[66] *Matter of Church Scientology Int'l,* 19 I&N Dec. 593, 597 (Comm'r 1988).

integrity of U.S. immigration programs amid resource constraints. The company reasoned that USCIS should not expend adjudicatory resources to conduct a full de novo review of the same underlying facts and circumstances for eligibility. Furthermore, the company agreed that the application of deference would allow for predictable, consistent, and faster determinations ''without compromising the level of scrutiny needed for substantive assessment.''

A few commenters remarked on the benefits of USCIS' proposed deference codification for specific employment sectors. For example, an association remarked that the policy would reduce the administrative burden for higher education institutions in the USCIS filing process. A trade association remarked that the clarification around deference would streamline processing, reduce backlog stress, and improve the ''well-being of the scientific workforce.''

Many commenters acknowledged that the proposed rule would codify longstanding USCIS policy, which was reinstated in 2021 through USCIS Policy Manual guidance. For example, a form letter campaign supported the codification, reasoning that the deference policy has essentially been ''in effect since 2004.'' An advocacy group said that the 2021 Policy Manual guidance, which instructed USCIS officers to defer to prior determinations when adjudicating extension requests unless there was a material error, change, or new circumstance, reversed 2017 policy rescinding deference and resulted in more work and extension denials for experienced technology employees. Citing a 2020 AILA Policy Brief, another advocacy group said that the 2017 rescission of the deference policy illustrated the benefits of this policy, as the rescission led to increased delays and backlogs, administrative burdens for employers, and no clear improvement to the integrity or efficiency of the H–1B program. A couple of trade associations and a business association similarly commended DHS for codifying the deference policy given the negative outcomes associated with its absence in the past, including ''significant business disruptions'' to companies and impacts to companies, employees, and families following the 2017 rescission. The business association cited these challenges as justification for bolstering the longstanding deference policy through regulation. An association wrote that the codification of deference aligns with the agency's policy before its rescission in 2017. The association cited its comments on a 2021 Notice (86 FR 20398, Apr. 19, 2021) in which it commended USCIS for reinstating the longstanding policy of deferring to prior approvals when no error or material change in fact has occurred.

In light of the above, commenters encouraged DHS to proceed with formalizing or codifying the existing deference policy in regulations.

Response: DHS agrees that codification of the deference policy will help ensure consistent and efficient adjudications and provide greater predictability to the visa petition process without, as noted by one commenter, compromising the level of scrutiny needed for substantive assessment. This provision may also reduce the need for RFEs, saving time for both USCIS and stakeholders. DHS recognizes that certain commenters find this provision beneficial for their specific employment sectors. New 8 CFR 214.1(c)(5) brings agency regulations in line with longstanding deference policy, as implemented in a 2004 memorandum, rescinded in 2017, and reinstated in 2021 in the USCIS Policy Manual. DHS agrees with the noted benefits of codifying this longstanding policy.

Comment: A few commenters, including a form letter campaign, expressly supported the change in regulatory language that would allow deference for any Form I–129 petition—not just extension requests. The campaign said that the acknowledgment that a petition may be filed with the same parties and underlying facts, other than for the purpose of an extension, would benefit everyone. A company endorsed the broadened scope of deference to include all requests filed on Form I–129 as an ''appreciated acknowledgment that these efficiencies can also exist in other types of Form I–129 filings involving the same parties and underlying facts.'' A joint submission, citing statements from the current USCIS Policy Manual, agreed that this change would ensure that the deference policy would not be misread as limiting deference to extensions and excluding other types of requests involving the same parties and material facts. To provide additional clarity on this point, the joint commenters encouraged DHS to replace the current title of 8 CFR 214.1(c) with ''Extensions of Stay and Other Requests Filed on Form I–129.''

Response: DHS agrees with the benefits of new 8 CFR 214.1(c)(5) applying to all nonimmigrants using Form I–129 involving the same parties and the same underlying facts, not just to those seeking an extension of stay. Those seeking a change of status, amendment or extension of stay, or consular notification of approval warrant the same deference unless there is a material error involved with a prior approval, material change in circumstances or eligibility requirements, or new, material information adversely impacting the petitioner's, applicant's, or beneficiary's eligibility. DHS would also note that nothing in this provision modifies general eligibility requirements for a change or extension of status. Extending deference to any request filed on Form I–129 involving the same parties and underlying facts broadly enhances efficiency and consistency.

DHS declines to replace the title of current 8 CFR 214.1(c) with ''Extensions of Stay and Other Requests Filed on Form I–129.'' DHS acknowledges that the current title of 8 CFR 214.1(c) (''Extensions of stay'') may initially create confusion as to the applicability of the deference provisions to I–129s other than those requesting an extension of stay. However, DHS would also note that the commenter's proposed title revision may also create confusion, as current 8 CFR 214.1(c) does not exclusively pertain to requests filed on Form I–129. For instance, 8 CFR 214.1(c)(2) pertains to extensions filed on Form I–539, and 8 CFR 214.1(c)(3) lists classifications ineligible for extension of stay. DHS believes this provision is most appropriately placed under 8 CFR 214.1(c) as proposed.

Comment: A professional association said it understood, as part of DHS's proposed codification, that deference would not apply in cases of past USCIS eligibility determinations involving the same employer and position but a different beneficiary. The association concurred that deference would not be appropriate in such contexts.

Response: DHS agrees that deference should not be afforded to determinations involving the same employer and position but a different beneficiary.

Comment: Several commenters raised concerns with the proposed regulatory language limiting deference when there has been a material change in eligibility requirements and the potential impact on future adjudications. For example, a couple of companies said it is unclear whether the term ''eligibility requirements'' refers to the employer's role requirements or the substantive requirements for H–1B eligibility, with one company stating that the latter interpretation could allow the Department to change the rules ''midgame'' and deny future extensions to individuals already on H–1B status. The companies, therefore, urged DHS to amend the regulatory text to state

clearly that the change in eligibility requirements refers to an employer's requirement for the role, not other regulatory or administrative changes. Similarly, a university expressed concern that USCIS would not grant deference to long-time H–1B holders where there is a change in eligibility (*e.g.,* due to the degree requirement), even when the position and position requirements remain unchanged. The university, therefore, suggested that DHS remove the change in eligibility from the proposed deference regulation, or, alternatively, create an allowance for current H–1B holders, particularly if they are beneficiaries of an employment-based immigrant visa petition. While also expressing concerns about the potential impacts of the new requirements on those with approved H–1B visas, an association suggested that DHS remove the phrase ''or eligibility requirements'' from the proposed deference provision.

Similarly, a joint submission expressed concern with the inclusion of the term ''material change in circumstances or eligibility requirements'' in the description of factors that would lead to a decision to decline to give deference to a prior adjudication. *See* proposed 8 CFR 214.1(c)(5). The commenters wrote that many H–1B beneficiaries and their accompanying family members have been waiting for an immigrant visa to become available for ''well over a decade,'' and these individuals justifiably rely on the ability to obtain future extensions of stay as long as the facts and circumstances of employment remain the same. Specifically, the joint commenters cautioned that the proposed changes to ''specialty occupation'' would jeopardize future extensions of stay for those who are ''established and respected members of their professional and local communities.'' Moreover, the commenters said it would be ''intrinsically inequitable'' to subject individuals who have acted in good faith to maintain legal status to unpredictable policy interpretations of changing administrations. Accordingly, the commenters urged DHS to amend the proposed description of the factors that would preclude an exercise of deference by removing the reference to ''changing eligibility requirements.''

Response: DHS declines to remove the reference to ''eligibility requirements'' from new 8 CFR 214.1(c)(5). Under 8 CFR 103.2(b)(1), an applicant or petitioner must establish eligibility for the requested benefit at the time of filing the benefit request. It is unclear how USCIS adjudicators could determine eligibility for the requested benefit if they defer to prior determinations made under different eligibility requirements. It is important to note that inclusion of ''eligibility requirements'' in this provision does not mean that a beneficiary previously found eligible will necessarily be found ineligible in future filings. Rather, as implemented at new 8 CFR 214.1(c)(5), when there has been a material change in eligibility requirements USCIS adjudicators ''need not give deference'' and will fully review the facts and regulations in place at the time of filing. With respect to the specific concern over provisions related to the specialty occupation determination, DHS reiterates that revisions to the regulatory language codify and better reflect adjudication practices. A position that was previously correctly determined to meet the definition of a specialty occupation should continue to do so and a beneficiary that was previously correctly determined to be qualified for such occupation should remain so qualified.

Comment: Many other commenters expressed particular concern with the intersection of the deference codification and the proposed changes to the definition and criteria of ''specialty occupation.'' One such commenter said that attorneys had observed a limitation in the deference policy: that deference is ''irrelevant'' unless a professional first qualifies under the revised specialty occupation standards. A university similarly wrote that the changes to the definition of specialty occupation constitute material changes that would eliminate USCIS' deference to a prior petition, thereby eliminating predictability and forcing employers to demonstrate anew that the position qualifies as a specialty occupation. A business association also highlighted the ''tension'' between the two provisions, stating that USCIS cannot defer to a prior decision if a job no longer qualifies as a specialty occupation. As such, the association warned that the deference policy would not promote certainty and efficiency for those who have been ''caught up'' in the immigration process and who rely on long-standing definitions; rather, it would lead to ''substantial business disruptions,'' harming its member companies, employees, and their family members.

A professional association said that in cases where a specialty occupation eligibility determination has already been made, the fairness and reliance interests would be particularly acute in the airline pilot industry, which involves extensive training and requires extended time horizons for planning, scheduling, and service decisions. In this context, the association continued, reversing prior eligibility determinations could disrupt the airline industry, causing harm to pilot visa holders, their families, employers, crewmembers, and U.S. airline consumers. The association additionally noted that the same fairness and reliance interest would be implicated where DOS made the prior eligibility determination, rather than by USCIS itself.

A trade association supported the intent to codify USCIS' existing deference policy but said that, given the scope of changes contained in the proposed rule, it would be necessary for USCIS to outline how it would address changes in requirements during the intervening period between an initial H–1B approval and the time for when a new Form I–129 is filed.

Echoing the above concerns, many commenters encouraged DHS to proceed with codifying the deference policy while requesting clarification that any modifications to program requirements and standards would only apply to initial petitions filed after the rule's effective date. A joint submission urged DHS to adopt this approach to ensure that the codification of USCIS' deference policy fulfills the proposed rule's goal of creating ''predictability for petitioners and beneficiaries and . . .fairer and more reliable outcomes.'' The commenters added that if the agency were to apply the changes for requirements or standards to individuals already in the immigration process, it would increase burdens and lead to unpredictable outcomes, harming employees, their families, and employers. A trade association cautioned that, as proposed, the provision would not protect employees already in the immigration process. The association urged DHS to clarify that changes to H–1B eligibility requirements would not apply to nonimmigrants who are in the immigrant visa backlog, reasoning that such individuals have relied on the current requirements for many years, and applying new standards could result in their loss of status or removal from the United States. The association thus encouraged DHS to protect employees and their families by ensuring that the new eligibility requirements would only apply to beneficiaries of initial petitions filed after the rule's effective date—not current H–1B beneficiaries who are already in the process. Another association, echoing these comments, reasoned that this clarification would

ensure fair and consistent adjudications. The association added that changing the requirements for individuals who have already been granted H–1B status before the final rule takes effect would harm its member companies' employees and their families while creating an ''extremely unpredictable adjudication environment.''

In line with the above recommendations, a business association proposed—outside of abandoning the specialty occupation changes—that DHS clarify that any deference policy would not apply new eligibility criteria to beneficiaries and families residing and working in the United States prior to the promulgation of the new standards. Instead, the association wrote, the new H–1B eligibility criteria should only apply to those whose initial petition was filed after the rule's finalization, and USCIS should delay the implementation of the requirements by at least 6 months to provide stakeholders with sufficient time to adapt and adjust their business practices accordingly. A professional association, expressing support for deference, additionally urged DHS to limit deference to petitions involving new employment and not use the policy to revoke or reconsider the eligibility of existing H–1B, E–3, or H–1B1 pilot visa holders or deny petitions for pilot visa holders to continue their current employment, make changes to their employment with their current employer, obtain concurrent employment, or change employers.

Several commenters proposed that DHS extend deference to the initial petitions of current H–1B holders. For example, a trade association suggested that DHS clarify that deference would be applied ''liberally'' to avoid re-adjudication under changed requirements during routine H–1B extensions or renewals. The association reasoned that H–1B beneficiaries often have resided in the United States for many years as they await the finalization of the immigrant visa process, and denying extensions based on new requirements would cause significant harm to visa holders, their employers, ongoing company projects, and the U.S. economy. The association added that changing program requirements without a correspondingly strong deference policy could harm families who have spent decades establishing their lives in the United States. A company similarly expressed concern about ensuring the opportunity to leverage deference for long-term H–1B visa holders due to the immigrant visa backlogs. The company said that these employees, who may have earned their bachelor's degrees long before the existence of today's specialized degree fields, have a strong case for deference given the number of times USCIS has reviewed their circumstances in prior petitions under the same employer. Thus, the company concluded that longstanding H–1B holders should not be given less certainty than others about the ability to maintain their status while awaiting an immigrant visa, and urged DHS to clarify that deference can and should apply in such circumstances. Another company similarly encouraged DHS to extend deference to H–1B holders who could otherwise be impacted by other proposed changes, such as the revisions to the definition of ''specialty occupation.'' A trade association likewise proposed that DHS specify in the final rule that deference would be based on the same standards and language contained in the original H–1B approval.

In line with the above remarks, an advocacy group urged the Department to ''grandfather in'' petitions that were approved before the finalization of key changes, such as the proposed definition of ''specialty occupation.'' In the absence of such a policy, the advocacy group warned that previously approved petitions could be subject to full adjudication, undermining the improved efficiencies promised by the deference provision. The advocacy group additionally expressed concern that holding petitions subject to a stricter standard than when they were approved would lead to denials, resulting in those with longstanding H–1B status being forced to leave their jobs and the United States. In light of these concerns, the commenter encouraged DHS to clarify that deference can apply to filings that were approved before the definition changes.

Response: DHS acknowledges the concerns expressed by various commenters pertaining to the deference policy and its intersection with H–1B eligibility requirements, including the revised definition of and criteria for ''specialty occupation'' promulgated in this rule. However, DHS reiterates that an applicant or petitioner must establish eligibility for the requested benefit at the time of filing the benefit request. DHS also reiterates that the deference provision codified in this rule applies to all requests on Form I–129 involving the same parties and underlying facts, not only to H–1B petitions. It is unclear how USCIS could create an exception to this requirement when adjudicating H–1B petitions, nor did DHS propose to do so in the NPRM. It is conceivable that future regulatory changes impacting other nonimmigrant visa classifications may occur which require petitioners to reestablish eligibility for the classification upon renewal. It seems that what commenters are requesting, with respect to deferring to eligibility determinations under previous regulatory requirements rather than those in place at the time of filing, goes beyond the scope of this rule and has much larger implications for all petitions and applications filed with USCIS.

DHS also reiterates that the specialty occupation provisions of this rule codify current USCIS policy. Because regulatory changes to the definition and criteria for specialty occupations are codifying current USCIS adjudication practices, a position that was previously correctly determined to meet the definition of a specialty occupation should continue to do so and a beneficiary that was previously correctly determined to be qualified for such occupation should remain so qualified.

Comment: Several commenters suggested changes to the language related to material error and general circumstances where deference would not apply. For example, a trade association and a joint submission welcomed the codification of deference but requested that DHS modify the ''material error'' standard to specify ''pure errors of law.'' While stating the need for ''more strength and clarity'' in the regulations, the association reasoned that the ''material error'' standard is too broad and could create confusion for adjudicators.

Response: DHS declines to revise the first enumerated exception to the deference policy at new 8 CFR 214.1(c)(5) from ''material error'' to ''pure errors of law.'' This proposed exception would too greatly narrow the level of discretion needed by USCIS adjudicators, such that consideration of material errors of fact, which may significantly impact eligibility for the requested classification or action, would be precluded.

Comment: A trade association urged DHS to explicitly state in the regulation that deference to prior adjudications applies to petitions involving changes in client locations, provided there are no other substantive changes in the role. Providing examples, the association said that when there is a change in client location, there often is no significant change in the worker's job duties. The association concluded that deference to prior adjudications where the role itself has not materially changed, would streamline the process and reflect the realities of modern consulting and technology roles.

Response: DHS declines to explicitly state in the regulation that deference to prior adjudications applies to petitions involving changes in client locations when there are no other substantive changes in the role. If a change in client location requires a new LCA, as determined by DOL regulations, the new location would constitute a material change. As such, DHS declines to codify in the regulations a blanket application of the deference policy for changes in client locations.

Comment: While endorsing the proposed codification, a company suggested that DHS clarify the circumstances where deference would not apply. In particular, to safeguard the intent behind the proposed codification and encourage the accurate application of the policy, the company requested that DHS clarify what constitutes ''a material error involved with a prior approval;'' ''a material change in circumstances or eligibility requirements;'' and ''material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility.'' The company additionally proposed that USCIS provide examples for adjudicators and petitioners, and if such circumstances are already defined in other regulations, these should be included in the rule as a point of reference. A form letter campaign also suggested further clarification around what would constitute a material change (*e.g.,* a change in SOC code, a change in worksite address within the same Metropolitan Statistical Area (MSA), or a more than 50-percent difference in job duties).

Response: DHS declines to identify specific scenarios that would definitively fall under the enumerated exceptions to the deference policy, as USCIS decides each matter according to the evidence of record on a case-by-case basis. DHS notes generally that the exceptions to deference due to material error, material change in circumstances or eligibility requirements, or new material information, are intended to account for legal and factual errors, changes, or new information that impacts eligibility for the requested benefit or classification. A fact is material if it would have a natural tendency to influence or is predictably capable of affecting the decision.[67]

An example of a material error of fact may include an incorrect determination that a beneficiary had earned the required licensure for their occupation. A material error of law involves the misapplication of an objective statutory or regulatory requirement to the facts at hand. As held in *Matter of Simeio Solutions, LLC,* a change in geographic area of employment that would require a new LCA is considered a material change. For example, a change in location may impact eligibility if the new location is in an MSA with a higher wage. DHS declines to identify a specific percentage of job duties that must remain the same for deference to apply, such as 50 percent as suggested by commenter. There could be scenarios where only one job duty changes, but that job duty is the core function of the position and would constitute a material change. Because the possibilities and types of duties for each occupation are numerous, each case will be decided on its merits and on the evidence provided. A material change in eligibility requirements may include a change in statute or regulation that implements new requirements to qualify for the requested classification. New material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility includes information not previously available that would impact eligibility. An example may include information that the beneficiary's license, which is required to perform the job, has been revoked by the licensing authority. New material information impacting eligibility also includes information that affects national security or public safety garnered from security checks conducted on beneficiaries and petitioners. Likewise, USCIS officers do not defer to a prior approval when there are indicators of potential fraud or willful misrepresentation of a material fact as that is new material information that adversely impacts eligibility.[68]

Comment: A form letter campaign, expressing support for the deference policy, said that the proposed regulations fail to define what is considered the ''same parties,'' citing, for example a company going through a corporate restructuring and renaming but having the same FEIN, or a merger in which the company is acquired under a new FEIN.

Response: The term ''same parties'' in this context refers to the same petitioner and the same beneficiary. DHS declines to identify changes to the petitioning employer which definitively impact the ''same parties'' determination. However, DHS notes that a mere name change of the petitioner generally would not result in the petitioner being considered a different party. Similarly, where an amended petition is not required under INA sec. 214(c)(10), 8 U.S.C. 1184(c)(10), the parties would generally be considered the same for purposes of deference. Conversely, if a petitioner is acquired under a new FEIN in a corporate restructuring and the terms and conditions of employment have changed, the petitioner would not generally be considered the same party for purposes of deference.

Comment: A form letter campaign requested further guidance on what an adjudicating officer must prove if they decide not to defer to prior determinations.

Response: DHS is codifying current USCIS deference policy, which requires the officer who determines that deference is not appropriate to acknowledge the previous approval(s) in the RFE, NOID, or denial. The officer must articulate the reason for not deferring to the previous determination (*e.g.,* due to a material error, material change in circumstances, or new adverse material information). Officers will generally provide the petitioner an opportunity to respond to the new information. *See* 8 CFR 103.2(b)(16)(i).

Comment: While expressing support for the proposed codification of the current deference policy, a few commenters encouraged DHS to extend the provision to include deference to H–1B cap exemption determinations.

A professional association remarked that the proposed codification of the deference policy would be helpful but is insufficient to address deference to prior cap exemption determinations. The association reported situations where practitioners received different outcomes on petitions requesting cap exemption filed by the same employer with identical evidence to the same USCIS Service Center. Thus, to increase efficiency and predictability, the association suggested that DHS also apply deference to cap exemption determinations and suggested some modifications to proposed 8 CFR 214.1(c)(5).

To provide additional certainty to employers on cap exemption determinations, the association suggested that DHS adopt other measures, such as annotated approval notices, a lookback policy for establishing the validity of previous cap-exemption determinations, and requirements for petitioners to update USCIS with current evidence confirming their eligibility for cap exemption.

The association added that USCIS could foster greater predictability and

[67] *See Kungys* v. *United States,* 485 U.S. 759, 770–72 (1988).

[68] *See* USCIS Policy Manual, Volume 2, ''Nonimmigrants,'' Part A, ''Nonimmigrant Policies and Procedures,'' Chapter 4, ''Extension of Stay, Change of Status, and Extension of Petition Validity,'' *https://www.uscis.gov/policy-manual/volume-2-part-a-chapter-4.*

transparency by publishing a list of cap-exempt employers, to be updated periodically, which the commenter said would aid employers in planning and would assist H–1B workers who may not always be aware of whether they have been counted against the cap when contemplating a move to a different employer. The commenter proposed adding regulatory text in line with these suggestions.

An association of local government agencies similarly conveyed concerns from its members about ''inconsistent and perplexing'' decisions on cap exemption and proposed that once USCIS determines that an organization is exempt from the cap, it should defer to that determination ''for a reasonable period of time.'' The association suggested that USCIS define the duration of that reasonable period and annotate Forms I–797A and I–797B approval notices to confirm the grant of a cap exemption. The association reasoned that the current approach leads to ''unpredictable'' and ''unfair'' results when separate petitions containing identical information result in different determinations. The association further stated that the current adjudication process is inefficient and costly both for USCIS and nonprofit employers, as the process involves the review of extensive evidence by multiple officers, inconsistent decisions, RFEs, and NOIDs. The association added that deference to prior cap exemption determinations would align with the proposed rule's replacement of deference in the case of ''an extension of petition validity'' with deference to a prior ''request filed on Form I–129.''

In line with other commenters, a local government agency expressed concern about inconsistent decisions on cap exemption by USCIS and administrative burdens associated with RFEs and NOIDs. The agency recommended, in giving H–1B program stakeholders more predictability, that the Department state in the final rule that cap exemptions are within the ambit of the deference policy that the NPRM proposes to codify.

An advocacy group, expressing support for the deference codification, suggested that DHS implement a blanket cap-exemption approval system for nonprofit research organizations. The group reasoned that providing a blanket approval of an organization's status as a nonprofit research organization for 1 or 2 years would streamline the application process for individual visas while preserving adjudicatory resources.

Response: DHS recognizes these commenters' concerns and the need for consistent and predictable determinations of cap-exempt status. However, DHS declines to expand the deference provision to include cap exemption determinations on petitions not involving the same parties and the same underlying facts. DHS did not propose through the NPRM to defer to prior cap-exempt determinations as a standard adjudicative practice. DHS further did not propose to establish a new, separate blanket approval process for the status of nonprofit research organizations or otherwise implement new operating procedures relating to cap exemption determinations. New 8 CFR 214.1(c)(5) codifies USCIS deference policy with respect to I–129 petitions involving the same parties and the same underlying facts. This approach strikes an appropriate balance to ensure fact specific adjudication. Furthermore, through this rule DHS is revising H–1B cap exemption provisions to provide additional flexibility to petitioners. These revisions may allay many of these commenters' concerns by leading to greater consistency and clarity and potentially reducing the issuance of RFEs and NOIDs involving cap-exempt status.

DHS disagrees with the commenters' statements that extension of the deference policy to any new request filed on Form I–129, not just limited to those requesting an extension of stay, suggests that deference may be extended to a petitioner's cap exemption eligibility even with different beneficiaries. New 8 CFR 214.1(c)(5) explicitly states that the same parties and same underlying facts must be involved for deference to apply.

Comment: A trade association and business association requested that DHS clarify the application of the deference policy in scenarios involving more than one adjudicating agency, such as the blanket L–1 visa process. The commenters suggested that additional clarity in this area would reduce burdens on employers and their employees while improving efficacy in the adjudicatory process.

Response: DHS reiterates that, under current policy, USCIS officers consider, but do not defer to, previous eligibility determinations on petitions or applications made by U.S. Customs and Border Protection (CBP) or DOS. Officers make determinations on the petition filed with USCIS and corresponding evidence on record. This rule codifies and does not change this existing policy.

Comment: A legal services provider agreed with the codification of the existing deference policy and requested that DHS extend deference to portions of a petition that have not changed, such as in cases where a petitioner obtains L–1B approval based on specialized knowledge and subsequently files a petition to change to L–1A status with the same company to assume a management position. The commenter acknowledged that the material change with the U.S. position prevents USCIS from deferring to the entire prior approval but suggested that USCIS should give deference to the previous determination that the beneficiary's employment abroad met the requirements for L–1 status.

Response: DHS declines to codify deference to portions of petitions. The NPRM proposed to codify existing USCIS deference policy, which requires the same parties and the same underlying facts. DHS believes this approach improves efficiency and consistency while ensuring that officers conduct necessary fact specific determinations in adjudications.

5. Evidence of Maintenance of Status

Comment: A couple of commenters expressed general support for the proposed provisions related to the evidence of maintenance of status. A commenter stated that requiring such evidence streamlines the process and ensures compliance. A trade association expressed appreciation for DHS's clarification of policies related to maintenance of H–1B status.

Response: DHS agrees that new 8 CFR 214.1(c)(6) will streamline and clarify the process and help ensure compliance.

Comment: Several commenters expressed general opposition to the proposed evidence of maintenance of status provision. A commenter expressed dissatisfaction with the proposal, adding that prior companies are unlikely to provide the forms USCIS is requesting, such as tax returns. Another commenter remarked that the proposed provision adds complexity to the process, potentially resulting in delays and increased compliance costs. A commenter called the proposal a ''dramatic change'' in the way nonimmigrant applications can be appealed in the event of a denial, adding that it is beyond the statutory authority granted by Congress and should be withdrawn. An advocacy group called the proposed provision ''troubling,'' stating it appears USCIS is seeking to punish employees whose employers have not paid full wages, which in turn undermines the ability of the Department of Labor to compel wage payment. A trade association objected to the proposal, stating the new requirement creates a situation where the approval of a petition may be

contingent on the beneficiary's ability to produce evidence that may be unavailable at the time of filing.

Response: New 8 CFR 214.1(c)(6) provides a non-exhaustive list of documents which may be submitted as evidence of maintenance of status. Petitioners are not required to submit every item listed and may submit alternate documentation not listed. DHS disagrees that this provision adds complexity, delay, or increased compliance costs. Rather, DHS expects that explicitly requiring evidence of maintenance of status at the time of petition filing will likely mitigate delay, by reducing the need to request additional evidence through RFEs or NOIDs. Based on USCIS experience, documents that evidence maintenance of status are often readily available in the normal course of business and are regularly and voluntarily submitted with extension petitions. DHS disagrees that this is a dramatic change in how denials can be appealed, noting that the language in this provision already exists. As noted in the preamble of the NPRM, new 8 CFR 214.1(c)(7) contains the same language as current 8 CFR 214.1(c)(5) except with added references to an ''amendment'' of stay and other non-substantive edits. 88 FR 72870, 72882 (Oct. 23, 2023). DHS rejects the claim that USCIS is seeking to punish employees whose employers have not paid full wages. This rule does not preclude employees from filing a wage-related complaint with DOL (or another governmental entity). By including a non-exhaustive list at new 8 CFR 214.1(c)(6), petitioners are given flexibility in the types of documentation which may be submitted to evidence maintenance of status. DHS also recognizes that there may be scenarios where evidence of maintenance of status is not available at the time of petition filing. This rule clarifies at new 8 CFR 214.1(c)(4) that USCIS may, in its discretion, excuse the late filing of an extension or amendment of stay request in certain circumstances.

Comment: Multiple commenters provided mixed feedback on the proposed provision. A company expressed general support for the proposal, elaborating that it would provide helpful clarity to evidentiary requirements, assist adjudicators in conducting efficient reviews, and would likely decrease the instance of RFEs or NOIDs. Additionally, the company expressed support for the modernization of regulatory language and the proposed amendment to 8 CFR 214.2(h)(14) to remove the sentence ''[s]upporting evidence is not required unless requested by the Director.'' The company also suggested a modification, stating that petitioners that fail to provide sufficient evidence of maintenance of status with the initial filing should be afforded an opportunity for correction through a RFE, rather than resulting in immediate denial of the petition.

While expressing agreement with the intent of the regulations to minimize the need for RFEs or NOIDs, an attorney remarked that the list of acceptable documents may embolden officers to expect and request more than what is typically required for approval. The attorney recommended using ''or'' instead of ''and'' in the final regulations. A law firm expressed that specification of the types of maintenance of status evidence that should be initially included with extension and amended petitions should advance the goal of reducing the issuance of RFEs and NOIDs. Additionally, the law firm provided a suggestion to specify that a change in an H–1B worker's remote work location is not a material change. A trade association commended DHS for proposing to codify evidentiary requirements, stating it provides certainty for employers and may result in a speedier adjudication process. However, the association suggested that DHS remove contracts and work orders in its list of evidence adjudicators may request, reasoning it would be unnecessarily onerous and subject to abuse.

Response: DHS agrees that this provision will provide clarity on evidentiary requirements, assist with efficient review, and likely decrease the need for RFEs and NOIDs. This rule does not implement a requirement under which failure to provide sufficient evidence of maintenance of status with the initial filing will result in immediate denial. The requirement at new 8 CFR 214.1(c)(6) to provide evidence of maintenance of status with Form I–129 requesting extension or amendment of stay will not change USCIS policy that generally provides for issuance of an RFE, or for notice and an opportunity to respond, prior to the denial of a petition. Furthermore, the list of documents included at new 8 CFR 214.1(c)(6) provides examples of individual documents which may be provided, either on their own or in conjunction with other documents, to meet this requirement. DHS does not believe amending this proposed provision to read ''or'' instead of ''and'' is necessary, nor is removing specific document types from this list necessary. DHS would also note that this provision does not define what constitutes a material change to a beneficiary's employment. Rather, as clarified in the NPRM, providing evidence of maintenance of status will assist USCIS in determining whether the beneficiary was being employed consistent with the prior petition approval or whether there might have been material changes in the beneficiary's employment. 88 FR 72870, 72881 (Oct. 23, 2023).

Comment: A few commenters expressed concern that the proposal is ambiguous and potentially unduly burdensome. Despite the NPRM requiring proof that status had been maintained ''before the extension of stay request was filed,'' the commenters said that the NPRM does not provide a specific temporal reference for this evidence. The commenters added the NPRM implies that evidence covering two pay periods may be long enough, yet this reference does not appear in the text of the proposed regulation. As a result, the commenters said this suggested temporal limitation may be disregarded, and adjudicators may issue RFEs or NOIDs if a petitioning employer submits proof of salary payments for only two pay periods. The commenters urged USCIS not to send current petitioners and the agency's own adjudicators ''down a rabbit hole'' of long-past activities requiring unattainable proof of a beneficiary's past engagements, associations, and activities involving prior employers. The commenters suggested regulatory language expressly stating that the petitioner would only be required to provide evidence of the last two pay periods while employed by the petitioner and clarifying that a determination that a beneficiary has failed to maintain prior status would not preclude an adjudicator from favorably exercising discretion to restore status.

A legal services provider expressed agreement with the added regulatory language stating that an amendment or extension must include proof the beneficiary has maintained status, reasoning it is current practice and necessary for USCIS to determine maintenance of status. The provider noted that USCIS sometimes issues RFEs for pay stubs covering a larger period, despite the I–129 instructions stating the beneficiary may provide the ''last two pay stubs.'' An advocacy group thanked the Department for the clarification on evidence of maintenance of status, while also expressing the need for an exception for documentation in the event a medical condition resulting in leave of absence for the beneficiary.

Response: DHS declines to codify specific temporal parameters on evidence of maintenance of status under

new 8 CFR 214.1(c)(6). Petitioners should adhere to these regulations in conjunction with USCIS form instructions, which state that the petitioner may submit copies of the beneficiary's last 2 pay stubs, Form W–2, and other relevant evidence. Additionally, DHS recognizes that different employment positions have different pay structures and timelines, so codifying more specificity into this provision may be needlessly restrictive. 8 CFR 103.2(b)(8) already provides USCIS with the discretion to request missing required initial evidence or additional evidence to establish eligibility. DHS believes this provision strikes the balance of clarifying the requirement for evidence of maintenance of status with retaining flexibility for both petitioners and adjudicators. DHS also recognizes that employees may face circumstances necessitating a leave of absence from their employer. Current 8 CFR 103.2(b)(8) and 8 CFR 214.1(c)(6) as finalized, in conjunction with existing regulations and policies governing issuance of RFEs and NOIDs, allow for discretion in these situations.

Comment: A commenter expressed concern with the following sentence found at 8 CFR 214.2(l)(14)(i), stating ''[An L–1] petition extension generally may be filed only if the validity of the original petition has not expired.'' Specifically, the commenter expressed concern that this sentence would negatively impact the ability of L–1 beneficiaries to extend their nonimmigrant status if they pursued an immigration benefit allowed by INA section 248 during the 3-year look-back period or entered the United States pursuant to a grant of advance parole. Thus, the commenter urged USCIS to remove the sentence from the regulatory text, which the commenter said would ''needlessly and unjustly'' prevent otherwise law-abiding L–1 petitioners and beneficiaries from accessing the intracompany transferee nonimmigrant visa classification in instances where a previously approved L–1 petition had expired.

Response: DHS did not propose to add a sentence to 8 CFR 214.2(l)(14)(i) as described by the commenter. Current 8 CFR 214.2(l)(14)(i) already includes the statement, ''A petition extension may be filed only if the validity of the original petition has not expired.'' As explained in the NPRM, through this final rule DHS is adding the word ''generally'' to this existing sentence to account for untimely filed extensions that are excused consistent with 8 CFR 214.1(c)(4) and deleting the preceding sentence from current 8 CFR 214.2(l)(14)(i) which states, ''Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director.'' 88 FR 72870, 72881 (Oct. 23, 2023). This rule also did not change general requirements for eligibility to change or extend nonimmigrant status. Someone who was previously in L–1 status and seeks to change back to L–1 status while requesting an extension of stay may still do so, assuming they are qualified under existing requirements. New 8 CFR 214.1(c)(6) adds the requirement that such a request must include evidence that the beneficiary has maintained the previously accorded nonimmigrant status before the extension request was filed. Nothing in this rule precludes L–1 petitioners and beneficiaries from continuing to access the L–1 visa classification in instances where a previously approved L–1 petition has expired, assuming they are otherwise qualified under existing regulations and policies.

6. Eliminating the Itinerary Requirement for H Programs

Comment: Several commenters stated their support for the elimination of the H program's itinerary requirement as it would eliminate administrative hurdles, unnecessary paperwork, duplicative content, would promote a more efficient adjudication process, and would lessen burdens on employers and employees.

In voicing support for the removal of H program's itinerary requirement, an attorney reasoned that it would reduce the workload and burden of USCIS officers in issuing RFEs requesting missing itineraries. A trade association mentioned that it would be especially helpful for graduates performing medical residencies in H–1B status since they may be working at different sites. A university stated its removal would provide clarity, consistency and predictability to employers and beneficiaries alike. A legal services provider reasoned that it is difficult to provide an exact, accurate itinerary due to the varying schedule over the course of the requested H–1B period.

Response: DHS agrees with the commenters that removing the itinerary requirement will help reduce unnecessary burdens and duplication of work for both petitioners and USCIS. As noted in the NPRM, and as further described below, the information provided in an itinerary is largely duplicative of information already provided in the LCA for H–1B petitions and the temporary labor certification (TLC) for H–2 petitions. 88 FR 72870, 72882 (Oct. 23, 2023).

Comment: In contrast to the above remarks, a couple of commenters expressed their opposition to the removal of the H program's itinerary requirement and included reasoning to support their decision. An advocacy group stated that the itinerary requirement was intended to deter and detect fraud. The advocacy group cited a report from the Office of the Inspector General that stated, ''in many cases, the projects provided within the petition are non-existent which allows beneficiaries to arrive in the country and not work in accordance with the H–B agreements'' and concluded that eliminating the itinerary requirement ''will encourage more fraud.'' A research organization reasoned that itineraries provide agency officers easy access to important information that can be used to uncover fraud and abuse in the H–1B program. The research organization suggested rather than eliminate the itinerary requirement, petitioners should provide more detailed itineraries to demonstrate that the petitioner has non-speculative employment.

Response: DHS disagrees that eliminating the itinerary requirement compromises the integrity of the H–1B program. Information that has historically been provided on an itinerary is provided elsewhere with the petition and required documentation. For example, the LCA and TLC require the petitioner to list the name and address where work will be performed, as well as the name and address of any secondary entity where work will be performed. The Form I–129 also requires the petitioner to provide the address where the beneficiary will work if different from the petitioner's address listed on the form. Further, DHS is proposing other measures to improve the integrity of the H–1B program, including codifying its authority to conduct site visits. In fact, the Office of the Inspector General report cited by one of the commenters relates to site visits, which DHS is addressing and strengthening through this rule and does not mention the itinerary requirement as an integrity or anti-fraud measure. Finally, eliminating the itinerary requirement is consistent with USCIS policy memorandum PM–602–0114 following the decision of the U.S. District Court for the District of Columbia in *ITServe Alliance, Inc.* v. *Cissna,* 443 F. Supp. 3d 14, 42 (D.D.C. 2020) (''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''). *See also Serenity Info Tech, Inc.* v.

Cuccinelli, 461 F. Supp. 3d 1271, 1285 (N.D. Ga. 2020) (citing *ITServe*).

7. Validity Expires Before Adjudication

Comment: Several commenters expressed general support for proposed 8 CFR 214.2(h)(9)(ii)(D)(*1*) and (*2*) allowing petitioners to amend requested validity periods where the validity expires before adjudication. A commenter expressed that the proposed provision provides flexibility and avoids unnecessary re-filing in case of delays. A trade association commended USCIS on providing necessary flexibility when adjudication surpasses the dates of intended employment, while a law firm remarked that USCIS should be granted the flexibility as outlined in this provision. Another trade association commended DHS for providing flexibility for member companies, while adding that the proposed provision would also reduce filing costs.

A company expressed support for DHS's proposal, noting that when validity periods are not updated after the initially requested validity period has passed, serious consequences for the beneficiary can result. The company concluded that the proposed provision ''simply'' and ''elegantly'' solves the issue.

A legal services provider stated that the proposed provision would solve the issue of validity periods expiring before a petitioner wins an appeal by allowing the petitioner to modify the requested dates. An attorney commended the agency for the ''creative'' and ''appreciated'' provision. A trade association expressed favorable support for the option for petitioners to adjust the requested validity period if the petition is deemed approvable after the initially requested validity period expires. A joint submission expressed support for the proposed provision, noting the provision increases efficiency.

Response: DHS agrees with the commenters that allowing petitioners to request amended validity periods where the validity period expires before adjudication will increase flexibility and efficiency for stakeholders. DHS appreciates the comments noting the anticipated time and cost savings associated with this change.

E. Benefits and Flexibilities

8. H–1B Cap Exemptions

Comment: Several commenters expressed general support for the proposed H–1B cap exemption provisions at 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*), (h)(8)(iii)(F)(*4*), (h)(19)(iii)(B)(*4*), and (h)(19)(iii)(C). A trade association applauded the proposed changes and said the changes will be a positive development to expand and strengthen the technology workforce. A professional association agreed and stated that the proposal would provide needed flexibilities to physicians and their employers as well as H–1B physician researchers. A company and a trade association stated that the proposal would be beneficial to public-private partnership programs between industry and nonprofits or universities. The trade association cited the CHIPS and Science Act of 2022 to indicate Congressional support for such collaborations. A university commented that the proposal would support international students and the growth of artificial intelligence, cybersecurity, education, and medicine sectors. An advocacy group stated that the proposal would support nonprofit contributions to public health, technological advancement, national security, and other national interests. A joint submission agreed that the proposal would support entrepreneurship and technological innovation, describing the commenters' partnerships with State governments for entrepreneurship programs. A joint submission wrote that the proposal would help legal services providers enlist needed H–1B labor.

Response: DHS agrees that the changes to the H–1B cap exemption provisions will benefit a variety of industries, occupations, and petitioner populations.

Comment: A legal services provider expressed general support for the proposed changes but also doubted that these changes would substantially increase the number of cap-exempt petitions.

Response: DHS acknowledged in the NPRM that it does not have data to precisely estimate how many additional petitioners would qualify for the expanded cap exemptions, but estimates that a fairly small population, between 0.3 percent and 0.8 percent of annual petitioners, may no longer be required to submit H–1B registrations as a result of the changes to the cap exemption provisions. 88 FR 72870, 72934 (Oct. 23, 2023). The NPRM specifically invited public comment regarding the number of additional petitioners that would qualify for cap exemption based on the modified standard as well as the percentage of current registrants (prospective petitioners that are cap subject) that may no longer have to submit a registration for the H–1B cap. The commenter did not provide data or cite to any research in support of their comment, nor did any other commenters provide data or research to specifically address DHS's estimate. DHS did not make any changes to its final analysis as a result of this comment.

Comment: Some commenters opposed the changes to the cap exemption provisions. An advocacy group stated that they oppose the exemptions for universities, nonprofit research entities, and government research programs and recommended that ''[t]he caps should be lowered on visa programs and their benefits to employers should be removed.'' A few commenters generally stated that the proposal would increase abuse of the H–1B program through loopholes for outsourcing companies to bypass the cap, with one commenter noting that this change will ''flood'' H–1B visas to non-profit organizations.

Response: DHS disagrees that these changes would provide loopholes to bypass the statutory cap. Congress set the current annual number of noncitizens who may be issued H–1B visas or otherwise provided H–1B status at 65,000, as well as the ''advanced degree exemption'' of an additional 20,000 H–1B visas for noncitizens who have earned a master's degree or higher from a U.S. institution of higher education. See INA sec. 214(g)(1), (5), 8 U.S.C. 1184(g)(1), (5). Congress also established the exemptions to the annual H–1B cap for workers who will be employed at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965, as amended) or a related or affiliated nonprofit entity, and workers who will be employed at a nonprofit or governmental research organization.[69] These exemptions are not numerically capped. *See* INA sec. 214(g)(5)(A)–(B), 8 U.S.C. 1184(g)(5)(A)–(B). No provisions adopted in this final rule allow DHS to exceed the statutory limitation on the number of H–1B visas issued per fiscal year. Nor do the provisions allow DHS to create a new type of cap exemption.

[69] Congress did not define the terms ''nonprofit research organization'' and ''governmental research organization'' in INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5). Because Congress did not define these terms and has delegated discretionary authority to DHS, DHS may reasonably define the terms consistent with their ordinary meanings and the overall statutory scheme. *See Loper Bright Enterprises* v. *Raimondo,* 144 S. Ct. 2244, 2263 (2024) (explaining that a statute's meaning may be that the agency is authorized to exercise a degree of discretion and empowered to prescribe rules to fill in statutory gaps based on ''reasoned decision making.''). In addition, DHS has express delegated authority to administer the immigration laws and issue regulations pursuant to INA section 103(a), 8 U.S.C. 1103(a), and to issue regulations pertaining to the admission of nonimmigrants, and set conditions for nonimmigrant petitions pursuant to INA section 214(a) and (c), respectively, 8 U.S.C. 1184(a) and (c).

Instead, these provisions are intended to clarify and simplify eligibility for the existing cap exemptions at INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5). The commenters did not provide data or cite to research to support their assertions concerning abuse of these current cap exemptions and how the new changes would significantly increase abuse of these cap exemptions. DHS does not expect these changes will increase abuse because the revised cap exemptions still contain meaningful limitations, such as the requirement that research is a fundamental activity of the petitioning entity.

Comment: A commenter wrote that increasing cap exemptions without expanding immigrant visa limits would exacerbate backlog issues and be unfair to H–1B workers currently waiting for employment-based permanent residence in the United States.

Response: DHS notes that Congress sets limits on the number of immigrant visas that can be issued each year and that DHS does not have the statutory authority to increase these limits. To the extent the commenter is requesting an increase in the number of immigrant visas, that request is beyond the scope of this rulemaking. While DHS is unable to precisely estimate how many additional petitioners will now qualify for cap exemption, the increase is expected to be small, and the commenter has not provided any evidence to the contrary. Further, not every beneficiary of a cap-exempt H–1B petition will ultimately seek an immigrant visa. Additionally, nothing prohibits a noncitizen from applying for an immigrant visa while outside the United States based on a qualifying family relationship, offer of employment, or another applicable basis. The order of consideration for immigrant visas is based on the applicable priority date, preference category, and country of chargeability. 8 U.S.C. 1152, 1153(e). The fact that a small number of additional noncitizens may be provided H–1B status annually is unlikely to materially impact overall demand for immigrant visas or cause those currently applying for an immigrant visa or adjustment of status to wait longer. Thus, DHS believes that impacts to immigrant visa processing or retrogression are speculative and, to the extent there is an impact, it is likely to be small. Further, DHS notes that USCIS has taken a number of steps to assist individuals who may be waiting for an ''immediately available'' immigrant visa.[70] As explained in the NPRM and in this final rule, the intent of the changes to the regulations related to H–1B cap exemption is to clarify, simplify, and modernize eligibility for cap-exempt employment, and to provide additional flexibility to petitioners to better implement Congress's intent to exempt from the annual H–1B cap certain H–1B beneficiaries who are to be employed at a qualifying institution, organization, or entity. 88 FR 72870, 72883 (Oct. 23, 2023). Therefore, DHS believes that the benefits of these changes outweigh the potential impacts, if any, on immigrant visa backlogs.

Comment: A few commenters generally supported revising the requirements for beneficiaries who are not directly employed by a qualifying organization, reasoning that the changes acknowledge the value of their contributions and ensures that essential work, even if not directly related to the organization's core mission, is recognized and supported, leading to a more efficient and productive research ecosystem. A professional association supported the proposal to treat H–1B holders who contribute to the missions of qualifying organizations as cap-exempt, reasoning that doing so is consistent with Congressional intent to keep graduates and educators in the United States. The commenter also stated that the cap would be needed to facilitate expanding public-private partnerships between universities and industry. A law firm also supported the proposal as consistent with congressional intent and promoting flexibility, transparency, and more equitable outcomes.

Response: DHS appreciates these commenters' support for the requirements to qualify for H–1B cap exemption when a beneficiary is not directly employed by a qualifying institution, organization, or entity. DHS believes these provisions add flexibility while retaining necessary guardrails to cap exemption determinations.

Comment: An advocacy group opposed the proposal contending it would formalize a practice the commenter claimed nonprofits and companies already use to avoid H–1B caps on for-profit employees. The commenter referenced as examples a university's entrepreneur program and another similar entrepreneur program through which entrepreneurs may be exempt from the H–1B cap. A union cited the same article as the advocacy group, expressing concern about partnerships between research or nonprofit institutions and other entities seeking to qualify for cap-exempt H–1B visas and stating they should be publicly disclosed to prevent abuse and exploitation of loopholes. The union also referenced a case where, the commenter wrote, an exploitative staffing agency was able to use the H–1B system by falsely claiming that school districts that would be employing H–1B visa holders had partnerships with public universities, and also referenced visa fraud litigation against another university. Likewise, a research organization wrote that the proposal would allow for-profit organizations to benefit from the cap exemption. The commenter referenced a 2016 letter from Senator Chuck Grassley as highlighting cases of universities abusing the H–1B program to evade cap limitations and stated that the proposal would contravene INA sec. 214(g)(5). The research organization commented that USCIS failed to adequately address these concerns in the proposed rulemaking, and that USCIS did not justify the proposed changes or demonstrate the congressional intent for broad inclusion of beneficiaries who are not directly employed by qualifying employers and are ''splitting their time'' to conduct non-qualifying work. In line with these comments, the research organization urged DHS to withdraw proposed 8 CFR 214.2(h)(8)(iii)(4) and (h)(19)(iii)(C), stating they unlawfully expand the positions and employers who may petition for a cap-exempt worker.

Response: DHS acknowledges the stated concerns but disagrees with these commenters. Exemption from the H–1B cap for those employed at qualifying institutions is a feature of the H–1B program established by Congress. Congress established cap exemptions for H–1B workers who are petitioned for or employed at an institution of higher education or its affiliated or related nonprofit entities, a nonprofit research organization, or a government research organization. INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5). Some of the references cited by the commenter contain no evidence of abuse of the H–1B program or a use of the program that is contradictory to existing rules. Additionally, DHS did not propose to publicly disclose partnerships between research or nonprofit institutions and other entities seeking to qualify for cap-exempt H–1B visas and declines to do so through this final rule.

More generally, DHS recognizes the potential for program abuse and bad actors, but, false representations are not an issue limited to cap exemption. H–

[70] *See* USCIS, ''FAQs for Individuals in H–1B Nonimmigrant Status,'' *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/uscis-actions-to-support-adjustment-of-status-applicants-who-are-in-h-1b-status-in-the-united-states.*

1B program integrity is a matter of serious importance to DHS, and USCIS is continuously monitoring for potential fraud and abuse in the program. For example, through USCIS' Administrative Site Visit and Verification Program (ASVVP), immigration officers in the Fraud Detection and National Security Directorate (FDNS) make unannounced site visits to collect information as part of a compliance review to ensure petitioners and beneficiaries follow the terms and conditions of their petitions.[71] USCIS takes a more targeted approach to site visits for certain employers and petitions and also encourages anyone to report suspected fraud or abuse in the H–1B program through the existing ICE Tip Form or other tip forms, as appropriate.[72]

The ability of USCIS to pursue and take action when fraud is found is enhanced by other provisions of this rule, including provisions requiring a bona fide job offer and bona fide employment and the site visit provisions. Additionally, DHS believes that H–1B cap exemption provisions, as finalized in this rule, contain sufficient guardrails to protect against abuse, particularly in the context of beneficiaries who are not directly employed by a qualifying institution, organization, or entity, as raised by the commenter. Notably, 8 CFR 214.2(h)(8)(iii)(F)(*4*) governs the quantity and nature of work that must be performed to qualify for H–1B cap exemption when not directly employed by a qualifying institution, organization, or entity. Additionally, 8 CFR 214.2(h)(19)(iii) outlines specific requirements for qualifying institutions, organizations, and entities, including those with which petitioning employers may be affiliated. DHS believes that these provisions, in conjunction with other provisions related to H–1B program integrity, serve as adequate safeguards against abuse. The changes in this rule better implement Congress's intent to exempt from the annual H–1B cap certain H–1B beneficiaries who are employed at a qualifying institution, organization, or entity, while still protecting the integrity of the H–1B program, including the numerical allocations.

Comment: A research organization requested that USCIS eliminate the allowance of cap exemptions for beneficiaries not ''directly'' employed by a qualifying institution by rescinding current 8 CFR 214.2(h)(8)(iii)(F)(*4*), stating that doing so would reduce fraud and abuse.

Response: DHS declines to eliminate the allowance of cap exemptions for beneficiaries not directly employed by a qualifying institution and did not propose to do so through the NPRM. Congress chose to exempt from the numerical limitations in INA sec. 214(g)(1) noncitizens who are employed ''at'' a qualifying institution, which is broader than being employed ''by'' a qualifying institution. USCIS interprets the statutory language as reflective of congressional intent that certain noncitizens who are not employed directly by a qualifying institution may nonetheless be treated as cap-exempt by virtue of the nature of their job duties.[73] USCIS therefore allows a petitioner to claim exemption on behalf of a beneficiary if the beneficiary will spend the majority of their work time performing job duties at a qualifying institution that will further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying entity. New 8 CFR 214.2(h)(8)(iii)(F)(*4*). The burden remains on the petitioner to establish the qualifying work being performed by the beneficiary, and that one of the fundamental purposes, missions, objectives, or functions of the qualifying institution is either higher education, nonprofit research, or government research.

Comment: A joint submission supported the proposed amendment but recommended that, in light of difficulty in measuring the ''at least half'' standard, USCIS clarify that the standard be measured over the course of the petition's validity period, rather than a smaller unit of time. Similarly, an advocacy group recommended that USCIS provide an alternative standard of hours per week to clarify when a position qualifies under the ''at least half'' standard. Another joint submission supported the proposal as recognizing remote or hybrid work structures.

Response: DHS appreciates the commenters' support for this change to 8 CFR 214.2(h)(8)(iii)(F)(*4*) and agrees that it will increase flexibility for employers and beneficiaries. DHS declines to specify that the standard be measured over the course of the petition's validity period. Codifying such specificity could potentially open the door for abuse of the requirements to qualify for H–1B cap exemption. For example, if a petitioning employer submits an H–1B petition requesting a 3-year period of employment, with the first 18 months of work to be conducted wholly at any otherwise cap subject employer, the beneficiary could conceivably change employment and never work at the qualifying cap-exempt institution. DHS also declines to specify a number of hours per week that will enable beneficiaries to qualify for H–1B cap exemption. Doing so would be impractical given varying work schedules. Furthermore, DHS believes such specificity is unnecessary because the ''at least half'' standard provides sufficient clarity. USCIS will continue to review each petition on a case-by-case basis to determine eligibility for H–1B cap exemption.

Comment: A commenter wrote that the proposal would negatively impact U.S. workers in the technology and IT sectors, stating that these workers are currently facing mass layoffs. A research organization commented that the proposed ''at least half'' standard lacks rationale or adequate evaluation on the number of cap-exempt positions the proposal would create. The commenter wrote that the proposal would facilitate abuse of the H–1B program, referencing a case from a university as showing a qualifying entity requiring U.S. workers to train H–1B replacements for their positions.

Response: DHS disagrees with these commenters' concerns with respect to these cap exemption provisions. The submission noting Americans in the technology and IT sector facing severe reductions in the job market did not provide data or resources to support this claim. DHS also notes that a revision from ''majority'' to ''at least half'' does not reflect a significant change in this requirement. Under existing regulations, a beneficiary could meet the ''majority'' standard by spending just a little more than 50% of their time working at a cap-exempt institution, organization, or entity. The new rule requires ''at least half'' of time, meaning 50% or more, which is not a significant change. Regarding the comment that the rule did not provide an adequate evaluation on

[71] *See* USCIS, ''Administrative Site Visit and Verification Program,'' *https://www.uscis.gov/about-us/organization/directorates-and-program-offices/fraud-detection-and-national-security-directorate/administrative-site-visit-and-verification-program* (last reviewed/updated Mar. 6, 2023).

[72] *See* USCIS, ''Combating Fraud and Abuse in the H–1B Visa Program,'' *https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program* (last reviewed/updated Feb. 9, 2021). The ICE Tip Form is available online at *https://www.ice.gov/webform/ice-tip-form* (last visited Dec. 9, 2024). Anonymous tips may alternately be reported to ICE via the toll-free ICE Tip Line, (866) 347–2423.

[73] *See* S. Rep. No. 106–260 (April 11, 2000) (stating, regarding S. 2045, the bill that was enacted into AC21, that individuals should be considered cap exempt ''. . . *by virtue of what they are doing*'' and not simply by reference to the identity of the petitioning employer).

the number of cap-exempt positions the proposal would create, DHS notes that the NPRM generally projected a likely increase in the population of petitioners eligible for cap exemption but could not precisely estimate how many additional petitioners would now qualify. 88 FR 72870, 72934 and 72915 (Oct. 23, 2023) (Table 12. Summary of Provisions and Impacts of the Proposed Rule). Evaluating such impact with specificity is not practically feasible as DHS does not have data on the number of petitions requesting cap exemption that were previously denied because they did not meet the prior ''majority of'' standard but would now be approvable because they would meet the new ''at least half'' standard.

DHS acknowledges the commenter's concerns about potential abuse of the H–1B program. However, it is unclear from the sources cited by the commenter whether and how such abuses stem from existing cap exemption requirements, or whether such abuse would be further increased by revisions to cap exemption requirements as codified in this rule. The commenter claims without evidence that certain H–1B workers were previously subject to the cap. They further claim without basis that these same workers would be cap-exempt under the changes in this rule; such cap exemption status cannot be projected on a generalized level, as USCIS determines eligibility on a case-by-case basis.

Comment: A form letter campaign wrote that the proposed ''at least half'' standard is an improvement but still exceeds statutory requirements. The campaign stated that H–1B employees may spend less than half of their time working for the qualifying entity while still being essential to that entity, additionally reasoning that measuring the ''at least half'' standard would impose administrative burdens. The campaign recommended that the regulatory text remove this standard.

Response: DHS declines to remove the regulatory text requiring a beneficiary spend ''at least half'' of their time working at a qualifying institution to be eligible for cap exemption. Removing this requirement would effectively allow beneficiaries who spend any amount of time whatsoever at a qualifying institution, however minimal, to qualify for H–1B cap exemption. Such allowance would leave the door open for potential abuse of H–1B cap requirements. Additionally, DHS believes that allowing for H–1B cap exemption based on any time working at a qualifying institution would not align with congressional intent. DHS recognizes that Congress chose to exempt from the H–1B cap beneficiaries who are employed ''at'' a qualifying institution. DHS interprets this statutory language as reflective of Congressional intent that certain beneficiaries who are not directly employed by a qualifying institution may be treated as cap-exempt based on the nature of their job duties.[74] DHS believes that the ''at least half'' standard implemented at 8 CFR 214.2(h)(8)(iii)(F)(*4*) helps ensure that individuals are effectively furthering an activity in support of one of the fundamental purposes of the qualifying institution.

Regarding the comment about administrative burdens, it is true that petitioners will continue to bear the burden of establishing eligibility for cap exemption. However, employers should be able to clearly document their H–1B beneficiaries' job duties and the typical work schedule. The requirement that a beneficiary spend at least half of their time at a qualifying institution strikes a reasonable balance between offering flexibility while maintaining program guardrails.

Comment: A couple of joint submissions supported the proposed text as recognizing that an organization may have more than one fundamental purpose, mission, objective, or function and the cap-exempt petitioner need not show the beneficiary's work contributes to all these purposes.

Response: This change updates the availability of cap exemptions to include beneficiaries whose work directly contributes to, but does not necessarily predominantly further, the qualifying organization's fundamental purpose, mission, objectives, or functions, which DHS believes to be a more reasonable standard. Further, this change reflects the modern reality that a qualifying organization may have more than one fundamental purpose, mission, objective, or function, which should not preclude an H–1B beneficiary from being exempt from the H–1B cap.

Comment: A form letter campaign stated that the proposed text is burdensome, unclear, and unduly restrictive. The campaign recommended that ''namely, either higher education, nonprofit research, or government research'' be stricken, providing an example as indicating where an H–1B employee could perform duties at a hospital that are essential but clinical rather than focused on higher education or research.

Response: DHS declines to adopt this commenter's recommendation. Under new 8 CFR 214.2(h)(8)(iii)(F)(*4*), an H–1B beneficiary must spend at least half of their work time performing job duties which directly further an activity that supports or advances one of the fundamental purposes, missions, objectives or functions of the qualifying institution, organization, or entity. The petitioner must demonstrate that the beneficiary's job duties directly further a purpose, mission, objective, or function related to higher education, nonprofit research, or government research, as applicable. Removing the language requested by the commenter (''namely, either higher education, nonprofit research, or government research'') would expand cap exemption eligibility too broadly and beyond congressional intent. INA sec. 215(g)(5)(A)–(B) specifically requires that the beneficiary be employed at a qualifying institution of higher education or a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization; taking out the references to ''higher education, nonprofit research, or government research'' from 8 CFR 214.2(h)(8)(iii)(F)(*4*) would be inconsistent with the clear language of the statute. Congressional intent was to exempt from the H–1B cap certain workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations.[75] As noted in the NPRM, DHS is revising ''the'' to ''an'' to acknowledge that a qualifying organization may have more than one fundamental purpose, mission, objective, or function, and that this fact should not preclude an H–1B beneficiary from being exempt from the H–1B cap. 88 FR 72870, 72884 (Oct. 23, 2023). If a beneficiary's job duties at the qualifying organization are unrelated to higher education, nonprofit research, or government research, they would not be

[74] See USCIS, ''Guidance Regarding Eligibility for Exemption from the H–1B Cap Based on 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)'' (Pub. L. 106–313) (June 6, 2006) (''Congressional intent was to exempt from the H–1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations.''), *https://www.uscis.gov/sites/default/files/document/memos/ac21c060606.pdf.*

[75] *See* USCIS, ''Guidance Regarding Eligibility for Exemption from the H–1B Cap Based on 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)'' (Pub. L. 106–313) (June 6, 2006) *(citing* S. Rep. No. 106–260 (April 11, 2000)), *https://www.uscis.gov/sites/default/files/document/memos/ac21c060606.pdf.*

eligible for cap exemption under 8 CFR 214.2(h)(8)(iii)(F)(*4*).

Comment: An advocacy group recommended that the proposed text be supported with examples, including that a worker's duties further a fundamental objective of a qualifying institution if those duties pertain to their employer's role in a regional innovation effort that includes the qualifying institution, and that the text clarify that advancing regional innovation is a ''normal, primary, or essential purpose'' of any organization officially participating in a federally sponsored regional innovation initiative.

Response: DHS declines to adopt this recommendation. If the beneficiary will not be directly employed by a qualifying institution, organization, or entity identified in INA section 214(g)(5)(A) or (B), to qualify for an exemption under such section they must spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties must directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research. If a beneficiary meets the above requirements, they will be eligible for H–1B cap exemption under 8 CFR 214.2(h)(8)(iii)(F)(*4*). DHS is unable to make a blanket determination that beneficiaries working as part of a regional innovation effort will meet the definitional requirements as requested by the commenter. USCIS adjudicators will continue to review each petition on a case-by-case basis to determine whether the beneficiary is eligible for cap exemption.

Comment: A form letter campaign supported the proposed change, reasoning that the nexus requirement was burdensome and resulted in unnecessary RFEs. A joint submission also supported the proposal and stated that the current nexus requirement is unnecessary.

Response: The revisions to 8 CFR 214.2(h)(8)(iii)(F)(*4*), as finalized by this rule, require the petitioner to establish that the beneficiary's duties further an activity that supports one of the fundamental purposes, missions, objectives, or functions of the qualifying entity, namely, either higher education, nonprofit research, or government research. DHS agrees this language renders the ''nexus'' requirement redundant and unnecessary.

Comment: A professional association generally supported expanding recognition for telework, especially in the field of telehealth, in the proposed rule. The commenter recommended that USCIS expand 8 CFR 214.2(h)(8)(iii)(F)(*4*) to explicitly provide for telehealth work. A form letter campaign, another commenter, and a joint submission also expressed support for recognizing telework and hybrid work arrangements under the proposed rule. An advocacy group and a joint submission supported the proposal and stated that H–1B regulations should focus on duties performed rather than location of work performed.

Response: As stated in the NPRM, DHS is aware that many positions can be performed remotely. 88 FR 72870, 72884 (Oct. 23, 2023). However, DHS declines to expand 8 CFR 214.2(h)(8)(iii)(F)(*4*) to explicitly provide for telehealth. Before promulgation of this rule, 8 CFR 214.2(h)(8)(iii)(F)(*4*) was silent on the matter of remote work arrangements. As proposed and finalized, 8 CFR 214.2(h)(8)(iii)(F)(*4*) states, ''When considering whether such a position is cap-exempt, the proper focus is on the job duties, rather than where the duties are performed.'' The regulation, as proposed and finalized, further states that work performed at the qualifying institution may include work performed in the United States, ''through telework, remote work, or other off-site work.'' This language sufficiently clarifies that the location where job duties are performed does not, on its own, determine cap-exempt status and would not, on its own, preclude telehealth. DHS reiterates that nothing in this rule changes DOL's administration and enforcement of statutory and regulatory requirements related to labor condition applications. *See* 8 U.S.C. 1182(n); 20 CFR part 655, subparts H and I. These requirements are unaffected by this rule and continue to apply to all H–1B employers. Additionally, nothing in this provision changes other statutory or regulatory requirements governing an occupation.

Comment: A union opposed the proposed changes to 8 CFR 214.2(h)(8)(iii)(F)(*4*) as a potential loophole that could allow abuse by private third-party employers, including staffing companies, through falsely claiming partnerships with school districts and higher education. The commenter also expressed concerns about a perceived ''lower threshold for cap exemption under the proposed rule'' and stated that the facilitation of remote work for H–1B beneficiaries could be used to facilitate the offshore transfer of work. The commenter further stated that the proposal would create a loophole for beneficiaries in locations with low prevailing wages to perform work for an entity with an onsite location in a geographical area with higher prevailing wages.

Response: DHS disagrees that the proposed change from ''the majority of'' to ''at least half'' will open a loophole for abuse by third-party employers. While changing the terminology may slightly expand who is eligible for the cap exemption, it will still require an employer to demonstrate that the beneficiary's duties ''directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research.'' New 8 CFR 214.2(h)(8)(iii)(F)(*4*). This is still a meaningful limiting standard that not every third-party employer that simply places its employees ''at'' a qualifying institution will be able to meet. Further, this provision does not expand or afford the cap exemption outside of congressional intent, but instead clarifies, simplifies, and modernizes eligibility for cap-exempt H–1B employment

DHS also disagrees that this provision will be a potential loophole that will provide for lower wages and lead to outsourcing work overseas. The physical location where duties are performed is not determinative of H–1B cap exemption eligibility. However, this rule does not change the fact that the physical location where duties are performed is relevant for wage requirements, as governed by DOL regulations. DHS also disagrees that the clarification that work performed ''at'' a qualifying institution may include work performed in the United States through telework, remote work, or other off-site work will facilitate the offshore transfer of work. The commenter did not explain why it believed this to be the case, and DHS notes that there is nothing currently in the H–1B regulations prohibiting remote work. DHS also notes that the revised definition of ''United States employer,'' which requires the employer to have ''a bona fide job offer for the beneficiary to work *within the United States,* which may include telework, remote work, or other off-site work *within the United States,*'' may help to alleviate the commenter's concern. *See* new 8 CFR 214.2(h)(4)(ii) (emphasis added).

Comment: A commenter requested DHS to allow cap-exemption for beneficiaries who are conducting research in a for-profit institution but

have their salary mostly paid by projects funded by non-profit organizations.

Response: DHS notes that a petitioner filing for a beneficiary as cap-exempt, where the beneficiary will not be directly employed by a qualifying institution, is required to establish that the beneficiary's duties will further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying entity. DHS declines to make any additional changes to the provision being finalized through this rulemaking. DHS places the focus on the work being performed by the beneficiary, rather than who pays the beneficiary for that work.

Comment: Citing INA sec. 214(g)(5), a professional association asserted that both the current regulation and the proposed rule exceed statutory authority by distinguishing H–1B beneficiaries on the basis of their employment at qualifying entities or with other entities at the same workplace. The commenter stated that any H–1B beneficiary at an exempt workplace should be exempted from the H–1B cap, citing legislative history in support of their position. The commenter stated that USCIS should make no distinction between H–1B beneficiaries employed ''at'' or ''by'' a qualified entity. While initially proposing more limited revisions to 8 CFR 214.2(h)(8)(iii)(F)(*4*), the commenter then stated that 8 CFR 214.2(h)(8)(ii)(F)(*4*) should be rescinded in its entirety, stating the only regulatory standard required to implement the affiliation-based cap exemption provision of the statute is that found at 8 CFR 214.2(h)(8)(ii)(F)(*2*). The commenter also stated that it is imperative for qualifying physicians to be exempt from the H–1B cap, given the difficulties that arise in the employment of H–1B physicians due to differences in academic and DHS's fiscal year calendars.

Response: DHS disagrees with the assertion that the current and final rules exceed statutory authority. DHS further notes that certain regulations cited by the commenter, namely 8 CFR 214.2(h)(8)(ii)(F)(*4*) and (*2*), do not exist; based on the context of the comment, DHS will assume the commenter is referring to § 214.2(h)(8)(iii)(F)(*4*) and (*2*), respectively. The statute's reference to ''employed at'' is ambiguous, as it is not clear if ''at'' is meant to refer to a physical location or to the employer. Notably, this same ambiguity allows for DHS to provide for telework, remote work, and work at other off-site locations to be included in this final rule and for which the commenter expressed support. The longstanding regulation and the changes made by this final rule provide the best interpretation of an ambiguous statute and are consistent with the intent of Congress. If, as the commenter implies, the only determinative factor is the physical location of the work to be performed, that interpretation would be contrary to congressional intent because Congress intended to exempt foreign national workers who would directly contribute to the research or education missions of institutions of higher education or certain research organizations [76] and, thus, would lead to anomalous results. For example, a business employing workers who will be physically located at a university or research organization that provides access to its facilities (*e.g.,* a university that simply rents out office space on its campus), would qualify for cap exemption based on the commenter's interpretation, even if the work performed is independent of, and entirely unrelated to, the mission of the university or research organization. That would be inconsistent with congressional intent which is to provide cap exemption to certain H–1B beneficiaries ''by virtue of what they are doing.'' [77] Providing for cap exemption based solely on the location where the work is performed would also increase the risk of abuse.[78]

DHS acknowledges that the period of post-graduate employment for physicians generally does not align with DHS's fiscal year, under which periods of employment for cap-subject H–1B nonimmigrants fall. Such discrepancy between employment dates and the October 1 fiscal year start date may occur for other occupations or employers as well. However, DHS declines to rescind current 8 CFR 214.2(h)(8)(iii)(F)(*4*) or to revise it in a manner other than that proposed in the NPRM. The regulations allowing for H–1B cap exemption, as proposed in the NPRM and finalized in this rule, strike a necessary balance between providing flexibility to petitioners and beneficiaries and ensuring that Congress' aims in exempting certain workers from the H–1B cap based on their contributions at qualifying institutions, organizations or entities are not undercut by employment that is peripheral to those contributions.

Comment: A joint submission provided strong support for this provision, specifically in relation to start-up and entrepreneurships, noting the ''major difficulties'' with the current structure and process for both immigrant entrepreneurs and key hires, particularly involving the inability to definitively rely on being selected for the H–1B lottery. The joint submission also notes how ''the cap-exempt visa pathway has emerged as a critical channel for immigrant entrepreneurs to grow their business[es] in the U.S., boosting new business formation, attracting venture capital, and driving American job creation.'' The submission also stated that USCIS should support and encourage use of H–1B cap exemption by codifying best-practices for individuals to pursue entrepreneurial or otherwise economically valuable activity, stating that the standard usage of cap-exemption to promote entrepreneurship involves a cap-exempt entity sponsoring an initial, primary petition and a beneficiary-owner sponsoring a secondary petition in relation to a startup.

Response: DHS appreciates the support expressed by the commenters and agrees the provision provides flexibility and clarity, including for beneficiary-owners who are also affiliated with a qualifying organization. DHS declines to codify in this rule best practices for entrepreneurs seeking H–1B cap exemption as requested by the commenter. Current 8 CFR 214.2(h)(8)(iii)(F)(*6*) details the parameters under which an H–1B beneficiary may be exempt from the cap if they are concurrently employed by a cap-exempt and a nonexempt employer. Specifically, when petitioning for concurrent cap-subject H–1B employment, the petitioner must demonstrate that the H–1B beneficiary is employed in valid H–1B status under a cap exemption under INA section 214(g)(5)(A) or (B), the beneficiary's employment with the cap-exempt employer is expected to continue after the new cap-subject petition is approved, and the beneficiary can reasonably and concurrently perform the work described in each employer's respective positions. If the cap-exempt employment ends, the individual becomes cap-subject unless previously

[76] *See* S. Rep. No. 106–260 (Apr. 11, 2000) (providing that individuals should be considered cap exempt because ''by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans'' and not simply referencing the identity of the petitioning employer or the physical location where the work is performed for purposes of permitting cap exemption).

[77] *Id.*

[78] *See, e.g.,* U.S. Dep' of Justice, U.S. Attorney's Office, ''Wright State University Agrees to Pay Government $1 Million for Visa Fraud'' (university agreed to use its cap exempt status to apply for H–1B visas for a privately held software company's employees, falsely claiming that these employees would physically work at the university's school campus), *https://www.justice.gov/usao-sdoh/pr/wright-state-university-agrees-pay-government-1-million-visa-fraud.*

counted. The parameters and requirements relating to concurrent employment with a cap-exempt and nonexempt employer outlined in 8 CFR 214.2(h)(8)(iii)(F)(*6*) apply to all H–1B petitioners and beneficiaries, including entrepreneurs. Furthermore, regulatory codification of best practices is not appropriate because employment scenarios include unique, specific fact patterns and must be addressed on a case-by-case basis. Petitioners bear the burden to establish eligibility for the requested classification, to include eligibility for cap exemption and beneficiary ownership.

Comment: A joint submission and a law firm expressed general support for the proposed ''nonprofit research organization'' and ''governmental research organization'' definitions as providing clarity in current regulations and to create more flexibility for the beneficiaries and entities affected by the revision. A couple of advocacy groups, trade associations, and other commenters supported exempting higher education, nonprofit, and government research organizations from annual numerical limits on H–1B availability. A professional association and a company wrote that the proposed definitions would diversify international postdoctoral graduates' available career paths.

Response: DHS appreciates these comments and agrees that revising the definitions of nonprofit entity, nonprofit research organization, and government research organization will increase clarity and flexibility for a variety of petitioners and beneficiaries.

Comment: An advocacy group cited 8 U.S.C. 1184(g)(5)(B) in stating that the proposed definition for nonprofit research organizations would bring H–1B regulations into alignment with congressional intent.

Response: DHS agrees that the new definition for nonprofit research organizations better aligns with congressional intent. DHS recognizes that Congress chose to exempt from the numerical limitations in INA section 214(g)(1) beneficiaries who are employed ''at'' a qualifying institution, which is a broader category than beneficiaries employed ''by'' a qualifying institution. Congressional intent was to exempt from the H–1B cap certain nonimmigrant workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access to a continuous supply of H–1B workers without numerical limitation.[79] The definitional changes finalized in this rule increase flexibility and clarity to better meet this intent.

Comment: Many commenters generally expressed support for the proposal to replace the language ''primarily engaged in basic research and/or applied research'' with ''a fundamental activity of'' basic research and/or applied research at 8 CFR 214.2(h)(19)(iii)(C). A professional association agreed and stated that the proposed change is consistent with congressional intent ''to help keep top graduates and educators in the country.'' A joint submission wrote that the proposed language would align regulations with the standard found for formal written affiliation agreements and reduce confusion. A local government agency supported the proposed change and expressed its understanding that a petitioner need not be ''directly and primarily'' engaged in research and that petitioners would no longer need to prove the percentage of their staff or budget dedicated to research but would need to demonstrate instead that research is a ''principal activity'' of the petitioner. A commenter agreed that the proposal furthers congressional intent behind the H–1B program by focusing on actual work performed and contributing to the education of Americans. An individual commenter supported the proposal and wrote that the ''fundamental activity'' language is sufficiently protective of the program. An advocacy group expressed support for USCIS' proposed revision as a way to address this issue and improve regulatory uniformity.

Response: DHS agrees that this proposed change will provide more clarity, uniformity, and flexibility for those who will not be directly employed by a qualifying institution, organization, or entity. As noted in the NPRM, the ''fundamental activity'' standard for formal written affiliation agreements was codified in DHS regulations at current 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*) and (h)(19)(iii)(B)(*4*) through a final rule published in 2016, and DHS believes that the changes to new 8 CFR 214.2(h)(19)(iii)(C) to align the standards will enhance clarity.[80] In addition, in the NPRM DHS acknowledged that it was making changes to 8 CFR 214.2(h)(19)(iii)(C) to effectuate the desired policy with respect to the H–1B cap exemption. 88 FR 72870, 72885–72886 (Oct. 23, 2023). Because the cap exemption provision in 8 CFR 214.2(h)(8)(F)(2)(iv) cross references the H–1B ACWIA fee exemption in 8 CFR 214.2(h)(19)(iii)(C) for the definitions of nonprofit research organization and governmental research organization, the definitional changes were made there. The regulatory parity between the definitional standards for the H–1B cap exemption and the H–1B ACWIA fee exemption has been in place since 2016 when DHS first codified its interpretation of AC21 amendments establishing the H–1B cap exemption for certain entities, including nonprofit research organizations and governmental research organizations, and, as proposed, DHS is continuing that parity with the changes made in this final rule.[81]

Comment: A company recommended that USCIS provide further guidance to define ''fundamental activity,'' stating that doing so would support industry reliance on the new definition and provided several suggested examples. The commenter noted that DHS offers ''some'' guidance in the present

[79] *See* USCIS, ''Guidance Regarding Eligibility for Exemption from the H–1B Cap Based on 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)'' (Pub. L. 106–313) (June 6, 2006) *(citing* S. Rep. No. 106–260 (April 11, 2000)), *https://www.uscis.gov/sites/default/files/document/memos/ac21c060606.pdf.*

[80] DHS recognizes that the definition of ''nonprofit research organization or government research organization'' at new 8 CFR 214.2(h)(19)(iii)(C) differs from DOL's definition of ''nonprofit research organization or governmental research organization'' at 20 CFR 656.40(e)(1)(iii). However, DHS definitions are separate from, and generally serve different purposes than, DOL definitions. Specifically, the DHS definition of ''nonprofit research organization or government research organization'' at new 8 CFR 214.2(h)(19)(iii)(C) is used to determine whether an H–1B petitioner is exempt from the H–1B cap under INA 214(g)(5)(B), 8 U.S.C. 1184(g)(5)(B), and from paying the ACWIA fee under INA 214(c)(9)(A), 8 U.S.C. 1184(c)(9)(A). In contrast, the DOL definition of ''nonprofit research organization or government research organization'' at 20 CFR 656.40(e) is used for prevailing wage determinations under INA 212(p)(1)(B), 8 U.S.C. 1182(p)(1)(B). *See also* 20 CFR 655.731(a)(2)(vii) (cross-referencing definition at 20 CFR 656.40(e) for purposes of H–1B LCAs).

[81] *See* 80 FR 81900, 81919 (Dec. 31, 2015) (proposing to conform DHS regulations to the then-existing policy pertaining to the definitions of several terms in INA section 214(g)(5) and the applicability of those terms to the ACWIA fee exemption provisions and the AC21 cap exemption provisions). The cross reference between the provisions was codified in the final rule. *See* 81 FR 82398, 82486 (Nov. 18, 2016). The provision codified at 8 CFR 214.2(h)(8)(ii)(F) was subsequently redesignated as 8 CFR 214.2(h)(8)(iii)(F). *See* 84 FR 888, 954 (Jan. 31, 2019). Note, however, that the policy of extending the definitions from the ACWIA fee context to the H–1B cap exemption context predates the codification of that policy. *See* Mem. from Michael Aytes, Assoc. Dir. for Domestic Ops., USCIS, *Guidance Regarding Eligibility for Exemption from the H–1B Cap Based on section 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106–313)* (June 6, 2006); *https://www.uscis.gov/sites/default/files/document/memos/ac21c060606.pdf.*

rulemaking by stating that ''a fundamental activity would still have to be an important and substantial activity, although it need not be the organization's principal or foremost activity under the current 'primary' construct.'' The commenter also asked DHS to include examples where the application of the proposed standard would be less clear, stating there is a lack of guidance on the application of the standard that would help to ensure consistency while contributing to economic growth and development within this important segment of the Unites States economy.

Response: As noted by the commenter and stated in the NPRM, a ''fundamental activity'' is ''an important and substantial activity, although it need not be the organization's principal or foremost activity.'' 88 FR 72870, 72885 (Oct. 23, 2023). While this change may somewhat expand who is eligible for a cap exemption, DHS does not expect or intend this to be a significant change for petitioners. Similar to how a petitioner may have demonstrated that it was primarily engaged in research under the prior standard, a petitioner may demonstrate that research is one of its fundamental activities by showing that research constitutes an important and significant activity within the context of its overall operations. The types of evidence that may be probative generally remain the same. For example, probative evidence may include the petitioner's mission statement, descriptions of the petitioner's research efforts and ongoing research projects, the petitioner's operating budget dedicated to research as evidenced by relevant tax forms, and staffing descriptions that indicate the level of staffing dedicated to research. However, unlike the prior ''primarily'' standard, a petitioner no longer needs to demonstrate that research is the principal or foremost activity, *i.e.,* that research constitutes more than 50% of its operations compared to all its other activities.[82] While there is not an exact minimum percentage that would always be required to meet the ''fundamental activity'' standard, it remains the petitioner's burden to establish eligibility for cap exemption. USCIS adjudicates each petition on a case-by-case basis, taking into consideration the totality of the facts.

DHS does not believe that it is necessary to provide additional guidance through this rulemaking but may consider providing additional guidance in the future through other means such as the USCIS Policy Manual. DHS declines to provide specific guidance on the examples provided by the commenter because those examples, without further context, could support a decision either in favor of or against granting a cap exemption. For example, ''a company that is at the outset of starting a research department'' may or may not qualify for cap exemption depending on all the relevant facts, such as how much of its resources (including time, money, and personnel) it dedicates to such research. Similarly, ''a company that pauses its research for a period of time and then resumes its research activities'' may or may not qualify depending on all the relevant facts, such as the length of pause and the resources dedicated to the resumption of its research activities.[83] As USCIS adjudicates each petition on a case-by-case basis, taking into consideration the totality of the facts, USCIS is not providing additional guidance or examples in response to this comment.

Comment: An advocacy group supported the proposed definition but recommended that USCIS clarify that government-chartered nonprofits involved in research through regional hubs qualify as nonprofit research organizations, stating that ''organizations that work on later stages of technology development should be able to qualify as research organizations.'' The advocacy group commented that a ''key goal of the regional hubs is the commercialization of its earlier stage research,'' and that a ''majority of technologies developed through basic and applied research fail to reach commercialization and subsequently benefit U.S. citizens.'' The advocacy group recommended that USCIS define research organizations to include nonprofits and government entities that conduct research as part of their role in a regional hub.

Response: DHS reiterates its goal of slightly modifying the definition of employers who are exempt from the H–1B cap in order to provide additional clarity and flexibility for these types of cap exemptions. Changing the definition of ''nonprofit research organization'' and ''governmental research organization'' by replacing ''primarily engaged'' and ''primary mission'' with ''fundamental activity'' provides potential exemption from the H–1B cap for a nonprofit entity or governmental research organization that conducts research as a fundamental activity but is not primarily engaged in research or where research is not the primary mission. This will create more flexibility for nonprofit and governmental research organizations and for beneficiaries who are not directly employed by a qualifying organization. There is nothing in this final rule that will preclude nonprofits and government entities that conduct research as part of their role in a regional hub from potentially qualifying for cap-exemption. However, it remains the petitioner's burden to demonstrate eligibility for the benefit sought.[84] Therefore, DHS declines to further define research organization or otherwise modify the definition in this rule.

Comment: An advocacy group recommended that the proposed regulations explicitly state that a ''nonprofit research organization or governmental research organization or educational or government organization may perform or promote more than one fundamental activity.''

Response: DHS declines to adopt this suggestion. Under this rule, the definition of a nonprofit research organization or government research organization at new 8 CFR 214.2(h)(19)(iii)(C) states that ''[a] nonprofit research organization or governmental research organization may perform or promote more than one fundamental activity.'' DHS declines to expand this definition to also include reference to educational or government organizations. This provision applies explicitly to nonprofit research organizations and governmental research organizations. DHS also notes that new 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*), pertaining to affiliation agreements between nonprofit entities and institutions of higher education, and new 8 CFR 214.2(h)(19)(iii)(B)(*4*), pertaining to exemption from the American Competitiveness and Workforce Improvement Act (ACWIA) fee referenced in 8 CFR 106.2 for

[82] *Cf. Open Soc'y Inst.* v. *USCIS,* 573 F. Supp. 3d 294, 305 (D.D.C. 2021) (''Based on the totality of evidence in the record, and considering its research activities in proportion to its other activities, we conclude that the record does not demonstrate that [Open Society] is directly and principally engaged in research. The research conducted by [Open Society] is incidental, or, at best, secondary to its principal activities. . . .''), dismissed No. 21–5251, 2022 WL 4002149 (D.C. Cir. Aug. 29, 2022) (per curiam).

[83] In both of these examples, the company, as with any other petitioner, would also have to demonstrate it meets all other eligibility requirements, including having a bona fide job offer for the beneficiary and meeting the definition of a nonprofit research organization.

[84] *See* INA section 291, 8 U.S.C. 1361; *Matter of Simeio Solutions, LLC,* 26 I&N Dec. 542, 549 (AAO 2015) (''It is the petitioner's burden to establish eligibility for the immigration benefit sought.''); *Matter of Skirball Cultural Center,* 25 I&N Dec. 799, 806 (AAO 2012) (''In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.'')

nonprofit entities related to or affiliated with an institution of higher education, are revised to include a statement that, ''[a] nonprofit entity may engage in more than one fundamental activity.'' Nothing in this rule precludes an educational or government organization from qualifying as an affiliated or related non-profit under 8 CFR 214.2(h)(8)(iii)(F)(*2*), nor under any of the other cap exemptions at 8 CFR 214.2(h)(8)(iii)(F). Finally, at new 8 CFR 214.2(h)(8)(iii)(F)(*4*), addressing H–1B beneficiaries not directly employed by a qualifying institution, organization, or entity, DHS removed the requirement that a beneficiary's duties ''directly and predominately further the essential purpose, mission, objectives or functions'' of the qualifying institution, organization, or entity and replaced it with the requirement that the beneficiary's duties ''directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions'' of the qualifying institution, organization, or entity. These revisions sufficiently acknowledge the potential for more than one fundamental activity, where applicable, of institutions, organizations, and entities relevant to cap exemption determinations.

Comment: A union opposed the proposed changes to 8 CFR 214.2(h)(19)(iii)(C) as opening a loophole for nonprofit and government employers not engaged in research to qualify for a cap exemption by claiming a ''secondary interest in research to qualify as a cap exempt entity.'' The commenter further stated that ''[t]he lower threshold for cap exemption under the proposed rule would create an incentive for nonprofits and government employers to restructure or reconfigure their operations to qualify for cap exemption.''

Response: DHS disagrees that the proposed change from ''primarily engaged'' and ''primary mission'' to ''a fundamental activity of'' in 8 CFR 214.2(h)(19)(iii)(C) will open a loophole for nonprofit and government employers not engaged in research to qualify for a cap exemption. While changing the terminology may slightly expand who is eligible for the cap exemption, it would still require that an employer demonstrate that research is a ''fundamental activity,'' which is a meaningful limiting standard. A fundamental activity would still have to be an important and substantial activity, although it need not be the organization's principal or foremost activity as required under the current ''primary'' construct.[85] Therefore, nonprofit and government employers not engaged in research would still not qualify.

Comment: A research organization commented that the proposal to qualify an organization as cap-exempt if one of its many ''fundamental activities'' is research ''is so expansive that virtually any nonprofit organization will become newly eligible for cap-exemption.'' The commenter stated that USCIS has not clearly defined ''research'' or ''fundamental activity'' and has no expertise in doing so, contrasting that against the ''primarily'' standard as applied by the National Science Foundation. The commenter stated that DHS provides ''no substantive rationale'' for the changes, citing the text from the NPRM as failing to meaningfully explain the revisions and failing to provide a ''bright-line criteria to identify eligibility.'' The commenter said that the changes would create an adjudication and litigation nightmare for DHS due to lawsuits from denials of cap-exempt claims. The commenter also cited statistics demonstrating the increase in cap-exempt petitions and stated that DHS has not adequately shown a compelling reason to expand those numbers further. The commenter requested that DHS provide the public with a detailed analysis of how the changes would impact the H–1B program and the scale of those impacts at the NPRM stage.

Response: DHS disagrees that the result of this change will effectively qualify any nonprofit entity as eligible for H–1B cap exemption. The change to 8 CFR 214.2(h)(19)(iii)(C), as proposed and finalized, requires establishing that research is one of the fundamental activities of the nonprofit research organization or government research organization. Not every activity an organization engages in would be considered a ''fundamental activity.'' A fundamental activity would still have to be an important and substantial activity, although it need not be the organization's principal or foremost activity. DHS disagrees with the commenter that virtually any nonprofit claiming to engage in an activity that it labels or considers as ''research'' would be eligible for cap exemption. Such a nonprofit would still have to show that research is one of its fundamental activities. Moreover, the nonprofit must show that the research being conducted meets the definition of ''basic research'' and/or ''applied research'' under 8 CFR 214.2(h)(19)(iii)(C). This is another meaningful limitation against a nonprofit simply claiming to engage in some activity that it labels as ''research.'' Regarding the comment that DHS did not define the terms ''research'' or ''fundamental activity,'' DHS disagrees and notes that it is revising existing definitions of ''basic research'' as well as ''applied research'' at 8 CFR 214.2(h)(19)(iii)(C).

Regarding the concern that the rule does not provide ''bright-line criteria to identify eligibility,'' it is not appropriate to provide ''bright-line criteria'' because research activities and employment scenarios include unique, specific fact patterns and must be addressed on a case-by-case basis. Petitioners bear the burden to establish eligibility for the requested classification, to include eligibility for cap exemption.

Regarding the comment requesting that DHS provide the public with a detailed analysis of how the changes would impact the H–1B program, the NPRM generally projected a small increase in the population of petitioners eligible for cap exemption but could not precisely estimate how many additional petitioners would now qualify for cap exemption. *See* 88 FR 72934, 72915 (Table 12. Summary of Provisions and Impacts of the Proposed Rule). Evaluating such impact with specificity is not practically feasible.

With respect to the comment that DHS provided no substantive rationale for the changes, DHS disagrees. As explained in the NPRM, changing the regulatory definition to ''fundamental activity'' provides for a reorientation of cap exemptions for nonprofit research organizations and governmental research organizations aligning with current ''fundamental activity'' standard found for formal written affiliation agreements under 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*) and (h)(19)(iii)(B)(*4*), which would bring more clarity and predictability to decision-making, for both adjudicators and the regulated community. 88 FR 72870, 72884 (Oct. 23, 2023).

Comment: A joint submission expressed general support for the proposed revision at 8 CFR 214.2(h)(19)(iii)(C). An advocacy group encouraged DHS to ''finalize its proposal insofar as it will again count indirect research as among the [qualifying] research activities,'' describing activities such as funding and monitoring the research of others as activities that would fall under ''indirect research.'' The group said that the provision acknowledges the full breadth of nonprofit ''research,'' thereby

[85] Multiple comments leading to the 2016 final rule also expressed concern that the ''primary purpose'' requirement was too restrictive, although in the context of 8 CFR 214.2(h)(8)(ii)(F)(*2*)(*iv*) and (h)(19)(iii)(B)(*4*). 81 FR 82403.

providing additional flexibility and reducing burdens for nonprofit employers seeking cap exemption. Another advocacy group supported the proposed changes and recommended that ''qualifying research includes not only basic and applied research but can also include later stages of research, such as technology development and transfer.''

Response: DHS generally agrees with the commenter that the revised requirements to qualify for H–1B cap exemption will provide petitioners seeking cap exemption additional clarity and flexibility. However, DHS does not agree with further broadening or changing the proposed parameters for qualifying activities, as the commenters suggested. DHS also does not agree with the commenter's characterization of the proposed changes as allowing ''indirect research.'' In this response, DHS clarifies that the definition at 8 CFR 214.2(h)(19)(iii)(C), as proposed and finalized, does not allow for ''indirect research'' in the sense of allowing cap exemption for a nonprofit organization that merely funds and monitors the research of others but does not itself directly conduct any research. DHS reiterates that 8 CFR 214.2(h)(19)(iii)(C) requires the nonprofit organization to *engage* in research. Further, 8 CFR 214.2(h)(19)(iii)(C) states that ''basic research and applied research . . . may include designing, analyzing, and directing the research of others if on an ongoing basis and throughout the research cycle.'' While funding and monitoring the research of others may fall under this provision, the petitioner must also direct such research on an ongoing basis throughout the research cycle. In other words, this language is meant to allow the petitioning entity to qualify for cap exemption only if the petitioner takes an active, consistent role in designing, analyzing, and directing the research of others. Simply providing some funds and sporadically monitoring the research of others, without more, would not be sufficient to meet new 8 CFR 214.2(h)(19)(iii)(C). Such a low standard could open a loophole for nonprofit and government employers not engaged in research or lead to abuse by third-party employers seeking to qualify for a cap exemption simply by giving funds to a qualifying non-profit.

Similarly, DHS declines to state in new 8 CFR 214.2(h)(19)(iii)(C) that ''qualifying research includes not only basic and applied research but can also include later stages of research, such as technology development and transfer.'' The phrase ''technology development and transfer'' is undefined and, without additional specificity, could open a loophole for nonprofit and government employers not engaged in research or lead to abuse by third-party employers seeking to qualify for a cap exemption simply by claiming to be developing and transferring someone else's research. Thus, DHS declines to specifically include reference to indirect research or technology development and transfer in the regulatory text.

Comment: An attorney writing as part of a form letter campaign supported the proposal to forego the requirement at 8 CFR 214.2(h)(19)(iv)(B) that tax-exempt organizations have an IRS document evidencing nonprofit status to also state whether the organization is primarily an educational or research organization. A law firm agreed that this proposal would align with the changes to research being a ''fundamental activity'' of the qualifying organization or entity. A local government agency also supported this proposal, reasoning that some tax-exempt organizations are created through statute and thus may lack IRS documentation. An advocacy group also supported the proposal, stating that DHS adjudicators have, in the past, made erroneous inquiries and denials based on the activities of the commenter as indicated in its tax forms.

Response: DHS agrees that amending the definition of ''nonprofit or tax-exempt organization'' to no longer require that the petitioner provide evidence of its approval by the IRS as a tax-exempt organization for research or educational purposes will help simplify and clarify the process for adjudicators and for stakeholders. DHS is not proposing to eliminate or otherwise change the overarching requirement that a qualifying nonprofit or tax-exempt petitioner be an institution of higher education or a related or affiliated nonprofit entity, or a nonprofit research organization or a governmental research organization institution, as required by the statute and regulations. A petitioner will still need to submit documentation to demonstrate that it is a nonprofit or tax-exempt organization, such as tax returns, tax exemption certificates, references to the organization's listing in the IRS's most recent list of tax-exempt organizations, articles of incorporation, bylaws, or other similar documentation. Through this rule, DHS is merely clarifying that such documentation does need not to be in the form of an IRS letter.

Comment: An association of local governmental agencies and an additional local government agency commented that the American Competitiveness Act in the Twenty-First Century did not distinguish types of nonprofit entities. The commenters wrote that the proposal at 8 CFR 214.2(h)(19)(iv) exceeds statutory authority by excluding some nonprofit organizations from qualifying for cap exemption and recommended removing references to sections 501(c)(3), (c)(4), and (c)(6) of the Internal Revenue Code (IRC) to avoid this issue.

Similarly, a professional association commented that distinguishing nonprofit entities affiliated with an institution of higher education under section 501(c)(3), (c)(4), or (c)(6) of the IRC lacks statutory support and recommended that the proposal at 8 CFR 214.2(h)(19)(iv) include, but not limit, tax-exempt organizations to those defined in the cited sections 501(c)(3), (c)(4), and (c)(6).

Response: DHS did not propose to substantively change the longstanding requirement at current 8 CFR 214.2(h)(19)(iv) that the nonprofit be defined as a tax-exempt organization under section 501(c)(3), (c)(4) or (c)(6) of the IRC.[86] As explained in the H–1B NPRM, 8 CFR 214.2(h)(19)(iv) ''would more simply state that a nonprofit organization or entity 'must be determined by the Internal Revenue Service [to be] a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3) (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6).' ''

DHS disagrees that this longstanding requirement is contrary to law. Rather, INA sec. 214(g)(5)(A) clearly limits eligibility to those nonprofit organizations that are ''affiliated'' with an institution of higher education and INA 214(g)(5)(B) limits eligibility to a ''nonprofit research organization.'' The limitations at paragraph (h)(19)(iv) relating to tax-exempt organizations under 501(c)(3), (c)(4), and (c)(6) are consistent with INA 214(g)(5)(A) and (B), and further promotes the INA's goals of improving economic growth and job creation by facilitating U.S.

[86] *See* ''Petitioning Requirements for the H–1B Nonimmigrant Classification Under Public Law 105–277,'' 63 FR 65657, 65658 (Nov. 30, 1998) (interim final rule with request for comments) (codifying paragraph (h)(19)(iv) requiring a nonprofit organization or entity to be qualified as a tax exempt organization under section 501(c)(3), (c)(4), or (c)(6) of the Internal Revenue Code); ''Petitioning Requirements for the H–1B Nonimmigrant Classification Under Public Law 105–277,'' 65 FR 10678, 10679 (Feb. 29, 2000) (final rule) (declining a suggestion to allow organizations that are tax exempt under state or local law to qualify as non-profit organizations for the purposes of the ACWIA, and declining another suggestion to expand the definition of the organizations considered to be nonprofit to include all non-profit organizations (not just non-profit research organizations), on the basis that there is no legislative support for either suggestion).

employers' access to high-skilled workers, particularly at these institutions, organizations, and entities.[87] DHS will finalize 8 CFR 214.2(h)(19)(iv) as proposed.

Comment: A joint submission recommended that the proposal at 8 CFR 214.2(h)(19)(iv) clarify that ''[a]n organization with its own tax filing and payroll can qualify for cap-exemption even if it is part of a larger nonprofit and uses the parent nonprofit's Federal employer identification number (FEIN)'' and that ''[a] nonprofit that engages a Professional Employer Organization (PEO) for human resource and payroll services may still qualify for cap-exemption even if the taxpayer identification number of the PEO is used for those functions.''

Response: DHS declines to add the requested language to this provision. A non-profit organization may be exempt from the cap if it is determined by the Internal Revenue Service as a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6), thereby meeting the definition of a nonprofit organization or entity as codified at new 8 CFR 214.2(h)(19)(iv), or if it is primarily engaged in basic research and/or applied research, thereby meeting the definition of a nonprofit research organization as codified at new 8 CFR 214.2(h)(19)(iii)(C). USCIS cannot make a generalized assessment as to whether a particular organization or entity will qualify for cap-exempt status. However, as USCIS has previously noted,[88] use of a PEO will not, standing alone, negate an employer's cap-exempt qualification. USCIS will consider all relevant factors and review the totality of the evidence for each petition using the preponderance of the evidence standard to determine cap-exempt status.

Comment: A trade association and a local government agency suggested that USCIS clarify when State and local governments can be qualifying tax-exempt organizations. Specifically, the trade association suggested that USCIS clarify that tax-exempt organizations that can create qualifying affiliations with universities include state and local governmental and quasi-governmental entities. The local government agency suggested that 8 CFR 214.2(h)(19)(iv) be revised to directly reference tax-exempt government entities.

Other commenters voiced concern that the proposed revision would exclude an entire class of entities that currently meet the current definition of ''non-profit entity'' but would not meet the definition in the proposed regulation change. One of these commenters said that the current definition of ''non-profit entities'' has two parts—first that the nonprofit organization or entity is ''defined'' as a tax-exempt organization under IRC 501(c)(3), (c)(4), and (c)(6), and second that the nonprofit has been ''approved'' as a tax-exempt organization for research or educational purposes—whereas the proposed regulation change requires that the nonprofit organization or entity ''must be determined by the Internal Revenue Service'' as a tax-exempt organization under IRC 501(c)(3), (c)(4), and (c)(6). This commenter stated that governmental units, such as local and State governments, are exempt from income taxation under IRC section 115, but would not be classified as tax-exempt organizations in the proposed rule and requested that they be provided for as cap-exempt entities. The commenter provided an example of a private religious school being cap-exempt under the proposed rule where a public school would not. The commenter said that since the H–1B cap exemption requirements mirror the requirements under the ACWIA, related to exemption of the ACWIA fee for H–1B employers, the proposed rule should be modified to include public primary and secondary schools, since nonprofit private primary and secondary schools would already be covered under the IRC 501(c)(3), (c)(4), and (c)(6) requirement.

Response: State and local governments that currently qualify as nonprofit or tax-exempt organizations under 8 CFR 214.2(h)(19)(iv) should generally continue to qualify as tax-exempt organizations under new 8 CFR 214.2(h)(19)(iv). In proposing to revise 8 CFR 214.2(h)(19)(iv), DHS's intention was simply to remove the unduly burdensome requirement under 8 CFR 214.2(h)(19)(iv)(B) that the IRS letter itself state that the petitioner's approval as a tax-exempt organization was ''for research or educational purposes.'' 88 FR 72886 (Oct. 23, 2023). It was never DHS's intention to restrict, much less eliminate, eligibility for state and local governments that currently qualify as nonprofit or tax-exempt organizations under 8 CFR 214.2(h)(19)(iv). DHS did not propose to eliminate or otherwise change the other requirements under 8 CFR 214.2(h)(19)(iv). As with current 8 CFR 214.2(h)(19)(iv)(A), new 8 CFR 214.2(h)(19)(iv) will continue to define nonprofit or tax-exempt organizations based on the Internal Revenue Service's definition of a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6).

DHS declines to further revise 8 CFR 214.2(h)(19)(iv) to directly reference tax-exempt government entities or public primary and secondary schools, as requested by the commenters. USCIS cannot make a generalized assessment as to whether a particular organization or entity will qualify as a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6). As stated above, state and local governments that currently qualify as nonprofit or tax-exempt organizations under 8 CFR 214.2(h)(19)(iv) should generally continue to qualify as tax-exempt organizations under new 8 CFR 214.2(h)(19)(iv).

DHS further reiterates that government entities may still qualify for cap exemption. State and local governments may qualify for cap exemption under new 8 CFR 214.2(h)(19)(iii)(B)(*4*), if the nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. Additionally, they may qualify for cap exemption under new 8 CFR 214.2(h)(19)(iii)(C) if they are a governmental research organization and a fundamental activity of the organization is the performance or promotion of basic and/or applied research. They may also qualify under new 8 CFR 214.2(h)(8)(iii)(F)(*4*) if they employ a beneficiary who will spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying

[87] *See* S. Rep. No. 106–260 (April 11, 2000) (AC21 sought to help the American economy by, in part, exempting from the H–1B cap ''visas obtained by universities, research facilities, and those obtained on behalf of graduate degree recipients to help keep top graduates and educators in the country''); *see also* ''Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,'' 81 FR 82398, 82447 (Nov. 18, 2016) (stating that DHS's policy of allowing cap exemption for individuals employed 'at' and not simply employed 'by' a qualifying institution ''is consistent with the language of the statute and furthers the goals of AC21 to improve economic growth and job creation by immediately increasing U.S. access to high-skilled workers . . . .'').

[88] USCIS, Electronic Reading Room, H–1B Cap Exemptions—Baker (Oct. 18, 2023), *https://www.uscis.gov/sites/default/files/document/foia/H-1BCapExemptions-Baker.pdf.*

institution, organization, or entity, namely, either higher education, nonprofit research, or government research. USCIS will consider all relevant factors and review the totality of the evidence for each petition using the preponderance of the evidence standard to determine cap-exempt status.

Comment: A joint submission agreed that the proposal should provide for government entities that serve research and educational purposes and requested USCIS provide additional information relating to how it will adjudicate cap exemptions. The commenter expressed concerns with the definition of nonprofit organizations, stating it fails to include specific guidance for government entities that serve research and educational purposes, such as a community health center or a public school system. The comment referenced a USCIS letter as indicating that USCIS would continue to consider these entities for cap exemption on a case-by-case basis, as well as provide clarifying language specifying the different ways the cap exemption standard may be met.

Response: USCIS will continue to consider H–1B cap exemption requests on a case-by-case basis, taking into consideration the eligibility requirements, as well as any documentation submitted to establish eligibility. USCIS reviews the totality of the evidence for each petition using the preponderance of the evidence standard and cannot make a generalized assessment as to whether a particular organization or affiliation will qualify for cap-exempt status. While government entities that serve research and educational purposes may not qualify for cap exemption by meeting the definition of a nonprofit entity, as noted by the commenter, such government entities may still qualify for cap exemption under new 8 CFR 214.2(h)(19)(iii)(C) if a fundamental activity of the organization is the performance or promotion of basic and/or applied research. They may also qualify under new 8 CFR 214.2(h)(8)(iii)(F)(*4*) if they employ a beneficiary who will spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research. Revisions to the definition of nonprofit or tax-exempt organizations at 8 CFR 214.2(h)(19)(iv) are intended to clarify and streamline evidentiary requirements for cap exemption eligibility. DHS believes the provisions in this rule related to H–1B cap exemptions will increase flexibility and better reflect Congress's intent, as well as better represent modern employment situations.

Comment: An organization requested that 8 CFR 214.2(h)(19)(iv) be amended to include language that an organization will not be precluded from establishing eligibility as a United States employer, under paragraph (h)(4)(ii), merely because the organization is controlled by one individual.

Response: DHS does not believe that the requested clarification is necessary as there is no such preclusion in the regulations, either in new 8 CFR 214.2(h)(19)(iv) or (h)(4)(ii).

Comment: A professional association cited a 2023 letter from USCIS [89] as stating that there is no collaboration time requirement between a university and an affiliated nonprofit for the purpose of cap exemption and that USCIS recognized university-government collaborations for training, education, and research purposes.

Response: DHS agrees that there is no statutory or regulatory requirement for a particular period of prior collaboration between a university and an affiliated nonprofit for purposes of H–1B cap exemption eligibility. DHS also recognizes the potential of government organizations collaborating with universities for training, education, and research purposes. In the case of affiliations, a government research entity may qualify for cap exemption if they employ a beneficiary who will spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly further an activity that supports or advances one of the permissible fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research. USCIS officers will review the totality of the evidence for each petition using the preponderance of the evidence standard to determine whether a particular organization or affiliation will qualify for cap-exempt status.

Comment: A professional association provided several recommended amendments to the proposed rule at 8 CFR 214.2(h)(8)(iii)(F)(*2*), including:

- Specifying that a nonprofit entity is ''operated by'' an institution of higher education when key personnel of the nonprofit entity are shared with the institution of higher education, or whether the institution of higher education controls key decisions and programs of the nonprofit entity;
- Defining ''attached'' to include its common-sense meaning; and the terms ''member, branch, cooperative, or subsidiary'' to be consistent with their common legal meaning;
- Providing examples of an ''active working relationship'' and confirming that new relationships memorialized through a formal written affiliation agreement meet the regulatory standard;
- Confirming that ''formal written affiliation agreements entered into between an institution of higher education, and the parent organization of the petitioner qualify for purposes of 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*), so long as the petitioner can provide documentation to show that petitioner is bound by the terms of the affiliation agreement.''

A joint submission also recommended definitions for the terms ''active working relationship'' and ''attached.'' These commenters stated that a definition of the former could clarify the evidence required to show an active working relationship for cap exemption purposes and that the latter could address the lack of caselaw or guidance on the meaning of ''attached'' by including in the definition ''a consistent collaboration with the institution of higher education, or that the institution of higher education has a vote or key role in the administration of the nonprofit's program or budget.''

Response: DHS appreciates these suggestions. However, DHS did not propose to revise 8 CFR 214.2(h)(8)(iii)(F)(*2*) and declines to do so through this rulemaking. Regarding the specific suggestions to clarify when a nonprofit entity is ''operated by'' an institution of higher education, as reflected in 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*ii*), while shared key personnel and control of key decisions and programs may be relevant factors, DHS reiterates that USCIS officers will review the totality of the evidence for each petition using the preponderance of the evidence standard to determine whether a particular affiliation will qualify for cap-exempt status. DHS declines to define the terms ''attached'' or ''member, branch, cooperative, or subsidiary'' as they appear in 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iii*). Whether a nonprofit entity is attached to an institution of higher education depends on its status as a member, branch, cooperative, or subsidiary, as is stated in

[89] USCIS, Electronic Reading Room, H–1B Cap Exemptions—Baker (Oct. 18, 2023), *https://www.uscis.gov/sites/default/files/document/foia/H-1BCapExemptions-Baker.pdf*.

the provision, and DHS does not believe these corporate relationships require further clarification in this regulation. Further, DHS declines to provide a definition of ''active working relationship'' and declines to confirm that formal written affiliation agreements between an institution of higher education and the parent organization of the petitioner qualify for purposes of 8 CFR 214.2(h)(8)(iii)(F)(*2*)(*iv*), as these relationships will be examined on a case-by-case basis.

Comment: A commenter said that another way to ensure greater levels of consistency in cap exemption adjudications would be for the agency to consider a separate rulemaking to establish a distinct adjudication procedure for determining whether an entity is eligible for a cap exemption, which the commenter said USCIS already does in other contexts such as Blanket L petitions. The commenter said that an advance determination of eligibility for the H–1B cap exemption with the ability to premium process, would give petitioners greater certainty in knowing that they must—or may not—file cap-exempt petitions for H–1B workers. The commenter added that the lack of consistency in adjudications means that petitioners who have been previously approved for cap exemption cannot be assured that the exemption would be honored in the filing of a subsequent petition even when the underlying facts have not changed.

Response: Under DHS regulations, eligibility for cap exemption is determined on a case-by-case basis. The NPRM did not propose to create a new, separate adjudication process for cap exemption determinations and such a process is not currently operationally feasible. USCIS may need to create a new form as well as a framework for this new adjudication. Even if DHS were inclined to adopt the commenter's suggestion, the regulated public should have an opportunity to comment on any such process and framework. DHS is unable to adopt this suggestion through this rule but may consider it in future rulemaking efforts.

Comment: An advocacy group generally requested that the proposed regulations provide for educational institutions and U.S. Government projects as cap-exempt employers. A trade association requested that the proposal provide for university research parks specifically for cap exemption purposes.

Response: DHS regulations state that an H–1B nonimmigrant worker is exempt from the cap if employed by: (1) an institution of higher education; (2) a nonprofit entity related to or affiliated with such an institution; (3) a nonprofit research organization; or (4) a governmental research organization. *See* 8 CFR 214.2(h)(8)(iii)(F)(*1*) through (*3*). Institutions of higher education are defined in section 101(a) of the Higher Education Act of 1965. If not directly employed by the qualifying institution or organization, the individual must meet the requirements outlined in 8 CFR 214.2(h)(8)(iii)(F)(*4*). USCIS reviews the totality of the evidence for each petition using the preponderance of the evidence standard and cannot make a generalized assessment as to whether a particular organization or affiliation will qualify for cap-exempt status.

9. Automatic Extension of Authorized Employment Under 8 CFR 214.2(f)(5)(vi) (Cap-Gap)

Comment: Many commenters, including law firms, research organizations, and trade associations, expressed general support for the automatic extension of authorized employment under 8 CFR 214.2(f)(5)(vi) (''cap-gap''). A commenter stated that the proposed provision could help many people, while an advocacy group remarked that it would be welcomed by students, employers, and universities. Another commenter expressed that the proposed provision would help many newly selected H–1B beneficiaries. A university welcomed the proposed provisions in as much as they would support graduates who are employed in the United States in industry positions. A union expressed that the proposed provision would benefit many in the higher education workforce.

Response: DHS agrees with these commenters that automatically extending employment authorization for F–1 students during the period known as the ''cap-gap'' will help prevent the disruptions in employment authorization that some F–1 nonimmigrants seeking H–1B change of status have experienced over the past several years. DHS recognizes the hardships that a disruption in employment authorization could cause to both affected individuals and their employers and seeks to prevent potential future disruptions by extending cap-gap relief.

Comment: Many commenters further expressed that the proposed provision would provide benefits to students, including increased flexibility, reduced disruption to employment authorization due to processing delays, and a smooth transition from their educational pursuits to the workforce. A professional association and a joint submission expressed support for extending the cap-gap timeframe, stating it would allow future medical students to remain in the United States to complete their education, training, and residency. A couple of commenters, including a university, elaborated that a smoother transition for students allows industries to benefit from their skills, enhances the United States' labor market, and strengthens its position as the premier global destination for higher education. A couple of commenters added that the proposed provision is crucial for ensuring fairness, efficiency, and transparency in the H–1B process, thereby benefitting both applicants and employers. Another commenter remarked that the added flexibility to the F–1 program would allow students to gain valuable work experience in the United States, thus creating a more dynamic, innovative, and inclusive workforce. The commenter concluded that this would bolster the overall prosperity and competitiveness of U.S. industries on a global stage. While discussing the proposed provision's benefits to students, a couple of commenters, including a professional association, expressed that the current period of ''limbo'' causes American-trained students not to pursue employment in the United States. A few commenters, including a trade association and a professional association, stated that the proposed provision would greatly improve employees' sense of certainty.

A company expressed general support for the proposed provision, noting that the proposal would reduce instances of work authorization gaps for individuals utilizing F–1 OPT in the event of increased processing times and future unavailability of the premium processing option for H–1B cap petitions. Similarly, an advocacy group expressed that the proposed provision would provide ''much-needed'' relief in the face of delays, including if premium processing is suspended for H–1B petitions.

Response: DHS agrees that the provisions in this rule will benefit students, employers, industries, and the United States. Students and employers will benefit from greater certainty about the maintenance of their employment authorization. Industries will benefit from the skill sets of these students. Further, the United States will remain attractive to global talent and improve its ability to retain such talent.

Comment: A professional association applauded DHS for taking actions that improve efficiency and are based on real-world realities such as the academic calendar, USCIS workload,

and processing times. Similarly, a trade association applauded USCIS for the proposed changes to better align status durations and authorization dates to current conditions as they pertain to adjudications. Another professional association remarked that the proposed provision would allow USCIS additional time to process petitions before the ''deadline.'' A university expressed optimism that the increased processing window for H–1B petitions could alleviate some of the delays associated with other benefit applications that USCIS adjudicates, such as OPT, STEM OPT, or changes of status.

Response: DHS believes that automatically extending employment authorization for F–1 students during the period known as the ''cap-gap'' will result in more flexibility for F–1 students and USCIS and will help to avoid disruptions to U.S. employers that are lawfully employing F–1 students. In addition to avoiding employment disruptions, the lengthier extension of F–1 status and post-completion OPT or 24-month extension of post-completion OPT employment authorization for F–1 students with pending H–1B petitions until April 1, which is one year from the typical initial cap filing start date, accounts for USCIS' competing operational considerations and would enable the agency to balance workloads more appropriately for different types of petitions.

Comment: A few commenters expressed that the proposed provision would positively impact the U.S. economy. A commenter remarked that the increased flexibility in the F–1 program would open the door to skilled students who contribute significantly to the economy. Another commenter remarked that the proposed provision would have positive impacts on the U.S. economy, including by ensuring the payment of education fees and the collection of income taxes from workers. A company commented that the proposed enhancements would play a pivotal role in attracting and retaining top global talent that is crucial for propelling U.S. economic growth.

Response: DHS agrees with this feedback that implementing this automatic extension until April, rather than October 1, of the relevant fiscal year will provide stability for F–1 students that will increase the United States' ability to attract and retain top global talent. DHS also generally agrees that this provision will have positive impacts on the U.S. economy, such as by benefiting employers to gain productivity and potential profits that the F–1 students' continuing employment will provide, as discussed in section IV(A)(3)(viii) below.

Comment: Multiple commenters stated that the proposed provision would provide benefits to employers. A few commenters, including a trade association, a professional association, and a business association, remarked that the proposed provision would greatly improve employers' sense of certainty, while a joint submission stated that the proposal would provide much needed predictability for employers to lawfully employ F–1 students. A professional association and a trade association commented that the proposed flexibilities would allow for better recruitment efforts among U.S. employers. A company expressed that the proposed improvements would support U.S. companies at the frontier of innovation. A university stated that the proposed cap-gap extension would reduce the negative impact on output experienced by employers, specifically for the jobs in research or technology-related areas. A trade association remarked that extending the cap-gap coverage would save company costs since they would not have to file under premium processing. A legal services provider agreed with the proposed provision, reasoning it should reduce the instances where employers have to terminate or place their ''cap-gap'' employees on leave on October 1 of a given year while their H–1B cap petitions were still pending.

Response: DHS agrees that expanding the duration of the cap-gap extension and employment authorization, as applicable, will benefit employers by providing stability and helping to avoid disruptions caused by adjudication delays.

Comment: A commenter suggested that USCIS provide F–1 students in OPT with the option of three to six months of leave to travel, in addition to the existing 60-day grace period, after graduation. The commenter added that this would allow students to visit their home country, travel in case of emergencies, and reduce pressure on the job market. A commenter suggested that USCIS consider extending OPT to at least 2 years for all undergraduate and graduate programs, adding that the U.S. is at a disadvantage compared to other developed markets that offer more generous employment visa options. Another commenter requested that USCIS extend validity of STEM OPT automatically until May of the year in which it expires, thereby providing an additional opportunity to get into the H–1B lottery and use the cap-gap if selected.

Response: DHS declines to adopt the commenter's suggestions concerning OPT and the STEM OPT extension, as such suggestions are beyond the scope of this rulemaking.

Comment: A commenter asked if the starting criterion for cap-gap could be March 1 instead of April 1 to address the issue of applicants who are registered in the lottery but lose work authorization before the results are announced. A couple of commenters asked that cap-gap extensions be based on the status of the student applicant at the time of H–1B registration rather than the status at the time of petition filing, reasoning the current rule is disadvantageous to applicants whose OPT status expires during the H–1B filing period.

A company encouraged DHS to further extend cap-gap to all beneficiaries registered in the H–1B lottery until USCIS concludes the lottery selection for the fiscal year. A commenter further requested an automatic extension of F–1 OPT until USCIS officially announces cap fulfillment or the commencement of the next cap season, stating this would address challenges faced by students who are not initially selected but their OPT status expires before the next round of selection.

Response: DHS declines to adopt the commenters' suggestions to change the ''starting criterion'' for the automatic extension from April 1 to March 1, or otherwise to the date that an organization submits an H–1B registration on a student's behalf. As explained in the NPRM, DHS was concerned with extending employment authorization and status because it could reward potentially frivolous filings that would enable students who may ultimately be found not to qualify for H–1B status. 88 FR 72870, 72887 (Oct. 23, 2023). DHS does not believe that the risks of allowing frivolous filings is outweighed by other factors that might merit extending cap-gap employment or status prior to filing a petition.

Regarding the suggestions to allow F–1 students remain in lawful status through the adjudication of H–1B petitions filed on their behalf, DHS will not make the requested changes to extend F–1 status and associated employment authorization, as applicable, through the commencement of the next cap season, when USCIS concludes registration selection for the relevant fiscal year, or when USCIS announces that the cap has been reached. DHS does not believe that these changes are necessary because April 1 of the relevant fiscal year is

further into the future than those three conditioning events. In the three most recent H–1B cap seasons, USCIS has commenced the next H–1B cap season, concluded all registration selection rounds, and announced that the respective H–1B caps have been fulfilled before April 1 of the respective fiscal years.

Comment: While expressing general support for the proposal, an attorney suggested that DHS revise the cap-gap provision to automatically extend status and employment authorization until adjudication of the H–1B petition is complete. The attorney added that there is no guarantee that extending the cap-gap would solve the issue at hand due to current processing delays and USCIS adjudication backlogs. A trade association echoed the request for the cap-gap provision to be extended until final adjudication of the H–1B petition, reasoning that the risk of fraud would be relatively low.

Response: As noted in the NPRM, according to USCIS data for FY 2016 through 2022, USCIS adjudicated approximately 99 percent of H–1B cap-subject petitions requesting a change of status from F–1 to H–1B by April 1 of the relevant fiscal year.[90] 88 FR 72870, 72887 (Oct. 23, 2023). By automatically extending employment authorization until April 1 of the relevant year, DHS expects USCIS will be able to adjudicate nearly all H–1B cap-subject petitions requesting a change of status from F–1 to H–1B by this date.[91] DHS declines to automatically extend employment authorization until the final adjudication of the H–1B petition given the size of the affected population and the subjectivity of the circumstances surrounding the delay in final adjudication of H–1B petitions for this population. Further, providing a certain end-date of employment authorization provides needed clarity with respect to the verification of employment authorization and reduces the risk of unauthorized employment.

Comment: A joint submission proposed that USCIS eliminate the April 1 outside limit on cap-gap coverage and instead extend status and work authorization throughout the entire pendency of the petition. Alternatively, the commenter recommended further clarity regarding the proposed regulatory term ''until the validity start date of the approved petition'' and proposed alternative language to refer to a petition that ''not been finally adjudicated by the requested start date on the petition.''

Response: DHS declines to adopt the commenters' suggestion to extend status and work authorization through the adjudication of the petition for the reasons explained above. Further, DHS believes that the regulatory text stating that duration of status and employment authorization will be automatically extended ''until the validity start date of the approved petition'' is sufficiently clear. The commenters' suggested language regarding petitions that have not been finally adjudicated would also allow extensions of status and work authorization for petitions that have been denied and appealed, which was not contemplated in the proposed rule. DHS is concerned that such an expansion could create an incentive for petitioners to file frivolous appeals in order to obtain extensions of status or work authorization, and therefore, declines to adopt this suggestion.

Comment: Many commenters provided additional suggestions in response to the proposed provision. To address the F–1 60-day grace period in the cap-gap context, a professional association asked DHS to include language in 8 CFR 214.2(f)(5)(vi) to clarify when the 60-day grace period would start if an H–1B petition has been denied, revoked, or withdrawn before April 1 or remains pending on April 1.

Response: As noted in the NPRM, if the H–1B petition underlying the cap-gap extension is denied before April 1, then, consistent with existing USCIS practice, the F–1 beneficiary of the petition, as well as any F–2 dependents, would generally receive the standard F–1 grace period of 60 days to depart the United States or take other appropriate steps to maintain a lawful status. 88 FR 72870, 72887 (Oct. 23, 2023) (citing 8 CFR 214.2(f)(5)(iv)). If the H–1B petition is still pending on April 1, then the beneficiary of the petition is no longer authorized for OPT and the 60-day grace period begins on April 1. 88 FR 72870, 72887 (Oct. 23, 2023). Although the F–1 beneficiary may not work during the 60-day grace period, individuals generally have been allowed to remain in the United States in an authorized period of stay while a subsequent H–1B petition and change of status request is pending. While this is stated in the preamble to the proposed rule, DHS declines add this language to the regulatory text.

Comment: An advocacy group provided the following suggestions in response to the proposed provisions:

- Extend the 24-month extension of post-completion OPT an additional 24 months in case the OPT beneficiary is not selected in the lottery;
- Extend OPT to a total of 36 months; and
- Increase the grace period to 180 days so that the OPT holder has adequate time to switch back to F–1 or obtain another status.

Response: The revision of the cap-gap extension finalized in this rulemaking is intended to provide greater flexibility and better prevent disruptions in employment authorization specifically for F–1 students who are beneficiaries of qualifying H–1B cap-subject petitions. As the suggestions to expand the STEM OPT extension, expand the period of time during which F–1 students may engage in OPT, and double the F–1 grace period, are unrelated to the goals of cap-gap extension, they are beyond the scope of this rulemaking and DHS declines to adopt the suggestions.

Comment: Several commenters generally opposed the extension of cap-gap and work authorization. A commenter stated that the cap-gap extension would hurt American students, while another commenter expressed that F–1 students should be limited to 90 days to find a job, as this would take jobs away from citizens who better understand the culture and workings of the United States.

Response: To qualify for this automatic extension, an F–1 student must be the beneficiary of a pending, timely-filed, non-frivolous H–1B cap-subject petition that requests a change of status. *See* new 8 CFR 214.2(f)(5)(vi)(A). As these F–1 students are necessarily seeking employment that is subject to annual numerical allocations, and the H–1B petitions filed on their behalf by a petitioning employer must be non-frivolous, DHS believes that the eligibility requirements for the automatic extension are sufficient to ensure that U.S. citizen students and workers are not adversely affected by the continued ability of these F–1 students to maintain employment authorization until April 1 of the relevant fiscal year.

Comment: While expressing general opposition, an advocacy group stated that DHS should deny visas to employers of post-graduate students until U.S. citizens in similar situations find employment. Citing an opinion piece on its own website, an organization stated that the proposed rule does not address the incentives that employers are given to hire F–1 nonimmigrant visa holders over recent American graduates. Another commenter asked USCIS to reconsider any changes that expand access to OPT, reasoning that the system incentivizes

[90] USCIS, OP&S Policy Research Division (PRD), Computer-Linked Application Information Management System 3 (C3) database, Oct. 27, 2022. PRD187.

[91] *See* 88 FR 72870, 72887.

employers to favor noncitizens over citizens since many OPT employers and workers are excused from paying the usual Federal payroll taxes. An advocacy group expressed that the proposed provision is not rooted in statute nor does it cite any legal justification for the change, thus the proposed changes are unauthorized by law. Similarly, another organization urged DHS to rescind all regulations and proposals that allow F–1 nonimmigrant visa holders to work in the United States following graduation, stating that OPT is not authorized under Federal immigration law and creates unlawful competition among workers. The organization added that allowing F–1 nonimmigrant visa holders to extend their period of authorized stay for the purpose of working after they are no longer students violates the scheme Congress created to regulate the admission of nonimmigrants and employment in the United States.

Response: DHS acknowledges the concerns of these commenters but notes that the INA does not contain a requirement that all H–1B petitioners seeking to employ F–1 nonimmigrants conduct a labor market test to determine that there are no able, willing, qualified, and available U.S. workers. DHS declines to impose such a requirement, as that was not proposed in the NPRM and is beyond the scope of this rulemaking. Additionally, DHS does not agree that potential short-term tax incentives employers or workers may experience are a reason to avoid finalizing revisions to 8 CFR 214.2(f)(5)(vi). DHS is aware that, under Internal Revenue Service (IRS) rules, some noncitizens, including F–1 students, may be exempt from paying some Federal taxes for a certain duration of time. However, it is not certain that every F–1 student who benefits from the automatic cap-gap extension of authorized employment will qualify for exemption from Federal taxation. DHS does not believe that potential short-term tax exemption for some F–1 students is a reason to decline to adopt this provision and notes that changes to IRS rules to extend the same Federal tax obligations to employers of F–1 students would need to be addressed by the IRS, not DHS. DHS will proceed with expanding the automatic extension as proposed.

DHS disagrees that the longstanding cap-gap provisions, or the proposed changes to the cap-gap provisions as finalized in this rule, are ultra vires. As stated under the Legal Authority section of the NPRM, section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), authorizes the Secretary to prescribe, by regulation, the time and conditions of the admission of nonimmigrants. 88 FR 72872–72873. As the D.C. Circuit Court of Appeals held, ''[t]he Department's charge to set the 'conditions' of nonimmigrant admission includes power to authorize employment—a fact that Congress has expressly recognized by statute.'' *Wash. All. of Tech. Workers* v. *Dep't of Homeland Sec.,* 50 F.4th 164, 190 (D.C. Cir. 2022). Thus, contrary to the commenter's assertion, the expansion of the cap-gap provisions as finalized in this rule are consistent with the Secretary's authority under section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1) and not ultra vires.

Comment: A professional association recommended that USCIS extend dual intent to F–1 visas and offer a ''direct route'' for doctoral candidates to transition from F–1 to H–1B status, as this would help attract and retain foreign talent and benefit the U.S. economy.

Response: DHS declines to adopt the suggestions. The requirement that a student have a residence in a foreign country which the student has no intention of abandoning and to demonstrate nonimmigrant intent is grounded in statute and beyond the scope of this rulemaking. As to the request to offer a ''direct route'' for doctoral candidates to transition from F–1 to H–1B status, it is not clear if the commenter is requesting a cap exemption, a set aside under the advanced degree exemption, or a different ''direct route.'' Regardless, DHS declines to adopt this suggestion. DHS responded to a similar comment in the final rule, ''Improving the H–1B Registration Selection Process and Program Integrity,'' published on February 2, 2024. This commenter requested that DHS introduce degree-based categorizations in the selection system, reasoning that such an approach would allow more advanced degrees, like Ph.D.s., to have a unique category to align with the specialty-based nature of the H–1B classification. 89 FR 7456, 7474 (Feb. 2, 2024). DHS responded to this comment, explaining that in the NPRM, DHS did not propose to prioritize or give preference to any registration based on skills, salaries/wages, education, experience, industry, or any other new criteria and declined to implement this suggestion. 89 FR 7456, 7474 (Feb. 2, 2024). Similarly, DHS will not adopt this suggestion.

Comment: A university encouraged USCIS to improve the Computer Linked Application Information Management System (CLAIMS), so that correct data flows into the Student and Exchange Visitor Information System (SEVIS) once USCIS has adjudicated H–1B petitions for which F–1 students are listed as beneficiaries. The university elaborated that if this solution is not feasible, the Student and Exchange Visitor Program (SEVP) could be given access to the approval information to increase communication between USCIS and SEVP.

Response: DHS and component agencies are making continuous enhancements to these and other systems. However, DHS believes that further improvements, to the extent they are necessary, can be accomplished outside of the regulatory process. Therefore, DHS declines to adopt these suggestions as part of this final rule.

10. Other Comments on Benefits and Flexibilities

Comment: A commenter remarked that the rule should be flexible and adaptable to changing economic conditions and workforce demands to ensure that the programs remain responsive to the needs of American businesses and the global economy. Another commenter encouraged USCIS to explore solutions for international students who wish to stay and contribute to the United States by exploring alternative visa pathways or retention measures.

Response: While DHS values flexibility and adaptability, this comment lacks specificity about the changes DHS could make to this rule to promote those values. DHS always strives to balance flexibility and adaptability with clarity and integrity, and DHS believes this rule strikes that balance. With respect to exploring solutions for international students who wish to stay and contribute to the United States, increasing the automatic extension of duration of status and authorized employment under 8 CFR 214.2(f)(5)(vi) will allow F–1 students greater flexibility to remain in the United States while their H–1B petitions are adjudicated. Additional changes as suggested by the commenter, such as exploring alternative visa pathways or retention measures, are beyond the scope of this rulemaking.

Comment: A commenter proposed the inclusion of provisions that allow H–1B visa holders to engage in supplementary income-generating activities in creative and AI-related fields, reasoning that these opportunities would foster innovation, job creation, and contribute to the United States' cultural and technological diversity. Another commenter suggested that H–1B holders be permitted to switch or work with multiple employers at the same time.

Response: It is unclear in what context the commenters propose to allow H–1B workers to engage in supplementary income-generating activities, such that existing regulations would not allow for such arrangements. An H–1B beneficiary may change employers if their new employer files a new petition requesting H–1B classification and an extension of stay for the beneficiary, *see* 8 CFR 214.2(h)(2)(i)(D). With respect to allowing H–1B beneficiaries to work for multiple employers, DHS notes that H–1B workers are permitted to change employers, *see* 8 CFR 214.2(h)(2)(i)(D), and obtain authorization to work concurrently for multiple employers, *see* 8 CFR 214.2(h)(2)(i)(C) (requiring that a separate petition be filed by each employer). In either scenario, an eligible H–1B beneficiary may start concurrent or new employment upon the filing of a non-frivolous H–1B petition or as of the requested start date, whichever is later. *See* 8 CFR 214.2(h)(2)(i)(H). Therefore, DHS will not make a change to this rule resulting from these comments.

Comment: A joint submission requested clarification on immediate and automatic revocation, specifically on the language stating that ''[t]he approval of an H–1B petition is also immediately and automatically revoked upon notification from the H–1B petitioner that the beneficiary is no longer employed.'' While discussing a terminated worker's ability to rejoin a petitioning company within a 60-day grace period so long as the petition has yet to be revoked, the commenters stated that the current requirement to notify USCIS immediately of a termination, along with the proposed automatic revocation provision, would effectively nullify this ability.

Response: DHS proposed to amend 8 CFR 214.2(h)(11)(ii) as part of its effort to modernize and improve the H–1B program, adding benefits and flexibilities and eliminating unnecessary burdens. Currently, 8 CFR 214.2(h)(11)(i)(A) states that, ''If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.'' When a petitioner submits a letter according to 8 CFR 214.2(h)(11)(i)(A), oftentimes the petitioner does not further request USCIS to take a specific action on the petition and therefore USCIS has to take the extra step of issuing an additional notice, such as a Notice of Intent to Revoke (NOIR) to confirm the petitioner's intent. This is an inefficient process as the NOIR essentially asks the petitioner to confirm what was already stated in the letter notifying USCIS that it no longer employs the beneficiary. New 8 CFR 214.2(h)(11)(ii) eliminates this redundancy and provides for immediate and automatic revocation upon notification from the H–1B petitioner that the beneficiary is no longer employed by the petitioner. The requirement that the petitioner notify USCIS of any material change, including when a beneficiary is no longer employed by a petitioner, is not a new requirement. DHS believes that this slight modification will increase efficiency for both stakeholders and USCIS, and reduce unnecessary, time-consuming tasks such as issuing unnecessary notices for which USCIS rarely receives a response or outcome other than revocation of the approved H–1B petition.

USCIS also has encountered companies using this technicality in the regulatory language to allow beneficiaries to retain an approved H–1B petition for additional time beyond that for which they would otherwise be eligible. These companies would submit a statement saying the beneficiary stopped working, thus complying with the existing 8 CFR 214.2(h)(11)(ii) regulatory language, but they would not explicitly request withdrawal or automatic revocation of the petition to retain the appearance of a valid petition approval for the beneficiary until a NOIR, petitioner response, and subsequent revocation could be completed. The appearance of a valid petition approval, and corresponding maintenance of status, creates potential confusion, particularly for other agencies that may rely upon the approval notice to validate eligibility for certain benefits.

The joint submission also states that finalizing this rule would ''effectively nullify the clear intent'' of an existing USCIS web page [92] explaining options for terminated nonimmigrant workers because that web page indicates that a terminated worker can rejoin a petitioning company during the 60-day grace period as long as the petition has not been revoked. However, DHS notes that the web page further explains ''If your employer notified us of the termination, thus automatically revoking the petition approval, the employer would need to file a new petition with us.'' [93] This is consistent with new 8 CFR 214.2(h)(11)(ii). DHS therefore does not agree that new 8 CFR 214.2(h)(11)(ii) will ''nullify the intent'' of the web page. Further, DHS believes that finalizing this rule will eliminate redundancy and promote efficiency in adjudications. Therefore, DHS declines to make any changes in response to this comment.

F. Program Integrity

11. Provisions To Ensure Bona Fide Job Offer for a Bona Fide Specialty Occupation Position

i. Contracts

Comment: A joint submission and a trade association stated that requesting contractual agreements would not help adjudicators in determining whether the position satisfies the specialty occupation requirements, as they often do not contain information about the position's minimum educational requirements. Both commenters added that these documents do not normally discuss minimum educational requirements for jobs being performed pursuant to the agreements as they are not typically relevant to the parties' business interests, cannot be practicably obtained due to nondisclosure provisions within those contracts, that the contractual evidence of minimum educational requirements is not always germane to the specialty occupation criteria, and that an H–1B petitioner may not have a contract with a third-party employer. The joint submission stated that when a petitioner and a client negotiate for a specific deliverable, clients do not typically seek to impose any minimum educational requirements on the employees the petitioner might assign to the project as the satisfactory completion of the project is the overarching objective. Similarly, a legal services provider voiced concern that most work orders would not contain the minimum educational requirements outlined in the proposed rule and that a USCIS officer could deny the petition even when the minimum educational requirements to perform the duties are clear from all of the other evidence submitted.

Response: DHS is aware that contracts do not always contain minimum educational requirements. DHS also recognizes that information that may be

[92] *See* DHS, USCIS, *Options for Nonimmigrant Workers Following Termination of Employment* (last reviewed/updated Apr. 1, 2024), *https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/options-for-nonimmigrant-workers-following-termination-of-employment.*

[93] *See* DHS, USCIS, *Options for Nonimmigrant Workers Following Termination of Employment* (last reviewed/updated Apr. 1, 2024), *https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/options-for-nonimmigrant-workers-following-termination-of-employment.*

relevant to one scenario (*e.g.,* where the beneficiary will be staffed to fill a position within the end-client's organization) might not be equally relevant or probative to other scenarios (*e.g.,* where the petitioner is hired to complete a project for the end-client and determine necessary staffing allocation to complete the project). DHS did not propose to require the submission of contracts in all instances. Rather, DHS proposed to clarify its existing authority to request contracts, work orders, or similar evidence, in appropriate cases in accordance with 8 CFR 103.2(b) (USCIS may request additional evidence if the evidence submitted does not establish eligibility) and 214.2(h)(9) (''USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication.''). Current 8 CFR 214.2(h)(4)(iv)(A) requires petitioners to submit evidence to establish that the beneficiary is qualified to perform services in a specialty occupation and that the services the beneficiary is to perform are in a specialty occupation. The petitioner bears the burden of establishing eligibility for an immigration benefit.[94] If the required initial evidence submitted by the petitioner is sufficient to establish that the services the beneficiary is to perform are in a specialty occupation and that the beneficiary is qualified to perform services in that specialty occupation, then additional evidence would not be needed to establish the minimum educational requirements for the position and would, therefore, not be requested under new 8 CFR 214.2(h)(4)(iv)(C). However, under existing USCIS policy, if the petitioner has not satisfied its burden, the adjudicating officer would generally issue an RFE to request evidence of eligibility.[95] The RFE should identify the eligibility requirement(s) that has not been established and why the evidence submitted is insufficient; identify any missing evidence specifically required by the applicable statute, regulation, or form instructions; identify examples of other evidence that may be submitted to establish eligibility; and request that the petitioner submit such evidence. The adjudicating officer should not request evidence that is outside the scope of the adjudication or otherwise irrelevant to an identified deficiency.[96] At the same time, DHS will not limit USCIS' prerogative to request contracts, work orders, or other similar evidence if it is determined such evidence would aide adjudicators in ascertaining whether a position is a specialty occupation, as claimed. Consistent with this policy, new 8 CFR 214.2(h)(4)(iv)(C) lists examples of evidence that may be requested by USCIS, and submitted by the petitioner, to establish eligibility. If evidence, such as contracts or work orders, is unavailable or does not contain the requested information, the petitioner may submit alternative evidence to establish eligibility. Regarding the commenter's concern about petitions where the position's minimum educational requirements are clear from all of the other evidence submitted, in such a case, USCIS would not likely issue an RFE for additional evidence of the position's minimum educational requirements.

Comment: An attorney, writing as part of a form letter campaign, requested that USCIS retain its current guidance noted in the document ''PM–602–1114 Recission of Policy Memorandum on Contracts and Itineraries'' which the commenter said, ''does not create extra work for both the H–1B petitioner and their clients.'' A law firm stated that the request for contracts would run counter to other streamlining measures and be contrary to the statements in the proposed rule.

Response: As stated in the NPRM, USCIS already has the authority to request contracts and other similar evidence. 88 FR 72870, 72901 (Oct. 23, 2023). DHS acknowledges that since USCIS Policy Memorandum PM–602–0114, ''Rescission of Policy Memoranda,'' was issued in July 2020, contracts and legal agreements have generally not been requested for H–1B petitions. DHS further acknowledges, as a result of new 8 CFR 214.2(h)(4)(iv)(C) and other provisions of this final rule, that petitioners may be requested to submit such documentation in some cases. However, while USCIS has not generally requested such evidence in recent years, USCIS retains the authority to request such evidence and, new 8 CFR 214.2(h)(4)(iv)(C) is a codification of that authority. Contracts and similar evidence may be helpful to establish the minimum educational requirements to perform the duties of a position and that there is a bona fide job offer and a position in a specialty occupation for the beneficiary, thereby establishing eligibility for H–1B nonimmigrant classification. Therefore, DHS believes it is appropriate to codify the authority to request such evidence and put stakeholders on notice of the kinds of evidence that could be requested to establish the bona fide nature of the beneficiary's position and the minimum educational requirements to perform the duties. Further, DHS does not believe that this provision runs counter to other measures from the proposed rule because, again, petitioners bear the burden of establishing eligibility for an immigration benefit[97] and nothing in this rule is intended to relieve petitioners of that burden.

In response to stakeholder comments, DHS is revising the contracts provision at 8 CFR 214.2(h)(4)(iv)(C) in this final rule to state that USCIS may request contracts or similar evidence ''showing the bona fide nature of the beneficiary's position'' rather than ''showing the terms and conditions of the beneficiary's work'' as stated in the NPRM. This revision is intended to clarify that USCIS will be reviewing contracts or similar evidence to determine if the position is bona fide, not that USCIS will be specifically looking at the terms and conditions of the beneficiary's work, which could include the terms and conditions as specified by the petition, but would not include the terms and conditions of the beneficiary's work more generally, which could imply that officers will be looking for an employer-employee relationship or the right to control. As explained in the NPRM and elsewhere in this final rule, DHS is removing the reference to the employer-employee relationship from the definition of U.S. employer, consistent with current practice since June 2020 when, following a court order and settlement agreement,[98] USCIS formally rescinded its January 2010 policy guidance on the employer-employee relationship.[99] As a result, USCIS no longer requires the petitioner to establish a right to control the beneficiary's work.

As also noted above, the provision provides greater transparency by putting

[94] *See* INA 291, 8 U.S.C. 1361.

[95] *See* USCIS Policy Manual, Vol. 1, ''General Policies and Procedures,'' Part E, ''Adjudications,'' Chap. 6, ''Evidence,'' *https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6*.

[96] *See* USCIS Policy Manual, Vol. 1, ''General Policies and Procedures,'' Part E, ''Adjudications,'' Chap. 6, ''Evidence,'' *https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6*.

[97] *See* INA 291.

[98] *See ITServe All., Inc.* v. *Cissna,* 443 F.Supp.3d 14, 19 (D.D.C. 2020) (finding that the USCIS policy interpreting the existing regulation to require a common-law employer-employee relationship violated the Administrative Procedure Act as applied and that the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) is ultra vires as it pertains to H–1B petitions).

[99] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf*. This memorandum rescinded the USCIS policy memorandum ''Determining Employer-Employee Relationship for Adjudication of H–1B Petitions, Including Third-Party Site Placements,'' HQ 70/6.2.8 (AD 10–24) (Jan. 8, 2010).

stakeholders on notice of the kinds of evidence that could be requested to establish the bona fide nature of the beneficiary's specialty occupation position and the minimum educational requirements to perform the duties. Such evidence will not be requested in all cases, but only those where the petitioner has otherwise failed to meet its burden of proof to establish eligibility by a preponderance of the evidence. Finally, DHS believes that codification of the authority to request contracts or other evidence will help enhance the integrity of the H–1B program, which is a primary goal of this final rule.

Comment: A joint submission and a trade association stated contracts and work orders specifying minimum educational requirements are not legally probative in most employment contexts, and in actual business practice often do not exist at all, and that the proposed provision ''creates the potential to exclude sectors of the economy from the H–1B program, as well as place burdensome obligations on parties not before USCIS.'' The joint submission added that the scope of the burden for providing documentation would be disproportionate to the goal of ensuring a bona fide job offer, stating that although the NPRM does not mandate the submission of contracts, it is strongly suggested. The commenters requested USCIS give more consideration to codifying that client contracts would continue to be an optional—but not necessary—type of evidence to support an H–1B petition.

Joint submission commenters wrote that codifying the ability to request contracts would be an invitation for adjudicators to view contracts as a basic requirement for all H–1B petitions, even when such contracts are legally irrelevant to establishing the existence of a bona fide job offer, particularly in consideration of the fact that the burden of proof is a ''preponderance of the evidence'' standard. The commenters added that the proposed regulation goes far beyond that which is necessary by establishing a requirement potentially applicable to all that is only probative in a subset of situations. The joint submission also stated that the types of evidence envisioned by this rule are not universal to all business models and arrangements, making the rule significantly burdensome, if not in some cases impossible. The commenters said that the proposed regulatory change also fails to recognize that the petitioning H–1B employer may not have a contract with the end client at whose business location the H–1B worker would be placed upon which to draw, which the commenter described as an entirely common practice. For these reasons, the commenters said that the proposed regulation fails to recognize the complex and rapidly changing nature of modern-day business arrangements, and, in so doing, creates unnecessary and unfair roadblocks to employers who need to access key talent using the H–1B program.

Response: As noted, new 8 CFR 214.2(h)(4)(iv)(C) is a codification of DHS's existing authority to request contracts, work orders, or similar evidence, in appropriate cases in accordance with 8 CFR 103.2(b) (USCIS may request additional evidence if the evidence submitted does not establish eligibility) and 214.2(h)(9) (''USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication.''). DHS does not expect that such evidence will be requested in all cases, and thus disagrees with commenters that the provision will be unduly burdensome, create unfair roadblocks for petitioners, or exclude sectors of the economy. DHS recognizes that information that may be relevant in one scenario (*e.g.,* where the beneficiary will be staffed to fill a position within the end-client's organization) might not be equally relevant or probative in other scenarios (*e.g.,* where the petitioner is hired to complete a project for the end-client and determine necessary staffing allocation to complete the project). DHS did not propose to request the submission of contracts in all instances.

With respect to commenters' concerns that specified documentation may not exist and that the types of evidence identified in the regulation ''are not universal,'' DHS notes that, in USCIS's adjudicative experience, generally, petitioners have been able to submit written agreements (or business arrangements/requests for services) between relevant parties in a service transaction and that such agreements are relevant and probative in certain cases. It is reasonable to expect petitioners, when relevant and probative, to continue to submit such documentation, most often in the form of contracts, work orders, or end-client letters. These documents, when relevant and probative, often assist DHS in establishing the type of work to be performed, the bona fide nature of the specialty occupation position, the skills and resources required to perform the work, and the bona fide nature of the beneficiary's job offer. Further, new 8 CFR 214.2(h)(4)(iv)(C) provides a non-exhaustive list of documents that may be requested in order to establish the bona fide nature of the beneficiary's position and the minimum educational requirements to perform the duties of the position. However, it is important to note that new 8 CFR 214.2(h)(4)(iv)(C) does not require or mandate submission of any specific type of evidence or in any specific format and, as noted in the NPRM, petitioners may submit other documentation that is detailed enough to provide a sufficiently comprehensive view of the position being offered to the beneficiary and the bona fide nature of the position. 88 FR 72870, 72901 (Oct. 23, 2023). While this provision does not require petitioners to submit any specific type of documentation, such as contracts or legal agreements between the petitioner and third parties, the petitioner must demonstrate eligibility for the benefit sought.[100]

DHS also disagrees that this codification of USCIS' authority to request evidence showing the bona fide nature of the beneficiary's position and the minimum educational requirements to perform the duties is unduly burdensome for petitioners. Again, new 8 CFR 214.2(h)(4)(iv)(C) does not require the submission of contracts or similar documents, and DHS does not anticipate that this evidence will be requested in all cases. In fact, DHS anticipates that in the majority of cases, petitioners will not be requested to submit contracts or similar evidence to demonstrate the existence of a bona fide position in a specialty occupation position. However, DHS believes that it is important to have clear authority in the regulations so that officers may request contracts, work orders, or other similar evidence where the petitioner has not shown that a bona fide position is available for the beneficiary. For example, uncorroborated statements about a claimed in-house project for a company with no history of developing projects in-house, standing alone, would generally be insufficient to establish the existence of a bona fide position in a specialty occupation. In such a case, an officer could request contracts or other similar evidence.

Comment: A joint submission said that many client contracts contain nondisclosure provisions that prohibit disclosure of the contracts to third parties, and the language of the proposed regulation would put these petitioners in a very difficult place where they must choose between violating a specific contractual provision prohibiting disclosure or having an H–1B petition for a key

[100] See USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf*.

employee denied. The joint submission said that the implied risk of denial from noncompliance is made clear in the proposed rule by stating, ''Although a petitioner may always refuse to submit confidential commercial information, if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of denial.'' [101]

The company, along with an individual commenter, stated that documents could contain ''highly confidential information related to controlled technology (including those involving government contracts), restricted from disclosure by government authorities or subject to non-disclosure agreements'' and would not verify the minimum educational requirements for the position. The company stated that employers should not be required to produce records ''irrelevant to the H–1B petition or sensitive business information when other information is available and sensitive information could be discoverable through the Freedom of Information Act,'' adding that ''the same information can also be provided by letters signed by an authorized company official and supplier representative.'' The commenter requested that ''at the very least'' employers be able to redact or omit sensitive information and that adjudicators not be able to deny H–1B petitions based on unavailable or inapplicable requested evidence, when the petitioner provides other probative evidence of the job offer and educational requirements of the offered position. Similarly, a trade association requested that USCIS clarify that, due to the highly confidential and sensitive nature of contracts, work orders, and similar evidence, redactions do not impact an officer's ability to evaluate the nature of the relationship between parties. Similarly, an individual commenter said that the proposed provisions provide no additional assurances of confidentiality of the documents being provided and do not address how contracts can be provided when the terms of the contracts specifically provide that they should not be disclosed to any person or agency.

Response: DHS is aware that contracts and associated documents could contain confidential or sensitive information. As noted in the NPRM and in line with current practice, if a petitioner submits contracts or other requested evidence that 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. 88 FR 72870, 72901 n.110 (Oct. 23, 2023). Alternatively, petitioners may submit other relevant and probative evidence, such as a letter signed by the end client. Petitioners will not be required to provide sensitive information that is irrelevant and does not show the non-speculative nature of the beneficiary's position or the minimum educational requirements to perform the duties. However, as the petitioner bears the burden of establishing eligibility for an immigration benefit,[102] it is critical that the submitted evidence contain all information necessary for USCIS to adjudicate the petition. Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. 552(b)(4), 18 U.S.C. 1905. Additionally, a petitioner may request pre-disclosure notification. *See* ''Predisclosure Notification Procedures for Confidential Commercial Information.'' E.O. 12600, 52 FR 23781 (June 23, 1987).

Comment: A few commenters voiced general concern that requests for documentation from petitioners and third parties would be burdensome, especially for smaller IT consulting firms and startups. A company and an advocacy group voiced concern with codifying an expectation that USCIS would request contracts, work orders, or similar evidence of the job offer due to employers being unable to provide complete copies of statements of work. A professional association and a law firm said the proposed rule would ''unfairly'' require third party employers to produce a higher amount of documentation to immigration authorities, making them more susceptible to ''broad, trivial inquisitions.''

A trade association stated that the requirement would ignore ''the reality of contract law'' because parties would not want to bind themselves to something contractually that is not necessary to the performance of the object and purpose of the contract, and because it would create contractual obligations to and for persons that are not in privity with all of the contracting parties, such as the H–1B beneficiary. The commenter added that such a dynamic could create burdens for the legal system in the event a contract dispute arises. Both the joint submission and the trade association said that due to these factors, requesting contractual evidence in support of a bona fide job offer would be arbitrary and capricious.

Response: DHS does not agree that this provision will be unduly burdensome on petitioners and does not agree that it will unfairly require any petitioner, including those where the beneficiary will provide service to a third-party, to provide a higher amount of documentation. Again, in all H–1B visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought.[103] Specifically, a petitioner must establish, among other things, that the beneficiary will perform services in a specialty occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty (or its equivalent) as a minimum requirement for entry into the occupation in the United States. Where the beneficiary will be staffed to a third party, this may be demonstrated by contracts or other similar evidence to establish the bona fide nature of the beneficiary's position and the minimum educational requirement(s) to perform those duties, thus ensuring that the beneficiary will perform services in a specialty occupation.[104] While the evidence needed to satisfy the petitioner's burden may differ from case to case, the essential elements of what the petitioner must establish remain the same. Therefore, while additional evidence may be required in some cases, DHS does not agree that this is unfair or unduly burdensome.

As stated previously, DHS does not anticipate that this evidence will be requested in all cases, but there may be cases where additional evidence is

[101] 88 FR 72901 & n.110 (citing *Matter of Marques,* 16 I&N Dec. 314 (BIA 1997)).

[102] *See* INA 291.

[103] *See* INA sec. 291, 8 U.S.C. 1361; *Matter of Simeio Solutions,* 26 I&N Dec. 542, 549 (AAO 2015) (''It is the petitioner's burden to establish eligibility for the immigration benefit sought.''); *Matter of Skirball Cultural Center,* 25 I&N Dec. 799, 806 (AAO 2012) (''In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.''); *Matter of Chawathe,* 25 I&N Dec. 369 (AAO 2010) (''In most administrative immigration proceedings, the applicant must prove by a preponderance of evidence that he or she is eligible for the benefit sought.'').

[104] *See Defensor* v. *Meissner,* 201 F.3d 384, 387–88 (5th Cir. 2000) (''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 nonspecialty 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.'').

needed to establish eligibility. For example, if a petitioner claims that a beneficiary will be staffed to a third-party yet fails to provide any documentation to establish the nature of the work to be performed by the beneficiary or the requirements of the position, then corroborating evidence may be needed to demonstrate the bona fide nature of the beneficiary's position and the minimum educational requirement to perform the duties. When submitted, these documents should be detailed enough to provide a sufficiently comprehensive view of the position being offered to the beneficiary. The documentation should also include the minimum educational requirements to perform the duties. Documentation that merely sets forth the general obligations of the parties to the agreement, or that does not provide specific information pertaining to the actual work to be performed, would generally be insufficient. If the existing contracts or work orders do not provide this level of detail, or the petitioner believes that they are unable to provide such evidence because of confidentiality or non-disclosure provisions, petitioners could provide other evidence, such as end-client letters that provide this information or similar evidence that petitioners think is relevant and probative. Through the proposed provision, which is being finalized in this rule, DHS is putting stakeholders on notice of the kinds of evidence that could be requested to establish the bona fide nature of the beneficiary's position and the minimum educational requirements to perform the duties.

Furthermore, DHS disagrees that this provision is arbitrary and capricious. As explained above, DHS is not requesting contracts or similar evidence in all cases. If the petition includes sufficient evidence of the bona fide nature of the position and the minimum educational requirements to perform the job duties, USCIS officers will not request additional documentation in this regard. Furthermore, DHS is aware that some contracts may not contain minimum educational requirements for a position. If contracts are unavailable or do not include the relevant information, petitioners may submit other reliable evidence to demonstrate the bona fide nature of the position or the minimum educational requirements for the proffered position. Additionally, DHS is revising the regulatory language from what it proposed such that new 8 CFR 214.2(h)(4)(iv)(C) does not contain the phrase the ''terms and conditions of the beneficiary's work.'' This change clarifies that contracts are being requested for limited purposes and not for the purpose of establishing an employer-employee relationship.

Comment: A few commenters stated that the proposed provision to ''require employers to show they have existing contracts for projects'' would contradict DOL rules governing a job offer, which the commenters said converts the LCA into a de facto contract for employment.

Response: DHS does not agree that new 8 CFR 214.2(h)(4)(iv)(C) requires ''employers to show they have existing contracts for projects'' in all cases. Rather, as noted above, it is a codification of DHS's existing authority to request contracts, work orders, or similar evidence, in appropriate cases in accordance with 8 CFR 103.2(b) (USCIS may request additional evidence if the evidence submitted does not establish eligibility) and 214.2(h)(9) (''USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication.''). While the reference to the LCA being converted ''into a de facto contract for employment'' is unclear, DHS notes that nothing in new 8 CFR 214.2(h)(4)(iv)(C) conflicts with DOL regulations and reiterates that this provision is a codification of existing DHS authority. While the LCA does contain information regarding the proffered position and the employer, as well as attestations from the employer regarding, among other things, wages and working conditions, it does not contain information regarding the specific educational requirements of the proffered position and thus will not be sufficient to establish that a position is in a specialty occupation.[105] Additional evidence may be needed in order to demonstrate the bona fide nature of the beneficiary's position and/or the minimum educational requirement to perform the duties, and new 8 CFR 214.2(h)(4)(iv)(C) clarifies the authority of USCIS to request such evidence as needed.

Comment: A professional association and a law firm stated that DHS's proposal to request contracts or similar evidence overstepped its congressional authority, citing the 2020 court case *ITServe Alliance, Inc.* The commenters stated that the District Court for the District of Columbia held that Congress did not intend to give USCIS the broad authority to request this type of evidence for H–1B visas under the American Competitiveness and Workforce Improvement Act of 1998 and wrote that itinerary and contract evidence for proving non-speculative terms and conditions of the work is ''a total contradiction'' of providing temporary expertise in a qualifying specialty occupation position. The commenter stated that terms and conditions of the beneficiary's daily duties ''change day-to-day to adjust to complex, unique situations.'' The commenters also stated that general terms and conditions like educational requirements are already disclosed in submitted documents like the Labor Condition Application and the I–129, Petition for a Nonimmigrant Worker. A trade association said that the codification of the authority to request contracts and similar evidence would be an unnecessary holdover from the employer-employee relationship requirement. The commenter, along with a legal services provider, cited the decision in *ITServe Alliance, Inc.,* as justification for why USCIS should not finalize the provision granting DHS the authority to request contracts and similar evidence. The trade association stated that the proposed rule only makes passing mention of *ITServe Alliance, Inc.* and simply repackages prior policies. Similarly, a legal services provider voiced concern that the proposed provision would result in the revival of the guidance of the 2018 Policy Memo, which was overturned in *ITServe Alliance, Inc.* The commenter stated concern that USCIS would begin requesting excessive evidence of the contractual relationship in the ''overreaching way'' that it did before the 2020 court settlement, which the commenter said would overburden employers and their clients, and create more work for USCIS in issuing RFEs.

Response: DHS disagrees with commenters' assertions that it is seeking to reinstate prior policy guidance from the 2018 memorandum *Contracts and Itineraries Requirements for H–1B Petitions Involving Third-Party Worksites.*[106] DHS is not suggesting that a contract is required or that contracts will be requested to accompany every petition. As explained in the NPRM and above, DHS is codifying USCIS' authority to request contracts, work orders, or similar evidence, in accordance with 8 CFR 103.2(b) (USCIS may request additional evidence if the evidence submitted does not establish eligibility) and 214.2(h)(9) (''USCIS will consider all the evidence submitted and

[105] DOL's regulation at 20 CFR 655.705(b) specifically recognizes that ''DHS determines. . .whether the occupation named in the labor condition application is a specialty occupation.''

[106] USCIS, ''Contracts and Itineraries Requirements for H–1B Petitions Involving Third-Party Worksites,'' PM–602–0157 (Feb. 22, 2018) (rescinded), *https://www.uscis.gov/sites/default/files/document/memos/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.*

any other evidence independently required to assist in adjudication.'').[107] With new 8 CFR 214.2(h)(4)(iv)(C), DHS is simply putting stakeholders on notice of the kinds of evidence that could be requested. While an H–1B petitioner is not required to submit contracts or legal agreements between the petitioner and third parties, the petitioner must demonstrate eligibility for the benefit sought.[108] By contrast, the 2018 memorandum stated that petitioners must establish, among other things, that ''the petitioner has specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested in the petition'' and that ''the employer will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period.'' [109] There are no such requirements in this final rule. Again, new 8 CFR 214.2(h)(4)(iv)(C) codifies USCIS' authority to request contracts and similar evidence but does not require submission of such evidence in all cases. Similarly, new 8 CFR 214.2(h)(4)(iii)(F) codifies the requirement that a petitioner must demonstrate, at the time of filing, availability of a bona fide position in a specialty occupation as of the requested start date but does not require petitioners to identify and document the beneficiary's specific day-to-day assignments for the entire validity period requested.

DHS further disagrees with commenters' assertions that this provision conflicts with the court's findings in *ITServe Alliance, Inc.* v. *Cissna,* 443 F.Supp. 3d 14 (D.D.C. 2020). The district court in that case found, in pertinent part, that it was arbitrary and capricious for USCIS to interpret the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) to require ''contracts or other corroborated evidence of dates and locations of temporary work assignments for three future years.'' [110] Similarly, the court found that the ''requirements that employers (1) provide proof of non-speculative work assignments (2) for the duration of the visa period is not supported by the statute or regulation and is arbitrary and capricious as applied to Plaintiffs' visa petitions.'' [111] However, the *ITServe* court did not find that USCIS' general authority to request corroborating evidence in appropriate cases—which falls far short of requiring evidence of the dates and locations of temporary work assignments for the duration of the validity period—to be impermissible.

While DHS disagrees with these comments, DHS is making some changes to the regulatory text to allay some commenter concerns. First, DHS is adding regulatory text to 8 CFR 214.2(h)(4)(iii)(F) to explicitly state that the petitioner ''is not required to establish non-speculative day-to-day assignments for the entire time requested in the petition.'' Further, DHS is not finalizing the ''terms and conditions'' language at new 8 CFR 214.2(h)(4)(iv)(C) as proposed in the NPRM. As noted above, this change clarifies that contracts are being requested for limited purposes and not for the purpose of establishing an employer-employee relationship. Also, while the definition of ''U.S. employer'' at 8 CFR 214.2(h)(4)(ii) is being amended to codify the existing requirement that the petitioner have a bona fide job offer for the beneficiary to work within the United States, the petitioner will not be required to establish an employer-employee relationship with the beneficiary for the duration of the requested validity period. Collectively, these changes will aide in improving the integrity of the H–1B program while also highlighting that DHS does not intend to reinstate the former policies and practices that some courts have found invalid.

Comment: An individual commenter and a trade association voiced concern that the proposed bona fide job offer provisions were reinstating old policies and stringent measures that could have detrimental effects on businesses. An individual commenter and a law firm stated that the provisions designed to ensure bona fide employment are ''individually and collectively incompatible with the entire practice of contracting specialized IT services,'' as they would upset companies' longstanding reliance interests and would be disruptive to the technology needs of American businesses due to the high demand for computer and technology specialists, which the commenters stated could only be met through using international talent. The commenter additionally said that the rule would ''revive invalidated guidance and rules'' that were put in place to '''target''' information-technology companies and would be contrary to the INA as well as arbitrary and capricious.

Response: DHS does not agree that the provisions to ensure a bona fide job offer for a specialty occupation position, including the codification of USCIS' authority to request contracts or other similar evidence, are contrary to the INA or revive invalidated policies such as those addressed in the court's decision in *ITServe Inc.* v. *Cissna* and rescinded by USCIS in a June 17, 2020 policy memorandum.[112] As discussed above and in the NPRM, new 8 CFR 214.2(h)(4)(iv)(C) is a codification of USCIS' existing authority to request evidence such as contracts and similar evidence. This provision is intended to ensure that there is a bona fide job offer to employ the beneficiary in a bona fide position in a specialty occupation, which is essential to the integrity of the H–1B program. Without a requirement to demonstrate that there is an actual position being offered, there would be no way for DHS to determine if the position is in a specialty occupation, and thus no way for DHS to determine whether the statutory definition of an H–1B nonimmigrant worker as someone who is ''coming temporarily to the United States to perform services in a specialty occupation. . . .'' has been met. *See* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b).

This provision does not require a day-to-day accounting of the beneficiary's tasks, but requires that the petitioner demonstrate there is a bona fide offer of employment for the beneficiary and that the bona fide position in a specialty occupation is immediately available upon the requested start date on the petition. As explained above, DHS is making changes to be responsive to concerns raised by commenters, including adding regulatory text to 8 CFR 214.2(h)(4)(iii)(F) to explicitly state that the petitioner ''is not required to establish non-speculative day-to-day assignments for the entire time requested in the petition.'' This added regulatory text is consistent with *ITServe Inc.* v. *Cissna* and highlights DHS's intent to differentiate this rule from former policies and practices that some courts have found invalid.

DHS further disagrees that new 8 CFR 214.2(h)(4)(iv)(C), either on its own or in

[107] *See also,* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1) (stating that an H–1B petition shall be in such form and contain such information as the Secretary shall prescribe); *cf. Pars Equality Ctr.* v. *Blinken,*—F. Supp. 3d—, 2024 WL 4700636, at *4–6 (N.D. Cal. Nov. 5, 2024) (observing that similar language in INA sec. 202(a), 8 U.S.C. 1202(a), regarding visa applications confers broad discretion on the agency with respect to what supporting evidence is required (citing cases)).

[108] See USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.*

[109] USCIS, ''Contracts and Itineraries Requirements for H–1B Petitions Involving Third-Party Worksites,'' PM–602–0157 (Feb. 22, 2018) (rescinded).

[110] 443 F.Supp. 3d at 41.

[111] *Id.* at 20.

[112] DHS, USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020), available at *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf*

combination with the other integrity measures in this final rule, are ''incompatible with the entire practice of contracting specialized IT services'' as asserted by the commenter. Again, many of these provisions are codifications of existing DHS authority and are intended to provide added clarity regarding the eligibility requirements for the H–1B classification and to enhance the integrity of the H–1B program. Further, the changes made in this final rule are applicable to all H–1B petitioners, not just those that provide IT services. DHS does not believe that codification of the existing authority to request evidence such as contracts or similar evidence, either by itself or in combination with other new integrity provisions in this final rule, will upset petitioners' reasonable reliance interests or disrupt American businesses' ability to meet technology needs.

Comment: A trade association said it wanted to ensure that USCIS is aware of legitimate business reasons integral to infrastructure design for employees—whether they are U.S. citizens, permanent residents, or H–1B visa holders—to work at a client site. The commenter provided an example of such a situation where engineers may have to work on a project site where the work of an engineer would depend upon the work of other contractors on the project and there would be better outcomes if the entire team was together on site. The commenter requested that ''USCIS contemplate these legitimate business reasons for employees, including H–1B visa holders, to work at a client site before it issues time-consuming RFEs to the employer.''

Response: DHS is aware that there are legitimate business reasons for employees to work at a client site and is not limiting or restricting the ability of H–1B beneficiaries to perform their duties at third-party worksites. However, entities filing H–1B petitions that contemplate such scenarios must still satisfy the H–1B specialty occupation requirements. As explained in the NPRM and in response to other comments, DHS is codifying USCIS' authority to request contracts, work orders, or similar evidence, in accordance with 8 CFR 103.2(b). Similarly, as discussed further below, DHS is codifying the existing requirements that there be a bona fide position in a specialty occupation available to the beneficiary as of the start date of the validity period and that the petitioner have a bona fide job offer for the beneficiary to work within the United States. DHS does not anticipate that finalizing these provisions will inhibit the ability of H–1B beneficiaries to work at third-party worksites, since DHS is codifying existing authority rather than imposing new requirements with respect to its ability to request contracts or similar evidence and requiring a bona fide job offer and a bona fide position in a specialty occupation available to the beneficiary.

ii. Bona Fide Employment

Comment: Several commenters voiced appreciation for the proposed provision to require non-speculative employment at the time of H–1B petition filing. A trade association stated that preventing the H–1B program from being used to bring in temporary foreign workers for speculative workforce needs helps improve the H–1B program's integrity and its role in meeting the immediate and specific needs of U.S. employers. Several commenters supported the NPRM's clarification that daily work assignments for the duration of the H–1B validity period are not required for non-speculative employment, and that DHS does not intend to limit H–1B validity periods based on contract, work order, or itinerary terms. One commenter recommended that DHS verify in the final rule that USCIS adjudicators cannot limit H–1B validity periods based on contract, work order, or itinerary terms.

Response: DHS agrees that requiring H–1B petitioners to establish that there is a position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition is an important measure for maintaining program integrity. As discussed below, a number of commenters expressed concern over the term ''non-speculative'' and, in response to those comments, DHS is replacing ''non-speculative'' with ''bona fide,'' so that new 8 CFR 214.2(h)(4)(iii)(F) will state, in relevant part, ''[a]t the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.'' This is not intended to be a substantive change, but to clarify what DHS meant by ''non-speculative'' and to emphasize that this provision is consistent with current policy guidance that an H–1B petitioner must establish that employment exists at the time of filing the petition and that it will employ the beneficiary in a specialty occupation.[113] Regarding daily work assignments, DHS explained in the NPRM, 88 FR 72870, 72902 (Oct. 23, 2023), and is adding to the regulatory text through this final rule, that petitioners are not required to establish specific daily work assignments through the duration of the requested validity period. While DHS does not intend to limit validity periods based on the end-date of contracts, work orders, itineraries, or similar documentation, DHS declines to add any limiting language through this rulemaking. As noted above, DHS is adding the following clarifying language to new 8 CFR 214.2(h)(4)(iii)(F): ''A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.'' As this new language makes clear that petitioners are not required to establish specific daily assignments, DHS believes it is sufficiently clear that USCIS will not limit validity periods based on the end-date of contracts, work orders, itineraries, or similar documentation.

Comment: A few individual commenters and a company said that the proposed provision would work to eliminate IT staffing companies. A business association stated that USCIS has repeatedly confused speculative employment with a speculative project. The commenter said that employment, and the right to receive pay, are guaranteed in the H–1B program once an employee enters the country and is available to start work, therefore making all H–1B employment non-speculative as a matter of law. The commenter added that, in contrast, all employment is based on speculative projects regardless of whether a product or consulting company is employing the H–1B beneficiary. The commenter recommended allowing employers to assume the risk of finding sufficient productive work for an employee to perform or suffer a financial liability if it fails to achieve this aim, in order to be more consistent with the INA.

Further, the commenter claimed that the proposed rule arises out of an attempt to curb the already prohibited practice of ''benching without pay.'' The commenter stated that DOL has already established rules governing a bona fide job offer that does not revolve around a non-speculative project, and that according to DOL, a bona fide job offer is complete when the petition has been approved and the employee is available for work in the United States. The commenter said that the statute and regulations do not create a requirement to show actual work the employee would perform, and in fact creates allowance for an employee to do no work provided they are paid in accordance with the employment contract/LCA. The commenter requested

[113] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020).

that DHS consider that enforcement powers for rules against benching without pay have been explicitly delegated to DOL since 2001, and DHS ''has no such authority codified in the statute.''

Response: DHS does not agree that codifying the requirement of bona fide employment will eliminate IT staffing companies. Nor does DHS agree that this provision confuses ''speculative employment'' with a ''speculative project.'' However, to add clarity to the provision, DHS is replacing ''non-speculative'' with ''bona fide,'' so that new 8 CFR 214.2(h)(4)(iii)(F) states, in relevant part, ''[a]t the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.'' This revision does not change the meaning or intent of the provision, which requires the petitioner to establish that it has a real position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. A bona fide position in a specialty occupation exists when the petitioner demonstrates the substantive nature of the specific position, such that a specialty occupation determination can be made, and when the petitioner demonstrates that the specified position in a specialty occupation exists within the context of its business.

DHS recognizes that employment may be actual, but contingent on petition approval, and emphasizes that employment that is contingent on petition approval, visa issuance (when applicable), or the grant of H–1B status may still be considered bona fide. Further, DHS disagrees with the commenters that requiring a bona fide position in a specialty occupation conflicts with DOL regulations regarding LCA requirements and its prohibition on benching without pay. Requiring a bona fide position is not the same as prohibiting benching without pay. This rule does not propose to change guidance on benching, which is generally prohibited by law to prevent foreign workers from unfair treatment by their employers and to ensure that the job opportunities and wages of U.S. workers are being protected.[114] Nor does DHS agree with the commenters' assertion that obligations under the LCA such as the right to receive pay render ''all H–1B employment non-speculative as a matter of law.'' Although the LCA and DOL regulations impose obligations on employers, the mere existence of these obligations does not, by itself, satisfy all statutory requirements for H–1B eligibility. As explained in the NPRM, the requirement of non-speculative employment derives from the statutory definition of an H–1B nonimmigrant worker as someone who is ''coming temporarily to the United States to perform services . . . in a specialty occupation . . . .'' *See* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 88 FR 72870, 72901 (Oct. 23, 2023). Although an employer has wage obligations under the LCA and DOL regulations, this alone does not establish that the beneficiary will be performing services in a specialty occupation. DHS must determine whether the duties of the position normally require the attainment of a U.S. bachelor's or higher degree in a directly related specific specialty to qualify the position as a specialty occupation, and whether the beneficiary has the appropriate qualifications to perform those duties. DHS is unable to make such determinations where the employment itself is undetermined. The bona fide employment requirement is also consistent with current USCIS policy guidance that an H–1B petitioner must establish that employment exists at the time of filing the petition and that the petitioner will employ the beneficiary in a specialty occupation.[115]

Comment: Several commenters voiced opposition to the proposed requirement for non-speculative employment on the grounds that it repeats prior DHS policies that lack basis in the INA and have been overturned by courts. The trade associations stated that the proposed rule is part of a pattern of DHS activity in contravention of court rulings and the INA, including a 1998 proposed rule and a 2018 Policy Memorandum. The commenters said that while the INA limits H–1B visas to those who would ''perform services . . . in a specialty occupation'' and while the program is not designed to allow individuals to job search within the United States or allow companies to recruit foreign workers based on entirely speculative expansion plans or workforce needs, the proposed rule disregards longstanding Departmental guidance recognizing that employment with a contracting firm may satisfy those requirements even without predetermined assignments to third-party client sites for the entire duration of the visa period. The commenters stated that, in regards to speculative employment, the INA only requires a petitioning employer to show that ''the purported employment is actually likely to exist for the beneficiary,'' suggesting that adjudicators would invariably issue requests for production, which has served as the basis for court decisions to invalidate previous attempts by DHS to demand non-speculative work assignments. A few commenters cited *ITServe Alliance, Inc.,* where the court addressed challenges to the 2018 Policy Memo. The commenters stated that in *ITServe Alliance, Inc.,* the court ruled that the Policy Memo's interpretation of ''specialty occupation,'' which required proof of non-speculative work assignments for the duration of the visa, was in contravention of the INA, which the court stated had emphasized ''occupation'' instead of ''job,'' which ''would likely encompass a host of jobs . . . with concomitant but differing job duties'' and ''[n]othing in [the INA's] definition requires specific and non-speculative qualifying day-to-day assignments for the entire time requested in the petition.'' The joint submission added that the *ITServe Alliance, Inc.* court held that ''[w]hat the law requires, and employers can demonstrate, is the nature of the specialty occupation and the individual qualifications of foreign workers.''

Response: As explained above, DHS is replacing ''non-speculative'' with ''bona fide,'' so that new 8 CFR 214.2(h)(4)(iii)(F) states, in relevant part, ''[a]t the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.'' DHS disagrees with the commenters that the requirement to establish a bona fide position at the time of filing lacks a basis in the INA. As explained in the NPRM, this requirement derives from the statutory definition of an H–1B nonimmigrant worker as someone who is ''coming temporarily to the United States to perform services . . . in a specialty occupation . . . .'' *See* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 88 FR 72870, 72901 (Oct. 23, 2023). Demonstrating bona fide employment is a basic, fundamental requirement [116] and is essential to maintaining the integrity of the H–1B program. The agency has long held that the H–1B classification is not intended

[114] There are certain limited circumstances where benching is not prohibited. *See* INA section 212(n)(2)(C)(vii) (listing exceptions to the prohibition on unpaid benching).

[115] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020).

[116] *Serenity Info Tech, Inc.* v. *Cuccinelli,* 461 F.Supp.3d 1271 (N.D. GA) (2020) (recognizing that ''[d]emonstrating that the purported employment is actually likely to exist for the beneficiary is a basic application requirement.'').

as a vehicle for a person 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.[117] This approach is consistent with current USCIS policy guidance that an H–1B petitioner must establish that employment exists at the time of filing the petition and that it will employ the beneficiary in a position in a specialty occupation.[118]

The requirement to establish a bona fide position at the time of filing does not conflict with the court's findings in *ITServe Alliance, Inc.* Importantly, DHS is not attempting to require evidence of non-speculative employment for the entire period of time requested in the petition. As clearly stated in the NPRM, ''establishing nonspeculative employment does not mean demonstrating non-speculative daily work assignments through the duration of the requested validity period.'' 88 FR 72870, 72902 (Oct. 23, 2023). Further, in response to stakeholder feedback, DHS is clarifying this in the regulatory text by adding, ''A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.'' This new regulatory language makes clear that DHS does not require employers to establish non-speculative and specific assignments for every day of the intended period of employment. The *ITServe* court found, in pertinent part, that the ''requirement that employers (1) provide proof of non-speculative work assignments (2) for the duration of the visa period is not supported by the statute or regulation and is arbitrary and capricious as applied to Plaintiffs' visa petitions.'' [119] However, the *ITServe* court did not find that a general requirement for bona fide employment—which falls short of requiring non-speculative work assignments for the duration of the visa period—to be impermissible. This requirement is consistent with current USCIS policy guidance that the petitioner will employ the beneficiary in a specialty occupation position.[120]

Comment: A law firm stated that the proposed provision to require non-speculative employment was arbitrary and capricious, as it contradicted 1995 policy memoranda advising that ''[t]he submission of [contracts between the employer and the alien work site] should not be a normal requirement for the approval of an H–1B petition filed by an employment contractor. Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation'' and ''[t]he mere fact that a petitioner is an employment contractor is not a reason to request such contracts.'' The commenter stated that DHS did not explain whether or to what extent the proposed provision represents a departure from these earlier memoranda and that DHS failed to consider relevant reliance interests on these earlier memoranda.

Response: DHS notes that the memoranda referenced by the commenter, a November 13, 1995 memorandum entitled ''Supporting Documentation for H–1B Petitions,'' and a December 29, 1995 memorandum entitled ''Interpretation of The Term 'Itinerary' Found in 8 CFR 214.2(h)(2)(i)(B) as It Relates to the H–1B Nonimmigrant Classification,'' were rescinded by the 2018 memorandum ''Contracts and Itineraries Requirements for H–1B Petitions Involving Third-Party Worksites.'' [121] Although the 2018 memorandum was itself rescinded by the ''Rescission of Policy Memoranda'' memorandum published on June 17, 2020,[122] that memorandum did not reinstate the 1995 memoranda. Therefore, DHS does not agree that there were any reasonable reliance interests in these previously rescinded memoranda that DHS failed to consider. DHS further disagrees that the requirement of a bona fide position in a specialty occupation is inconsistent with the 1995 memoranda, and notes that the December 29, 1995 memorandum, while discussing the itinerary requirement, which DHS is eliminating in this final rule, acknowledged the requirement of non-speculative employment. The November 13, 1995 memorandum acknowledged that requests for contracts would be appropriate ''where the officer can articulate a specific need for such documentation,'' which is consistent with the codification of USCIS' authority at new 8 CFR 214.2(h)(4)(iv)(C) to request contracts or similar evidence where needed to establish the bona fide nature of the beneficiary's work and the minimum educational requirement to perform the duties. Further, as noted above, new 8 CFR 214.2(h)(4)(iii)(F) is consistent with current USCIS policy guidance that an H–1B petitioner must establish that employment exists at the time of filing the petition and that it will employ the beneficiary in a position in a specialty occupation.[123] DHS therefore does not agree that the provisions in this rule contradict previous policy or that DHS failed to properly consider reasonable reliance interests.

Comment: Some commenters, including a company, a form letter campaign, a joint submission, and a trade association, supported the NPRM's clarification that daily work assignments for the duration of the H–1B validity period are not required for non-speculative employment, and that DHS does not intend to limit H–1B validity periods based on contract, work order, or itinerary terms.

Response: DHS is not attempting to require evidence of non-speculative employment for the entire time requested in the petition. As clearly stated in the NPRM, ''establishing nonspeculative employment does not mean demonstrating non-speculative daily work assignments through the duration of the requested validity period.'' 88 FR 72870, 72902 (Oct. 23, 2023). DHS does not propose to require employers to establish non-speculative and specific assignments for every day of the intended period of employment.'' In response to these comments, and to provide further clarification of the requirements with respect to establishing non-speculative employment, DHS is clarifying the regulatory text by adding, ''A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.'' *See* new 8 CFR 214.2(h)(4)(iii)(F). As stated in response to other comments, DHS is also replacing ''non-speculative'' with ''bona fide'' in this provision to add clarity.

Comment: A company noted its concern that the NPRM preamble references non-speculative employment, yet the proposed rule requires a non-speculative position. The commenter also stated that, ''the NPRM confirms daily work assignments for the duration of the H–1B validity period are not required for non-speculative

[117] 63 FR 30419, 30420.

[118] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020) (citing *Matter of Chawathe,* 25 I&N Dec. 369 (AAO 2010)).

[119] *See ITServe All., Inc.* v. *Cissna,* 443 F.Supp.3d 14 (D.D.C. 2020).

[120] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020) (citing *Matter of Chawathe,* 25 I&N Dec. 369 (AAO 2010)).

[121] USCIS, Policy Memorandum PM–602–0157, Contracts and Itineraries Requirements for H–1B Petitions Involving Third-Party Worksites (Feb. 22, 2018) (rescinded), *https://www.uscis.gov/sites/default/files/document/memos/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.*

[122] USCIS, Policy Memorandum PM–602–0114, Recission of Policy Memoranda (June 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.*

[123] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020) (citing *Matter of Chawathe,* 25 I&N Dec. 369 (AAO 2010)).

employment.'' The commenter encouraged DHS to conform the final rule's language to the NPRM preamble, requiring ''non-speculative employment'' at the time of filing, reasoning that one offered position should not be required for H–1B petition approval, as the petitioner can reasonably sponsor H–1B employment for a future or contingent position. The commenter stated that sponsored U.S. employment is often the same as foreign employment for employees transferring from related entities abroad, whereas the U.S. position may be contingent on changing business, management, and contract needs. The company added that the final rule should account for additional contingencies under non-speculative U.S. employment as employers can file for these non-speculative contingent positions without harming H–1B program integrity.

Response: The regulatory text will be finalized to state: ''At the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.'' Although DHS disagrees with the commenter that there is a discrepancy between the NPRM preamble referencing non-speculative employment and the proposed regulatory text requiring a non-speculative position, DHS is replacing ''non-speculative'' with ''bona fide'' to add clarity.

To determine whether the H–1B worker will perform services in a specialty occupation as required by statute, USCIS must examine the nature of the services the beneficiary will perform in the offered position. Where the proposed position is undetermined, USCIS is unable to properly analyze and determine whether the position is a specialty occupation, and the petitioner will not be able to establish the nature of the offered position. Undetermined employment where there is no defined position precludes the agency from ascertaining whether the duties of the offered position normally require the attainment of a U.S. bachelor's or higher degree in a directly related specific specialty to qualify the position as a specialty occupation, and whether the beneficiary has the appropriate qualifications to perform those duties. Conversely, a bona fide position in a specialty occupation exists when the petitioner demonstrates the substantive nature of the specific position, such that a specialty occupation determination can be made, and when the petitioner demonstrates that the specified position in a specialty occupation exists within the context of its business.

Regarding the requirement for day-to-day work assignments, as stated in the NPRM, ''DHS does not require a petitioner to identify and document the beneficiary's specific day-to-day assignments.'' 88 FR 72902 (Oct. 23, 2023). To make this point clear, DHS is adding the following regulatory text to new 8 CFR 214.2(h)(4)(iii)(F): ''A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.'' DHS acknowledges that a beneficiary's daily work assignments may vary and 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 specialty occupations.'' *ITServe All., Inc.* v. *Cissna, 443 F. Supp.* 3d 14, 39 (D.D.C. 2020). Bona fide employment under new 8 CFR 214.2(h)(4)(iii)(F) is sufficiently broad to allow for reasonable variations and changes to the beneficiary's daily work assignments, provided those variations and changes remain consistent with the petitioner's job description and other supporting evidence. Ultimately, what new 8 CFR 214.2(h)(4)(iii)(F) requires is for the petitioner to adequately demonstrate what duties the beneficiary will perform in the proffered position in order to establish that the beneficiary will, in fact, be employed in a specialty occupation position.[124] *See ITServe All., Inc.* v. *Cissna, 443 F. Supp.* 3d 14, 39 (D.D.C. 2020) (''What the law requires, and employers can demonstrate, is the nature of the specialty occupation and the individual qualifications of foreign workers.'').

DHS disagrees with the comment that an H–1B specialty occupation worker may have a petition filed for a ''future or contingent'' position, where ''future or contingent'' means that the beneficiary's job duties are undetermined and dependent on changing business, management, and contract needs. DHS wishes to emphasize that speculative employment should not be confused with employment in a position that is contingent on petition approval, visa issuance (when applicable), or the grant of H–1B status. DHS recognizes that employment in a specific position may be actual, but contingent on petition approval, visa issuance, or the beneficiary being granted H–1B status. However, the petition approval process should not be confused with the requirement that the beneficiary's employment be in a bona fide position in a specialty occupation. Employment that is contingent upon petition approval should not be confused as permitting petitions for future and contingent positions that lack the specificity or detail needed to establish eligibility as a specialty occupation.

Comment: A commenter requested additional discussion on the proposed provision. An attorney writing as part of a form letter campaign stated that DHS did not provide clear guidance on what it expects beyond what is already generally submitted with H–1B petitions to establish the employment is non-speculative. The campaign voiced concern that this lack of specificity would leave the H–1B petitioner with the burden of guessing what it needs to prepare, taking up more administrative time beyond what it is already required in preparing H–1B petitions. The campaign urged DHS to define required evidence in future proposals. Similarly, a law firm requested that DHS provide a definition of ''speculative employment'' to provide petitioners and adjudicators with further guidance. A couple of commenters similarly stated that the non-speculative employment requirement failed to provide articulable standards against which petitioning employers can plan to provide enough evidence to predictably satisfy adjudicators. The commenters requested that, at a minimum, DHS provide further clarification for the ''non-speculative position'' requirement, and requested that DHS recognize that a petitioning employer can satisfy the requirement via a ''wide breadth of evidence.'' A joint submission and a law firm stated that the absence of guidance on what is required to establish non-speculative employment raises concerns that the regulatory provision may result in RFEs and NOIDs with open-ended requests for documents that are difficult for petitioners to provide. The joint submission said that there was a lack of explanation for how adjudicators would determine that a qualifying, ''non-speculative position'' exists without requiring the same evidence of ''specific and nonspeculative qualifying assignments'' or an ''itinerary,'' which the *ITServe Alliance, Inc.* court held USCIS must not require. A trade association and a business association voiced concern that the NPRM's lack of specific guidance on acceptable documentation provides no opportunity for the regulated public to provide constructive feedback on the practicality of such documentation for employers,

[124] *See ITServe All., Inc.* v. *Cissna, 443 F. Supp.* 3d 14, 39 (D.D.C. 2020) (''What the law requires, and employers can demonstrate, is the nature of the specialty occupation and the individual qualifications of foreign workers.'').

and recommended that the rule include a non-exhaustive list of acceptable documentation.

Response: While DHS does not agree that the requirement of non-speculative employment lacks clarity or specificity, in response to this and several other comments, DHS is revising this provision to replace ''non-speculative'' with ''bona fide.'' A bona fide position in a specialty occupation exists when the petitioner demonstrates the substantive nature of the specific position, such that a specialty occupation determination can be made, and when the petitioner demonstrates that the specified position in a specialty occupation exists within the context of its business. The agency has 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.[125] Examples provided in that proposed rule are also relevant here. Specifically, the 1998 proposed rule noted that the H–1B classification was not intended to allow individuals ''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.'' [126] In such cases, the actual employment would be undetermined and, therefore, speculative. By contrast, where a position is bona fide, the petitioner should be able to establish, through the submission of evidence such as evidence relating to its past employment practices and evidence relating to its employment plans for the beneficiary, that the beneficiary will, in fact, commence work in a specialty occupation immediately upon admission in H–1B classification.[127]

Demonstrating bona fide employment in a specialty occupation is a basic, fundamental requirement [128] that is derived from the statutory definition of an H–1B nonimmigrant as someone who is ''coming temporarily to the United States to perform services . . . in a specialty occupation . . . .'' *See* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b), and is essential to maintaining the integrity of the H–1B program. Although the requirement of bona fide employment is longstanding, DHS acknowledges that since the issuance of USCIS Policy Memorandum PM–602–0114, ''Rescission of Policy Memoranda'' in July 2020, it has not always been the practice of USCIS to require petitioners to submit evidence beyond the petitioner's own description of the position to establish that there is a bona fide position in a specialty occupation available for the beneficiary as of the start date of the requested validity period. DHS further acknowledges that codification of the requirement to establish a bona fide position in a specialty occupation may result in petitioners providing more evidence than in recent years. However, with this rule DHS is providing the transparency necessary for petitioners to meet their burden to demonstrate eligibility with the information they provide in their petitions to demonstrate the existence of a bona fide position in a specialty occupation that is available to the beneficiary. Although DHS is codifying its authority and clarifying USCIS' current practice, the requirement of a bona fide position in a specialty occupation is not new. The evidence used to demonstrate the existence of the bona fide position in a specialty occupation will vary based on the business of the petitioner and the specific position being offered. In some cases, the nature of the petitioner's business and the nature of the offered job will be credible without further explanation. In other cases, the evidence provided may not sufficiently explain how the petitioner, as it describes its own business, would need a worker in the offered position. Thus, the petitioner would not have met their burden of proof and would require the petitioner to explain and provide additional evidence of how it is able to offer employment in the specified specialty occupation position within the context of its business. In the later instance, for example, the petitioner could demonstrate that it has a bona fide position available through contracts, statements of work, master service agreements, end client letters, and any other documentation that shows that there is a bona fide position available on the start date requested on the petition. As explained in the NPRM, petitioners will not be required to demonstrate non-speculative daily work assignments or document the beneficiary's specific day-to-day assignments. 88 FR 72870, 72902 (Oct. 23, 2023). Additionally, in order to further clarify this point, DHS is revising the proposed regulatory text to explicitly state that the petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.

Moreover, because this requirement is fundamental to demonstrating eligibility for H–1B nonimmigrant classification, it is reasonable to require petitioners to provide evidence of a bona fide position in a specialty occupation.

Comment: In the case of proving non-speculative employment when a beneficiary is staffed to a third-party worksite, an individual commenter and a law firm stated that the proposed rule offers no guidance on how USCIS would adjudicate an application if the petitioner does not provide proof of specific third-party assignments for the duration of the visa period.

The commenters stated that DHS should affirm that a petitioner's description of the beneficiary's position may show the position is non-speculative, in line with the guidance in the 1995 Policy Memo stating that ''in the case of an H–1B petition filed by an employment contractor, a general statement of the alien's proposed or possible employment is acceptable . . . [a]s long as the officer is convinced of the bona fides of the petitioner's intentions.'' The commenters also stated that another option would be DHS clarifying that evidence of a consistent need for high-skilled workers in the given specialty may demonstrate that the position is ''non-speculative,'' adding that, in such circumstances, the need for the position is proven through historic evidence and satisfies the INA's only requirement that the petitioning employer ''[d]emonstrat[e] that the purported employment is actually likely to exist.'' The commenters stated that, consistent with the longstanding business models IT service providers have utilized, the mere fact that the petitioning employer cannot identify at the time of filing every third-party client for whom the beneficiary would provide services does not render the offer ''illegitimate''. The commenters said that it is the historic occurrence of labor shortages in the IT space and the use of IT services companies to address those needs that supports any such position's legitimacy.

Response: As stated above, the requirement for bona fide employment derives from the statutory definition of an H–1B nonimmigrant worker as

[125] *See* ''Petitioning Requirements for the H Nonimmigrant Classification,'' 63 FR 30419, 30420 (June 4, 1998).

[126] *See* ''Petitioning Requirements for the H Nonimmigrant Classification,'' 63 FR 30419, 30420 (June 4, 1998).

[127] *See* ''Petitioning Requirements for the H Nonimmigrant Classification,'' 63 FR 30419, 30420 (June 4, 1998).

[128] *Serenity Info Tech, Inc.* v. *Cuccinelli,* 461 F.Supp.3d 1271 (N.D. GA) (2020) (recognizing that ''[d]emonstrating that the purported employment is actually likely to exist for the beneficiary is a basic application requirement.'').

someone who is ''coming temporarily to the United States to perform services . . . in a specialty occupation'' at INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b). 88 FR 72870, 72901 (Oct. 23, 2023). Where the proposed position is speculative, the petitioner will not be able to establish the nature of the offered position and USCIS will not be able to determine if the position is a specialty occupation. In the NPRM, DHS explained that petitioners will not be required to demonstrate non-speculative daily work assignments through the duration of the requested validity period. 88 FR 72870, 72902 (Oct. 23, 2023). This is equally true for third-party placement—new 8 CFR 214.2(h)(4)(iii)(F) will not require a petitioner to provide proof of specific third-party assignments for the duration of the requested period and, as noted above, DHS is adding that clarification to the regulatory text in this final rule. Given the discussion in the NPRM, this final rule, and the inclusion of this language in the final regulatory text, DHS believes it is clear that the bona fide employment requirement does not oblige a petitioner to ''identify at the time of filing every third-party client for whom the beneficiary would provide services.'' Rather, a petitioner must demonstrate, at the time of filing, availability of bona fide employment in a specialty occupation as of the requested start date. That is, the petitioner must show that the employment in a specialty occupation is ''actually likely to exist for the beneficiary'' [129] as of the requested start date.

DHS declines to state categorically that a description of the position will, in all cases, be sufficient to establish that a position is non-speculative and again notes that the 1995 memoranda to which the commenters cite were rescinded in 2018.[130] Further, DHS disagrees that a historic occurrence of labor shortages and consistent need for workers can act as a substitute for showing that a position is bona fide, as such general information would not necessarily establish the existence of a bona fide position with respect to a specific petitioner and beneficiary. As stated in the NPRM, 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 conduct their business, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers. 88 FR 72870, 72901 (Oct. 23, 2023).

Comment: A trade association and a joint submission said that the non-speculative work requirement is overly broad and fails to acknowledge the challenging reality faced by modern businesses that cannot conduct precise workforce planning months in advance in a rapidly evolving economic environment.

A company and a trade association stated that the standard duration of contracts in the IT consulting industry is 6 months long; and, even if an employer had a contract for the beneficiary's services at the time of filing, it would expire by the time the employee was able to enter the country on their initial H–1B visa. The commenters said that for this reason, establishing a requirement to show non-speculative projects over a 3-year visa period would be unworkable for petitioners. The trade association said that given the low odds of lottery selection, it is not possible for consulting companies to negotiate and secure contracts for the services of an employee that they have no guarantee of receiving.

Response: Under new 8 CFR 214.2(h)(4)(iii)(F), DHS will not require employers to establish non-speculative and specific assignments for every day of the intended period of employment. Rather, a petitioner must demonstrate, at the time of filing, availability of a bona fide position as of the requested start date. In response to stakeholder feedback, DHS is clarifying this in the regulatory text by adding, ''A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.'' As noted in other comment responses, DHS is also replacing ''non-speculative'' with ''bona fide'' for clarity.

As DHS discussed in the NPRM, 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 conduct their business, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers. 88 FR 72870, 72901 (Oct. 23, 2023). New 8 CFR 214.2(h)(4)(iii)(F) is consistent with current USCIS policy guidance that an H–1B petitioner must establish that employment exists at the time of filing the petition and that it will employ the beneficiary in a specialty occupation.

Comment: A trade association said that the proposed rule's narrow range of evidence of a non-speculative position reaches beyond statutory requirements to create unnecessary evidentiary restrictions on petitioners and employers. The commenter stated that while they recognize that the establishment of non-speculative employment does not necessarily require the demonstration of non-speculative work assignments, most adjudicators are unable to make the necessary distinction between speculative employment and speculative work assignments, particularly in cases involving third-party placements. A commenter added that the impact of the non-speculative work requirement would have negative policy consequences for American businesses, inconsistent with the Administration's stated goals of fueling innovation in technology industries and maintaining a globally premier workforce. A trade association voiced concern that the non-speculative work requirement was extremely broad and could cause unintended negative consequences for H–1B workers.

Response: DHS disagrees with the commenter that new 8 CFR 214.2(h)(4)(iii)(F) allows for only a ''narrow range of evidence'' to establish that a petitioner has non-speculative employment available. In fact, new 8 CFR 214.2(h)(4)(iii)(F) does not impose any limitations on the evidence a petitioner may provide; it simply codifies the requirement, consistent with current USCIS policy, that the petitioner must establish that it has a bona fide position available as of the start date of the validity period requested on the petition. As noted in other comment responses, DHS is replacing ''non-speculative'' with ''bona fide'' to add clarity to this provision. DHS also disagrees that USCIS adjudicators will be unable to distinguish between speculative employment and speculative work assignments, as DHS stated clearly in the NPRM that petitioners will not be required to establish non-speculative and specific assignments for every day of the intended period of employment. 88 FR 72870, 72902 (Oct. 23, 2023). Rather, a petitioner must demonstrate, at the time of filing, availability of a bona fide position in a specialty occupation as of the requested start date. Further, as noted above, in response to stakeholder feedback, DHS is clarifying this in the regulatory text by adding, ''A petitioner is not required to establish specific day-to-day

[129] *Serenity Info Tech.* v. *Cuccinelli* 461 F.Supp.3d 1271.

[130] USCIS, ''Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status,'' PM–602–0151 (Oct. 23, 2017), *https://www.uscis.gov/sites/default/files/document/memos/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.*

assignments for the entire time requested in the petition.'' DHS also disagrees that the provision is ''extremely broad'' such that it may have unintended negative consequences for workers. While the commenters' concern is not entirely clear, DHS recognizes that employment may be bona fide even though the beneficiary does not begin working on the requested start date. However, if DHS determines that there was a lack of a bona fide position in a specialty occupation as of the requested start date at the time of filing, or that the petitioner did not have a bona fide job offer for the beneficiary, then the petition may be denied or revoked on that basis. Finally, DHS disagrees that codifying the requirement of a bona fide position will harm American businesses. To the contrary, 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 conduct their business, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers.

Comment: A commenter and a law firm voiced concern that DHS does not explain whether, or to what extent, it is changing positions with respect to its historical guidance on how to demonstrate bona fide employment or consider relevant reliance interests. The commenters stated that the new proposed rule is arbitrary and capricious for its failure to acknowledge and explain the departure. A few commenters said the proposed rule fails to consider or analyze any reliance interests—including those held by consulting firms whose business models have long depended in part on sourcing high-skilled foreign labor for American businesses and businesses that have relied on the H–1B program to help alleviate shortages in high-skilled domestic labor in the IT space.

Response: As stated above, the requirement of bona fide employment codified at new 8 CFR 214.2(h)(4)(iii)(F) derives from the statutory definition of an H–1B nonimmigrant worker as someone who is ''coming temporarily to the United States to perform services . . . in a specialty occupation . . . .'' INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 88 FR 72870, 72901 (Oct. 23, 2023). This is not a ''departure,'' or a new requirement but rather a codification of a longstanding requirement.[131] A bona fide position in a specialty occupation exists when the petitioner demonstrates the substantive nature of the specific position, such that a specialty occupation determination can be made, and when the petitioner demonstrates that the specified position in a specialty occupation exists within the context of its business. In response to comments and stakeholder feedback, DHS is replacing ''non-speculative'' with ''bona fide'' to add clarity to this provision. Again, DHS reiterates that this provision simply requires a petitioner to demonstrate, at the time of filing, availability of a bona fide position in a specialty occupation as of the requested start date. This is different from requiring petitioners to demonstrate specific, day-to-day work assignments for the beneficiary for the duration of the requested validity period, as may have been common practice prior to the July 2020 recission of the 2018 Contracts and Itineraries memorandum.

DHS acknowledges that, since the issuance of the July 2020 USCIS Policy Memorandum PM–602–0114, ''Rescission of Policy Memoranda'', it has not always been the practice of USCIS to require petitioners to submit documentary evidence to establish that there is a position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. As noted above, DHS is replacing ''non-speculative'' with ''bona fide'' for added clarity in the provision. The bona fide position requirement derives from the statutory definition of an H–1B worker and is generally consistent with current USCIS policy guidance that an H–1B petitioner ''has the burden of proof to establish that employment exists at the time of filing and it will employ the beneficiary in the specialty occupation.'' Specifically with respect to statutory requirements, as stated above, the requirement of a bona fide position derives from the statutory definition of an H–1B nonimmigrant worker as someone who is ''coming temporarily to the United States to perform services . . . in a specialty occupation . . . .'' INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 88 FR 72870, 72901 (Oct. 23, 2023). Prior to the July 2020 policy memorandum, DHS (and previously INS) long held and communicated the view that speculative employment is not permitted in the H–1B program. Thus, DHS does not agree that codification of the bona fide position requirement at 8 CFR 214.2(h)(4)(iii)(F) impairs any reasonable reliance interests. To the extent that petitioners had any such reliance interests in the continuation of the recent practice to not require evidence of a bona fide position in a specialty occupation, DHS believes that these interests are outweighed by DHS's interest in maintaining the integrity of the H–1B program and in achieving a key goal of the H–1B program, which is to help U.S. employers obtain the skilled workers they need to conduct their business, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers.

Comment: A company and a trade association stated that once in the country and available for work, consulting company employers may find it economically advantageous to swap out employees assigned to a given project, which the commenter said is allowed by statute and DOL regulations, but added that a non-speculative project requirement would prohibit companies from changing projects, which would impede smart financial decisions and ignore petitioning consulting companies' long-term need for particular skill sets—focusing exclusively on the end client's requirements for a short-term project.

Response: The statute explicitly requires that H–1B classification be approved only for positions that are specialty occupations. Although companies may find it economically advantageous to move employees around, if those employees are in H–1B status, the company must continue to comply with the relevant statutory and regulatory requirements. These requirements include demonstrating that the petitioner is offering bona fide employment in a specialty occupation position and that the beneficiary is qualified for the offered position. DHS did not propose to require non-speculative projects for the entire validity period requested. Rather as noted in the proposed rule, the petitioner must demonstrate that, at the time of filing, it has a non-speculative position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. In response to stakeholder feedback, DHS is replacing ''non-speculative'' with ''bona fide'' in this provision to add clarity. This new regulation will require the petitioner to

[131] USCIS, ''Rescission of Policy Memoranda'' PM–602–0114 (Jun. 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf* (stating ''The petitioner has the burden of proof to establish that employment exists at the time of filing and it will employ the beneficiary in the specialty occupation.''). *See also* ''Petitioning Requirements for the H Nonimmigrant Classification,'' 63 FR 30419, 30419–30420 (June 4, 1998) (proposed rule explaining 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).

specify the duties the beneficiary will be performing as of the start date of the petition, although it will not require the petitioner to identify every prospective project at the time of filing. However, if the beneficiary will be placed on projects with different minimum requirements, or with a different third party, then the new project and the new third party's requirements may impact the specialty occupation determination. The petitioner is free to place the beneficiary at a new project or new third-party site, as long as the petitioner complies with DOL and DHS requirements to file new or amended LCAs and petitions.

iii. LCA Properly Corresponds With the Petition

Comment: A company voiced general support for DHS's proposal to codify its authority to ensure the LCA supports and properly corresponds with the accompanying H–1B petition and recognized that DHS should consider the position offered and its relationship to the occupation listed in the LCA. A professional association stated that DHS should verify the accuracy of H–1B LCA information. A professional association agreed that DHS both has the authority and the obligation to ensure that any DOL-approved LCA actually supports the H–1B petition, and added that it therefore wholly supports the NPRM's addition of the proposed text. The commenter stated that for the labor certification process to serve its intended function of protecting U.S. workers, DHS must impose consequences on employers that violate it. The commenter said that particularly with respect companies that use collective bargaining agreement (CBA) wage rate, USCIS can and should be empowered to ensure that the resulting certifications truly support the petition and hold employers accountable for any false statements or misrepresentations in LCAs.

Response: DHS agrees with these commenters that it is appropriate for DHS to ensure that the LCA supports and properly corresponds with the accompanying H–1B petition and is finalizing the text proposed in the NPRM through this rulemaking. DHS acknowledges the commenter's concern about CBA wage rates and agrees that petitioners must attest to the truthfulness and accuracy of the information provided on LCAs, including the use of an appropriate wage source. If the facts presented in the H–1B petition or the information on the LCA was inaccurate, fraudulent, or includes a misrepresentation of a material fact, the petition may be denied or, if approved, the petition approval may be revoked. *See* 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(*2*).

Comment: Several commenters stated that the proposed provision establishing DHS's authority and obligation to determine whether a certified LCA supports and properly corresponds with the H–1B petition, separate and apart from the DOL's power to certify the LCA, would distort the DOL regulations, and insert a substantive component over LCAs that exceeds DHS's authority. The trade associations said that USCIS lacks the expertise to evaluate the LCA and that although the preamble states that USCIS would not supplant DOL's responsibility with respect to wage determinations, USCIS could exceed its authority by reassessing DOL's determinations in the LCA. The joint submission added that the proposed regulation appears to require—or at least encourage—USCIS adjudicators to go much further than simply carrying out their authorities under existing DOL regulations by performing detailed analyses of each element of an LCA and potentially reject LCAs altogether if the adjudicator does not agree with one of the many elements of the underlying LCA. A few commenters said that the LCA requirement, as framed in the INA and implemented by DOL, is intended only to protect U.S. and foreign workers, offering grounds for recourse in case, for example, the petitioner pays the beneficiary below the prevailing wage. The commenters added that Congress did not create the LCA requirement to offer substantive proof of a bona fide position in a specialty occupation, and that such a proposal exceeds DHS's statutory mandate. Similarly, a trade association said that the INA does not authorize DHS to take any action with respect to the LCA other than confirming it ''corresponds'' to the petition, and that DOL has the responsibility to verify the LCA under DOL regulations. The commenter added that an LCA does not contain sufficient information to assist an adjudicator's determination of a specialty occupation, such as the job duties and educational requirements, that DOL's traditional and separate role reviewing and enforcing LCAs is already effective, and that an expansion of DHS authority to perform similar activities is unwarranted. Several commenters requested that DHS reissue the proposal or insert a statement in the final rule clarifying that USCIS can do no more regarding the LCA than simply confirm that it corresponds to the position described in the H–1B petition, and cannot undermine DOL's determination or in any way re-adjudicate the LCA. A few commenters requested that USCIS more clearly state in the rule that the wage level in the certified LCA is not solely determinative of whether the position is a specialty occupation and that USCIS would not supplant DOL's responsibility with respect to wage determinations. One commenter said that practitioners have noted USCIS nitpicking SOC codes to deny petitions, noting that it is DOL, not USCIS, which determines questions of wage level and other matters under 20 CFR 655.705(a).

A joint submission stated that DOL solely possesses the jurisdiction to verify wage levels and representations listed in an LCA, and that there is no legitimate purpose for USCIS to investigate or otherwise examine such information if USCIS does not intend to investigate an employer's LCA practices. The commenters said that to determine whether an LCA ''corresponds'' with an H–1B petition, USCIS need only verify that the certified LCA and the petition at issue do not materially conflict, but added that with the proposed examination of the ''wage level (or an independent authoritative source equivalent),'' USCIS appears to go further than mere comparison and venture into investigations in the domain of DOL. The commenter wrote that the required wage is evident on the face of the LCA and reveals whether the certified LCA comports with the offered salary, but that the prevailing wage level itself is part of the prevailing wage determination process, which is exclusively within DOL authority. The commenter added that the prevailing wage determination is ''in no way'' indicative of the duties the beneficiary would perform, and an Occupational Employment and Wage Statistics (OEWS) Level 1 wage determination is wholly consistent with the definition of a specialty occupation. The commenter stated that because of this, inquiring into the wage level itself is to examine whether and how the employer properly applied DOL regulations and guidance, and it is precisely this authority that INA sec. 101(a)(H) invests in DOL.

A few commenters said that review of an LCA is limited by design, with DOL certifying an LCA so long as it is complete and not obviously inaccurate and enforcing the agreement's terms through a post-hoc complaint process. The commenters stated that, in that way, DOL recognized ''that Congress . . . intended to provide greater protection than under prior law for U.S. and foreign workers without interfering with an employer's ability to obtain the H–1B workers it needs on a timely basis.'' The commenters noted that DOL

regulations recognized that other agencies have discrete obligations vis-à-vis an LCA, among them being ''DHS accepts the employer's petition (DHS Form I–129) with the DOL-certified LCA attached. DHS determines whether the petition is supported by an LCA which corresponds with the petition.'' The commenters added that DOL regulations further reiterate DHS's general authority to determine whether the occupation listed, and the nonimmigrant's qualifications satisfy the statutory requirements for an H–1B visa. The commenters stated that, under a plain reading of the regulation, and consistent with the INA's delegation of LCA authority to DOL, DHS's role is limited to ensuring the petition (1) is predicated on—or ''is supported by''—a certified LCA; and (2) the LCA ''corresponds with'' the petition. However, the commenters said that the proposal adds a substantive component to DHS's review of a DOL-certified LCA that is absent from the DOL regulation and is contrary to the INA. The commenters said that this provision represents an unexplained and unacknowledged change in policy guidance following the rescission of the 2018 Contracts and Itineraries memo and renders the provision arbitrary and capricious.

Response: DHS disagrees that ensuring that the LCA supports and properly corresponds to the accompanying H–1B petition exceeds its authority. As explained in the NPRM, DHS already has the authority under INA sections 101(a)(15)(H)(i)(b), 103(a), and 214(a)(1) and (c)(1), 8 U.S.C. 1101(a)(15)(H)(i)(b), 1103(a), and 1184(a)(1) and (c)(1), to determine whether the LCA supports and properly corresponds with the H–1B petition. 88 FR 72870, 72902 (Oct. 23, 2023). As further stated in the NPRM, these changes do not supplant DOL's responsibility with respect to wage determinations. 88 FR 72870, 72903 (Oct. 23, 2023). The authority provided to DOL under INA section 212(n), 8 U.S.C. 1182(n), does not deprive DHS of authority to administer and enforce the H–1B nonimmigrant classification. Congress provided DHS with broad authority to administer and enforce the H–1B nonimmigrant classification, in addition to the authority provided to DOL to administer and enforce requirements pertaining to LCAs. *See ITServe Alliance, Inc.* v. *U.S. Dep't of Homeland Sec.,* 71 F.4th 1028, 1037 (D.C. Cir. 2023) (the authorities provided to DOL under 8 U.S.C. 1182(n) ''are not by their terms exclusive, so as to oust USCIS from its own authority over the H–1B petition process. And the INA strongly suggests that the agencies' respective authorities are complementary rather than exclusive. . . .''). As the D.C. Circuit Court of Appeals explained, INA section 103(a)(1), 8 U.S.C. 1103(a)(1), independently provides DHS with authority to administer and enforce the INA, including a petitioning employer's compliance with the terms of an LCA. *Id.*

USCIS' review pertains to evaluating whether the information on the LCA, including, but not limited to, the standard occupational classification (SOC) code, wage level (or an independent authoritative source equivalent), and location(s) of employment, sufficiently align with the information about the offered position as described in the petition. When conducting this review, USCIS officers consult DOL's published guidance and other publicly available sources referenced in DOL's prevailing wage determination policy guidance [132] to determine what occupation and corresponding prevailing wage DOL certified so that USCIS can determine whether the information on the LCA is consistent with the information in the petition; however, USCIS officers would not question whether DOL properly certified the LCA.

DHS disagrees with the assertion that the rule encourages USCIS adjudicators to perform a detailed analysis of each element of an LCA or investigate an employer's LCA practices. USCIS does not view the LCA or wage level as determinative of whether the position is a specialty occupation. Further, ensuring the LCA corresponds to the petition by comparing the information contained in the LCA against the information contained in the petition and supporting evidence is consistent with current practice. DHS also disagrees with the assertion that it is trying to impose additional requirements from the 2018 Contracts and Itineraries Memo, which was rescinded in 2020. As explained in USCIS' June 2020 policy memorandum ''Rescission of Policy Memoranda,'' the petitioner has the burden of proof to establish that employment exists at the time of filing and it will employ the beneficiary in the specialty occupation.[133] If the petitioner's attestations and supporting documentation meet this standard, then the officer will not request additional evidence, provided all other eligibility requirements are met by a preponderance of the evidence. If the officer finds that a petitioner has not established, by a preponderance of the evidence, statutory or regulatory eligibility for the classification as of the time of filing, the officer will articulate that basis in denying the H–1B petition.

Comment: A professional association stated that USCIS' objective with the proposed amendment to the regulation regarding LCAs is unclear, given that it ''restates DOL regulations and DOL jurisdictional considerations.'' A healthcare provider requested that DHS provide additional clarity around the term ''properly support'' in the LCA provision, so that organizations can provide documentation that would be deemed acceptable. A joint submission said that the final rule should mirror existing DOL regulations in stating that USCIS would determine ''whether the petition is supported by an LCA which corresponds with the petition, [and] whether the occupation named in the [LCA] is a specialty occupation'' and remove ambiguous and potentially expansive language like ''properly corresponds'' that appear to broaden USCIS' scope of inquiry regarding LCAs. They further stated that the proposed rule contains no instructions for how an adjudicator should determine whether an LCA ''properly corresponds'' with the petition. An attorney writing as part of a form letter campaign said that it is not clear what USCIS means in its statement that it would not supplant DOL's responsibility with respect to wage determinations, inquiring if USCIS would now assert that a position should be wage level 2 or wage level 3 when the petitioner has followed DOL guidance in determining a wage level 1 position, or if USCIS would now assert the SOC code is not correct on the LCA after the petitioner has reviewed the SOC codes and selected the one which they feel is best aligned with the position.

Response: As explained in the NPRM, when determining whether the submitted certified LCA properly corresponds with the petition, USCIS will consider all information on the LCA, including, but not limited to, the SOC code, wage level (or an independent authoritative source equivalent), and location(s) of employment. 88 FR 72870, 72903 (Oct. 23, 2023). USCIS will evaluate whether that information sufficiently aligns with the offered position, as described in the rest of the petition and supporting

[132] *See* ''Prevailing Wage Determination Policy Guidance,'' Employment and Training Administration, Dept. of Labor (Nov. 2009), *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

[133] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.*

documentation. This is consistent with current practice and not intended to replace DOL's role or responsibility with respect to wage determinations. As explained in the previous response and in USCIS' June 2020 policy memorandum ''Rescission of Policy Memoranda,'' the petitioner has the burden of proof to establish that employment exists at the time of filing and it will employ the beneficiary in the specialty occupation.[134] If the petitioner's attestations and supporting documentation meet this standard, then the officer will not request additional evidence, provided all other eligibility requirements are met by a preponderance of the evidence.

Material inconsistencies between the information certified on the LCA and contained in the petition and/or other supporting documentation may raise questions as to whether the petitioner has submitted all required evidence under the regulations or established eligibility by a preponderance of the evidence. For example, if the petition and other supporting documentation indicates that the beneficiary's position and associated job duties requires a wage level 2 or wage level 3 per DOL guidance, but the LCA is certified for a wage level 1 position, that may call into question whether the petition is supported by an LCA that properly corresponds to the petition or whether the offered position was accurately described in the petition. Similarly, USCIS may find a material discrepancy in cases where the SOC code on the LCA is inconsistent with the job duties as described in the H–1B petition. However, this is not the same as supplanting DOL's responsibilities because DOL does not review the information contained in the H–1B petition and supporting documentation. USCIS' review is limited to whether the information on the LCA sufficiently aligns with the offered position as described in the H–1B petition and supporting evidence, and does not in any way determine whether DOL properly certified the LCA.[135]

Comment: A few commenters said the proposed rule indicates that DHS believes the LCA duplicates the preexisting itinerary requirement in its explanation of its decision to eliminate said requirement. They said that the proposed rule's listing of the LCA provision as one designed ''to ensure [a] bona fide job offer for a specialty occupation'' reinforces that, consistent with DHS's position in the 2018 Policy Memo, the Department currently views the LCA as substantive proof of whether a petition identifies an H–1B qualifying position—akin to the former itinerary requirement. The commenters added that, in context, the LCA-review provision is a ''backdoor'' for USCIS adjudicators to reimpose a functionally identical itinerary requirement that was declared unlawful in *ITServe Alliance, Inc.* The commenters further stated that the provision suggests or does not foreclose that adjudicators may treat LCA review just like the itinerary requirement the rule eliminates, which the commenter said would be arbitrary and capricious and contrary to the INA. The commenters requested clarity on the meaning of ''properly support'' stating that nothing in the rule precludes USCIS from finding that an LCA does not ''properly support'' a petition if it fails to identify every third-party client to whom an H–1B worker might provide services throughout their tenure, risking compounding the non-speculative employment provision's ''error.''

Response: DHS does not agree that new 8 CFR 214.2(h)(4)(i)(B)(*1*)(*ii*) ''duplicates'' the itinerary requirement that is being removed in this final rule, or that new 8 CFR 214.2(h)(4)(i)(B)(*1*)(*ii*) is a ''backdoor'' to reimpose an itinerary requirement. As stated in the NPRM and above, new 8 CFR 214.2(h)(4)(i)(B)(*1*)(*ii*) codifies DHS's existing authority to ensure that the LCA supports and properly corresponds with the accompanying H–1B petition. 88 FR 72870, 72902 (Oct. 23, 2023). As further explained in the NPRM, in determining whether the submitted certified LCA properly corresponds with the petition, consistent with current practice, USCIS will consider all the information on the LCA, including, but not limited to, the standard occupational classification (SOC) code, wage level (or an independent authoritative source equivalent), and location(s) of employment. 88 FR 72870, 72903 (Oct. 23, 2023). USCIS will evaluate whether that information sufficiently aligns with the offered position, as described in the entire record of proceeding.[136] This is different from the itinerary requirement, which is being removed in this final rule, and which previously required ''an itinerary with the dates and locations of the services or training.'' New 8 CFR 214.2(h)(4)(i)(B)(*1*)(*ii*) imposes no such requirements. Rather, this provision codifies USCIS' authority to compare the information contained in the LCA against the information contained in the petition and supporting evidence, and to deny or revoke the petition if the LCA does not properly correspond to the petition.

DHS also does not agree that this provision will require petitioners to identify every third-party client to whom a beneficiary might provide services throughout their ''tenure.'' As explained in the NPRM and throughout this final rule, petitioners will not be required to demonstrate non-speculative or specific daily work assignments through the duration of the requested validity period. *See* new 8 CFR 214.2(h)(4)(iii)(F). 88 FR 72870, 72902 (Oct. 23, 2023). Similarly, petitioners will not be required to identify every third-party client to whom a beneficiary might provide services throughout the requested validity period. DOL regulations require employers to list all intended places of employment on the LCA, 20 CFR 655.730(c)(5); and DOL has further specified that a worksite should be listed as an intended place of employment ''if the employer knows at the time of filing the LCA that it will place workers at the worksite, or should reasonably expect that it will place workers at the worksite based on: (1) an existing contract with a secondary employer or client, (2) past business experience, or (3) future business plans.'' [137] Thus, neither DOL nor DHS regulations require a petitioner to list every third-party client to whom a beneficiary might provide services throughout the requested H–1B validity period. However, there may be instances where the places of employment listed on the LCA may be relevant to determining whether the LCA properly corresponds with the petition. For example, if the petition indicates that the beneficiary will be placed at a third-party worksite in Chicago, IL, but the LCA only contains work locations in Los Angeles, CA, USCIS may issue an RFE to provide the petitioner an opportunity to explain the discrepancy and to ensure that the LCA properly corresponds to the petition and covers all work locations for the beneficiary. Further, DHS notes that a petitioner can make changes to the beneficiary's place of employment or place the beneficiary

[134] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.*

[135] In reviewing the LCA, USCIS uses published DOL guidance and other publicly available sources referenced in DOL's prevailing wage determination policy guidance. *See* ''Prevailing Wage Determination Policy Guidance,'' Employment and Training Administration, Dept. of Labor (Nov. 2009), *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

[136] 88 FR 72870, 72902–72903 (Oct. 23, 2023).

[137] Labor Condition Application for H–1B, H–1B1 and E–3 Nonimmigrant Workers Form ETA–9035CP—General Instructions for the 9035 and 9035E, *https://flag.dol.gov/sites/default/files/2019-09/ETA_Form_9035CP.pdf.*

at new third-party site during the approval period, as long as the petitioner complies with DOL and DHS requirements, which may include filing new or amended LCAs and petitions as applicable.

Comment: A couple of trade associations stated that the provision to codify USCIS' ability to examine LCAs as evidence of a bona fide job offer would undermine USCIS' goal of reducing backlogs and improving efficiencies by requiring adjudicators to consider a new standard that is outside their expertise and legal purview, slowing down adjudications and resulting in more RFEs. Another trade association recommended that due to the ''unnecessary'' additional burden of paperwork, cost, and time on both the petitioner and USCIS, ''with little to no benefit for the additional requirement as the agency looks to streamline and not further complicate the H–1B program,'' DHS should eliminate the proposal for USCIS to review LCAs as proof of a bona fide job offer.

Response: As discussed in the NPRM, this provision codifies DHS's existing authority to ensure that the LCA supports and properly corresponds with the accompanying H–1B petition. 88 FR 72870, 72902 (Oct. 23, 2023). This is consistent with current practice and not expected to create additional burdens on petitioners or USCIS adjudicators.

Comment: A professional association stated that given the complexity of the H–1B petition, the LCA provision should specify that denial or revocation of a petition due to USCIS' inability to verify facts would be limited to its inability to verify material facts rather than simply relevant facts. The commenter added that such a standard would provide necessary limits to the scope of USCIS authority and would be a wiser use of resources. An attorney stated that in the event that USCIS gives itself regulatory authority to review LCAs, USCIS should include in the final rule a requirement that USCIS, in any RFE or NOID, provide the LCA code and/or alternate wage that it believes applies to the position, and give the petitioner the opportunity to rebut the designation(s). An attorney writing as part of a form letter campaign stated that the technical changes such as replacing ''shall'' with ''must,'' ''application'' with ''certified labor condition application,'' and ''the Service'' with ''USCIS,'' for additional clarity should not be made because the petitioner already takes the time to review DOL SOC codes and wage levels.

Response: DHS declines to make any additional changes to the LCA provision to limit USCIS' authority. As explained in the NPRM, while the LCA, H–1B petition, and supporting documentation must be for the same position, the same position does not necessarily mean that all information describing the position must be identical. 88 FR 72870, 72903 (Oct. 23, 2023). A petitioner may supplement or clarify the record with additional information about the offered position in response to an RFE, on motion, or on appeal, and so long as the supplemental information does not materially change the position described in the H–1B petition, DHS would consider the position to be the same. Further, the technical changes are being made to add clarity to these provisions, not impose a new requirement on petitioners.

iv. Revising the Definition of U.S. Employer

Comment: A company voiced support for DHS's proposal to amend its definition of U.S. employer to align with current adjudicatory practices and court rulings. A professional association voiced appreciation for synchronizing and modernizing the definition of ''employer'' between USCIS and DOL for clarity, consistency, and entrepreneurship. The commenter stated that the current definition of ''employer'' as well as the requirement to perform only specialty occupation work, created significant hurdles for physicians who wished to start a medical practice or incorporate as a solo practitioner for locum tenens work, such as filling critical shortages or vacancies to ensure uninterrupted care to patients throughout the country. The commenter added that the changes would directly support the ability of foreign physicians to become entrepreneurs, particularly those who desire to supplement the locum tenens workforce. A legal services provider added that on top of safeguarding integrity and compliance with the H–1B program, the changes to the definition would encourage entrepreneurship and not stifle business or personal growth, and would allow beneficiary-owners to take on further duties apart from the core specialty occupation requirement that relate to owning a business.

Response: DHS agrees that the revised definition of U.S. employer better aligns the definition with current practice. As explained in the NPRM, this proposed change, which is being finalized as proposed, largely reflects USCIS' current practices since June 2020, following a court order and settlement agreement.[138] 88 FR 72870, 72903 (Oct. 23, 2023).

v. Employer-Employee Relationship

Comment: Several commenters supported DHS's proposal to remove the reference to ''an employer-employee relationship'' from the definition of U.S. employer, which had previously been a reason for petition denial. A law firm said that harmonization of DOL's and USCIS' definition of the ''employer-employee relationship'' is welcome. A joint submission agreed with USCIS that past policies regarding the establishment of employer-employee relationships have led to significant administrative barriers and limited access to key H–1B talent.

Response: DHS appreciates the feedback. As explained in the NPRM, removing the employer-employee relationship language from the regulations promotes clarity and transparency in the regulations and supports DHS's overall commitment to reducing administrative barriers. 88 FR 72870, 72903 (Oct. 23, 2023).

Comment: An individual commenter said that the elimination of the employer-employee relationship would make the program ripe for abuse as anyone could declare themselves an employer and obtain an H–1B visa. A joint submission noted that DHS confirms that ''[i]t is in DHS's interests to promote, to the extent possible, a more consistent framework among DHS and DOL regulations for H–1B, E–3, and H–1B1 petitions and to increase clarity for stakeholders,'' and acknowledges that USCIS past policy was inconsistent with DOL's regulatory definition of an employer, which resulted in USCIS deciding a petitioner was not an H–1B employer when DOL determined the petitioner was an employer and certified the LCA, which the commenters said increased the potential for confusion among H–1B stakeholders. The commenters said that the NPRM purports to significantly redefine DHS's definition of ''employer'' to exceed and conflict with DOL's regulatory definition, which would increase confusion and lead to contradictory results. The commenters stated that ''by focusing on contracts with third parties to determine whether a role is or is not a specialty occupation, USCIS is inherently shifting the focus of the

[138] *See ITServe Alliance, Inc.* v. *Cissna,* 443 F. Supp. 3d 14, 19 (D.D.C. 2020) (finding that the USCIS policy interpreting the existing regulation to require a common-law employer-employee relationship violated the Administrative Procedure Act as applied and that the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) is ultra vires as it pertains to H–1B petitions).

employer-employee relationship to the contractual relationship that exists between a company and its customers.'' The commenters recommended that DHS ''remove the emphasis on contractual relationships as a general matter and, in particular, any reference that relates to the definition of an employer-employee relationship.''

Response: DHS disagrees that removing the reference to an employer-employee relationship from the H–1B regulations will make the program ripe for abuse. As explained in the NPRM, this change is largely consistent with current USCIS policy guidance that the petitioner needs only to establish that it meets at least one of the ''hire, pay, fire, supervise, or otherwise control the work of'' factors with respect to the beneficiary to meet the employer-employee relationship test. 88 FR *72870,* 72904 (Oct. 23, 2023). However, since H–1B petitioners will continue to be required to submit an LCA attesting that they will pay the beneficiary, and a copy of any written contract (or summary of terms of the oral agreement) between the petitioner and the beneficiary, which typically affirms that they will hire and pay the beneficiary, the current employer-employee relationship test is usually met as a matter of complying with the other H–1B eligibility requirements. As an additional integrity measure, DHS is codifying within the definition of ''United States employer'' the existing requirement that the petitioner have a bona fide job offer for the beneficiary to work within the United States as well as a new requirement to have a legal presence in the United States and be amenable to service of process in the United States.

Further, DHS disagrees that removing the employer-employee relationship requirement from the definition of ''United States employer'' exceeds and conflicts with DOL's regulatory definition of ''employer'' at 20 CFR 655.715 [139] and will increase confusion. Rather, the revised definition creates a more consistent framework among DHS and DOL regulations for H–1B, E–3, and H–1B1 petitions and increases clarity for stakeholders. As explained in the NPRM, USCIS' previous 2010 policy guidance sometimes caused USCIS to conclude that a petitioner was not an employer for purposes of the H–1B petition even though DOL deemed that same petitioner to be an employer for purposes of the LCA. 88 FR 72870, 72904 (Oct. 23, 2023). DHS also notes that it is not shifting the focus from the employer-employee relationship to the contractual relationship that exists between a company and its customers. As explained above, codifying DHS's authority to request contracts between the petitioner and a third party is a different provision and not intended to replace the employer-employee relationship requirement. Specifically, contracts and other similar evidence may be requested to show the non-speculative nature of the beneficiary's position and the minimum educational requirements to perform the duties, which go to the issue of whether the offered position qualifies as a specialty occupation and whether the job offer is bona fide, not whether the petitioner otherwise qualifies as a United States employer under the previous employer-employee relationship regulatory text.[140]

vi. Bona Fide Job Offer

Comment: An attorney writing as part of a form letter campaign voiced support for DHS's codification in the definition of a U.S. employer of the existing requirement that the petitioner has a bona fide job offer for the beneficiary to work within the United States. Several commenters voiced support for the clarification that a bona fide U.S. job offer includes ''telework, remote work, or other off-site work within the United States'' which would bring DHS's definition of bona fide job offer in line with current U.S. employment practices. The university stated that it is important to note that many employees who work remotely may also have more flexible work schedules, such that their working hours deviate from common business hours.

Response: DHS agrees with commenters that it is important to note that a bona fide U.S. job offer includes ''telework, remote work, or other off-site work within the United States,'' which may include more flexible work schedules.

Comment: An advocacy group stated that while it supports the recognition of the flexible nature of work via the proposed rule's support for telework and remote work, DHS should ensure that the regulation does not eliminate the need for H–1B beneficiaries to complete some portion of their work in person within the United States. The commenter added that DOL's labor certification process already establishes criteria for third-party or offsite H–1B work locations, so the proposed language could be rewritten to state that an eligible U.S. employer must have ''a bona fide job offer for the beneficiary to work within the United States. The job offer may include, but should not be limited to, telework or remote work within the United States during the requested petition validity period.'' A law firm stated that a definition of what constitutes ''bona fide'' is required. A university stated that while employees may have different types of work arrangements, the NPRM does not sufficiently address some of the complexities and challenges that may result from those arrangements. A trade association said that a bona fide job offer is a concept that is ''completely absent'' from DHS's current regulation or statutorily delegated powers, which the commenter said raises the question of how this ''existing requirement'' sprang to life and became in the DHS's view a binding and enforceable standard.

Response: DHS agrees with the commenters that the bona fide job offer must be in the United States. The regulatory text at 8 CFR 214.2(h)(4)(ii) clearly states that the U.S. employer in the United States has a bona fide job offer for the beneficiary to work ''within the United States,'' which may include telework, remote work, or other off-site work ''within the United States.'' By repeating ''within the United States'' several times throughout the provision, DHS believes it is sufficiently clear that the job opportunity must be in the United States and the work must be performed in the United States. DHS also declines to further define the term ''bona fide'' in the regulatory text, which is used throughout numerous immigration provisions and follows the standard definition and Latin translation of ''in good faith.'' [141] Additionally, DHS does not think it is

[139] Although the commenter referenced 20 CFR 755.715, DHS assumes the intended citation is to 20 CFR 655.715 which defines ''employer'' as ''a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H–1B, H–1B1, or E–3 nonimmigrants and/or U.S. worker(s). In the case of an H–1B nonimmigrant (not including E–3 and H–1B1 nonimmigrants), the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.''

[140] This provision does not preclude USCIS from requesting contracts for other reasons, such as to establish eligibility of agents as petitioners, and maintenance of status. See 8 CFR 214.2(h)(2)(i)(F) (''An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition.''); new 8 CFR 214.1(c)(6) (''Evidence of such maintenance of status may include, but is not limited to: copies of paystubs, W–2 forms, quarterly wage reports, tax returns, contracts, and work orders.'').

[141] Miriam-Webster Dictionary, ''Bona fide,'' *https://www.merriam-webster.com/dictionary/bona%20fide.*

necessary to address various complexities and challenges that may result from different types of work arrangements. Each case will be adjudicated on its merits, and it is not possible to cover all possible types of work arrangements in this rulemaking. Regarding the assertion that a bona fide job offer is absent from DHS's regulations or statutorily delegated powers, this basic requirement derives from the statutory and regulatory requirements that the petitioner be an ''importing employer'' and a ''United States employer'' that will employ the beneficiary in a ''specialty occupation.'' *See* INA sec. 214(c)(1), (i)(1); 8 CFR 214.2(h)(4)(i)(A)(*1*); 8 CFR 214.2(h)(4)(ii). It is also reflected in current USCIS policy guidance, which states that the petitioner must establish that ''[a] bona fide job offer . . . exist[s] at the time of filing,'' [142] as explained in the NPRM. 88 FR 72870, 72904 (Oct. 23, 2023). This requirement, which is being codified in DHS regulations in this final rule, is also consistent with DHS's general authority under 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 and establish such regulations as the Secretary deems necessary for carrying out such authority. It is also consistent with section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the time and conditions of nonimmigrant admission and 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 nonimmigrant workers, including H–1B nonimmigrants, and the information that an importing employer must provide in the petition.

vii. Legal Presence and Amenable to Service of Process

Comment: A law firm said that the legal presence and amenable to service of process provision is ''not controversial.'' A joint submission also voiced support for the provision, adding that it would provide clear guidance to all employers, especially new and emerging companies, with respect to the minimum legal threshold for establishing their status as bona fide U.S. employers.

An attorney writing as part of a form letter campaign said that DHS's proposal to replace the requirement that the petitioner ''[e]ngages a person to work within the United States'' with the requirement that the petitioner have a legal presence and be amenable to service of process in the United States is unclear. The commenters said that while DHS is not proposing to change the requirement of an employment identification number (EIN), it is making the definition vague, voicing confusion about the term ''have a legal presence.'' The commenters inquired whether DHS intended to allow non-U.S. employers to petition if they have a P.O. box and an EIN, or whether DHS considered how DOL would interpret this legal presence regarding the use of a P.O. box when it comes to the labor certification process where there is a physical address requirement. The commenters stated that ''[i]t does not make sense to change from the current definition of 'United States employer as a person, firm, corporation, contractor, or other association, or organization in the United States.' '' Additionally, an individual commenter requested that a U.S. employer should have an office and staff in the registered location, including if it is remote and hybrid within the United States and not elsewhere like offshore or outside of the United States. The commenter added that the U.S. employer should process all information in the United States and not through ''group companies like for [i]nsurance,'' while payroll processing and benefits could be done by a vendor or third party.

Response: DHS agrees with the commenters who said that requiring the petitioner to have a legal presence in the United States and be amenable to service of process in the United States will provide clear guidance to employers with respect to the minimum legal threshold for establishing their status as eligible U.S. employers, and disagrees with the commenters who said this requirement is confusing. As explained in the NPRM, ''legal presence'' means that the petitioner is legally formed and authorized to conduct business in the United States, and ''amenable to service of process'' means that the petitioner may be sued in a court in the United States. 88 FR 72870, 72905 (Oct. 23, 2023).

To clarify, this is a new requirement at prong two of the definition of ''United States employer.'' Overall, DHS is removing the previous requirement that the petitioner ''[e]ngages a person to work within the United States'' and the employer-employee relationship requirement, and is adding the requirements that (1) the petitioner have a bona fide job offer for the beneficiary to work within the United States, and (2) the petitioner has a legal presence and is amenable to service of process in the United States. DHS is still maintaining the part of the definition that a United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States.

Regarding the questions of whether, under the legal presence requirement, DHS intends to allow non-U.S. employers to petition as a U.S. employer if they have a P.O. box and an EIN or whether such employers must have a physical address/office in the United States, DHS believes that this is generally covered by the new requirement that the petitioner have a legal presence in the United States as well as the LCA requirements.[143] Ultimately, however, the answer may depend on the applicable state(s) laws where the petitioner is legally formed and authorized to conduct business in the United States. DHS declines to add additional regulatory requirements that were not proposed in the NPRM, such as requiring a physical office with staff or specifying where and by whom various business information must be processed.

12. Beneficiary-Owners

Comment: A couple of commenters expressed general support for provisions impacting entrepreneurs, noting that the proposed regulations would encourage entrepreneurs to start their own businesses and not stifle business or personal growth. One commenter said that this would be highly beneficial to the visa holder, the startup environment, and the United States; and, another commenter said this would support the entrepreneurial spirit of the United States and would help improve the economy by enabling entrepreneurs to file as H–1B petitioners. A professional association wrote that improved H–1B policies could allow

[142] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020); *see also* USCIS, Adjudicator's Field Manual (AFM) Chapter 31.3(g)(4) at 24, ''H1–B Classification and Documentary Requirements has been partially superseded as of June 17, 2020,'' available at *https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm31-external.pdf* (''The burden of proof falls on the petitioner to demonstrate the need for such an employee. Unless you are satisfied that a legitimate need exists, such a petition may be denied because the petitioner has failed to demonstrate that the beneficiary will be employed in a qualifying specialty occupation.''). While USCIS retired the AFM in May 2020, this example nevertheless illustrates the agency's historical interpretation.

[143] *See* ''Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,'' 56 FR 61111, 61112 (Dec. 2, 1991) (explaining that the requirement to post a notice of the filing of a labor condition application at the petitioner's place of employment ''obviously requires the petitioner to have a legal presence in the United States'').

postdoctoral researchers to remain in the United States and ''continue contributing to the U.S. innovation pipeline while cutting red tape.'' Other commenters said that by giving H–1B holders the chance to pursue entrepreneurship opportunities, the proposed rule would create employment opportunities for others in the United States, move the H–1B program in a positive direction, and prevent talented individuals from leaving the United States for Canada, Australia, and their home countries. A commenter wrote that they know of people who have travelled back to their home countries to start their entrepreneurial journey because of current restrictions in the United States and that by removing entrepreneurship restrictions for such individuals, the U.S. economy would benefit from new successful companies.

An advocacy group expressed appreciation for USCIS' exploration of policies to improve H–1B pathways for startup talent. Another commenter emphasized the prevalence of immigrants in the startup ecosystem while expressing concerns about declining U.S. innovation as the United States becomes a less attractive destination for qualified entrepreneurs compared to places like the UK, the European Union, and Canada.

An advocacy group wrote that the definition of an employer-employee relationship makes it difficult for entrepreneurs to qualify for H–1B status, which USCIS has recognized deters high-skilled foreign nationals from starting a company. While citing a report from the National Foundation for American Policy, the group emphasized that nearly two-thirds of U.S. billion-dollar companies were founded or co-founded by immigrants or the children of immigrants, representing what the U.S. economy loses when restricting foreign-born entrepreneurship.

Response: DHS appreciates the feedback from these commenters and acknowledges that there are limited pathways for entrepreneurs to come to the United States under existing regulations. The intent of the beneficiary-owner provisions is to promote access to the H–1B program for entrepreneurs, start-up entities, and other beneficiary-owned businesses while also setting reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity to better ensure program integrity.

Comment: Numerous commenters offered remarks in support of the measures enabling beneficiary-owners to access and participate in the H–1B program. One commenter said that the proposed H–1B eligibility requirements ''hold promise'' for emerging entrepreneurs, while an advocacy group welcomed steps towards creating pathways for entrepreneurs to develop and grow businesses in the United States. An advocacy group supported the regulatory language acknowledging that beneficiary-owners are ''legitimate and valid participants in the H–1B program,'' and a research organization said the proposal is an improvement upon existing rules. A few commenters generally endorsed the relaxation of ''unreasonable and unnecessary requirements for founders, while other commenters stated the general need to allow H–1B holders to start a business.

Numerous commenters endorsed the provision on the basis that promoting access to H–1B visas for entrepreneurs and start-up owners would foster innovation, job creation, and economic growth in the United States. A trade association supported additional pathways for entrepreneurs and founders, reasoning that their companies represent an essential part of the U.S. economy. Similarly, a joint submission described the role of beneficiary-owners in the start-up economy and ongoing barriers to innovators in the U.S. immigration system. The commenters supported the rule's provisions allowing founders to launch and grow companies and slow the drain of start-up talent to other countries. A form letter campaign wrote that, in addition to job creation and innovation, the proposed provisions facilitating H–1B access for start-up founders would drive industry diversity and global competitiveness. A law firm added that codifying a petitioner's ability to qualify as a U.S. employer, even when the beneficiary owns a controlling interest in the petitioner's business, would address historical barriers for beneficiary-owned businesses in the H–1B program. The commenter wrote that the changes would encourage more innovators to utilize the program, leading to increased innovation, job creation, and new opportunities. While citing a report from the New American Economy, an advocacy group wrote that immigrant entrepreneurship is a ''major economic and jobs multiplier'' that keeps talent in the United States while creating employment opportunities for U.S.-born workers. The group concurred with DHS's statement in the NPRM that if more entrepreneurs can obtain H–1B status, the United States would benefit from the creation of jobs, new industries, and opportunities. Another commenter added that entrepreneurs bring a wealth of knowledge that contributes to the growth of various sectors, including health, technology, and finance. The commenter said that attracting global talent would encourage the creation of cutting-edge solutions, products, and services to enhance U.S. competitiveness while aligning with the principles of a dynamic and inclusive economy.

An advocacy group welcomed DHS's efforts to acknowledge the contributions of immigrant founders in the start-up and innovation ecosystem. The advocacy group said that easing barriers for founders to come to the United States is a ''net positive,'' as the majority of billion-dollar start-ups have at least one immigrant founder. These companies, the advocacy group said, create U.S.-based jobs while strengthening the economy and communities. Additionally, the group said that encouraging entrepreneurs' participation in the program would represent an important step in supporting more pathways for immigrant founders to come to the United States. A law firm remarked that ''liberalizing'' opportunities for founders to obtain H–1B status would increase the number of companies established by graduates of U.S. universities. A university wrote that international students often to pursue entrepreneurial ventures outside of the United States and that this proposal would create an important opportunity for international researchers to become entrepreneurs in the United States.

Commenters also supported the clarification around beneficiary-owners on the basis that it would provide increased certainty to prospective beneficiaries and other stakeholders in the H–1B program. A business association thanked DHS for including explicit regulatory authorization for entrepreneurs to obtain H–1B visas, reasoning that this approach aligns with its previous recommendations to the agency and would provide greater certainty for start-up businesses across industries. A joint submission endorsed efforts to encourage beneficiary-owner participation in the H–1B program and concurred with the NPRM's description of problems and uncertainty affecting the entrepreneurial community. The commenters supported efforts to clarify longstanding policies and establish practices that facilitate the inclusion of entrepreneurs, founders, and beneficiary-owned petitioners in the H–1B visa program. Another joint submission and a form letter campaign also concurred that USCIS' common-law analysis of the employer-employee relationship has been an impediment to beneficiary-owners as a result of the

legacy of the now-rescinded 2010 guidance and reasoned that the proposed change would provide much-needed clarity.

Response: DHS agrees that clarifying how the regulations apply to entrepreneurs will provide greater certainty for entrepreneurs and start-up business owners. In clarifying this policy, DHS seeks to encourage more beneficiary-owned businesses to participate in the H–1B program. As explained in the NPRM, if more entrepreneurs are able to obtain H–1B status, the United States could benefit from the creation of jobs, new industries, and opportunities. 88 FR 72870, 72905 (Oct. 23, 2023).

Comment: While expressing support for the proposed measures to provide H–1B visas to beneficiary-owners, an advocacy group encouraged DHS to ease pathways—via H–1B and other programs—for start-up founders who do not have a controlling interest in their companies to remain in the United States and grow their companies. The group reasoned that facilitating pathways only for those with controlling ownership may force founders to decide between expansion, which comes with relinquishing majority ownership, or retaining equity for visa purposes, limiting companies' contributions to the U.S. economy.

Response: There is nothing currently, or historically, in the regulations that prevents an owner with less than a controlling interest from qualifying for H–1B status. As explained in the NPRM, historically, USCIS' common law analysis of the employer-employee relationship has been an impediment for certain beneficiary-owned businesses (*e.g.,* beneficiaries who are the sole operator, manager, and employee), to use the H–1B program. 88 FR 72870, 72905 (Oct. 23, 2023). Through the beneficiary-owner provision, DHS is clarifying its current policy and encouraging more beneficiary-owned businesses to participate in the H–1B program. By creating certain conditions—such as the majority of the time requirement and shortened validity periods—that would apply when a beneficiary owns a controlling interest in the petitioner, DHS intends to ensure that the beneficiary will be employed in a specialty occupation in a bona fide job opportunity. Limiting this framework to beneficiary-owners who have a controlling interest in their companies is meant to add integrity protections to the program and prevent these owners from abusing the H–1B program. This is not intended to hinder or impede entrepreneurs who do not have a controlling interest in their companies, to whom the additional conditions would not apply. DHS seeks to encourage more beneficiary-owned businesses to participate in the H–1B program, regardless of whether they have a controlling interest in the petitioning business.

Comment: A few commenters voiced concern about allowing petitioners to sponsor themselves for an H–1B visa, including a commenter who generally stated that H–1B visa holders should not be allowed to have their own businesses or start-ups. A different commenter wrote without reference to any statutory provisions, or analysis thereof that ''self-sponsorship'' would be risky and breach H–1B law established by Congress, while another commenter expressed concerns with program exploitation associated with self-sponsored visa holders. A different commenter also expressed concern with abuse associated with the provisions allowing entrepreneurs to ''self-sponsor'' their H–1B visa. The commenter said that in the absence of ''proper gating criteria'' for beneficiary-owners, DHS would likely see an increase in ''self-sponsor'' petitions.

Response: DHS disagrees that the beneficiary-owner provision is ultra vires. There is nothing in the statute prohibiting a noncitizen with an ownership interest in a U.S. employer from being the beneficiary of an H–1B petition filed by that employer and the commenter did not identify any statutory provisions that preclude a beneficiary-owned business from qualifying as an employer for H–1B purposes.

Through this provision DHS is clarifying its current policy, which has been in place since 2020 [144] when DHS rescinded its 2010 policy memorandum [145] explaining the common law analysis of the employer-employee relationship. However, like some commenters, DHS is also concerned with the possibility of beneficiaries exploiting the H–1B program, which is why DHS is creating certain conditions that must be adhered to when a beneficiary owns a controlling interest in the petitioner. These conditions include the requirement that the beneficiary must perform specialty occupation duties a majority of the time and shortened validity periods for the initial petition and first extension of 18 months. These restrictions are meant to act as safeguards and to better ensure that the beneficiary will be employed in a specialty occupation in a bona fide job opportunity.

DHS disagrees with the claims that this provision amounts to ''self-sponsorship'' and would be contrary to statute. There is a difference between allowing a beneficiary-owned business, versus an individual acting in their individual capacity, to file a petition as a ''United States employer.'' As a general principle of law, a corporation is a separate and distinct legal entity from its owners or stockholders.[146] Therefore, even if a beneficiary is a sole owner of a business, that business may still file an H–1B petition as a ''United States employer'' if the business meets all the definitional elements at new 8 CFR 214.2(h)(4)(ii), *i.e.,* has a bona fide job offer of employment, has a legal presence in the United States and is amenable to service of process, has an IRS tax identification number, and, if the beneficiary has a controlling interest in the petitioner, the beneficiary will perform specialty occupation duties a majority of the time, consistent with the terms of the H–1B petition. DHS notes that the regulatory definition of ''United States employer'' at 8 CFR 214.2(h)(4)(ii)—which has existed since 1991—includes ''a person.'' [147]

Comment: Numerous commenters expressed support for the provision clarifying that the beneficiary may perform duties that are directly related to owning and directing the petitioner's business, as long as the beneficiary performs specialty occupation duties authorized under the petition for a majority of the time. Several commenters reasoned that the proposal would acknowledge the reality of beneficiary-owners' responsibilities outside of specialty occupation tasks and allow them to grow their businesses. For example, a law firm generally stated that the proposal reflects the duties of entrepreneurs in addition to their specialty occupation tasks, while an advocacy group said that allowing beneficiaries to perform duties outside of the scope of their specialty occupation would be critical for founders, enabling them to engage in other tasks inherent to building a startup, like seeking out investors. A

[144] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (Jun. 17, 2020).

[145] *See* USCIS, ''Determining Employer-Employee Relationship for Adjudication of H–1B Petitions, Including Third-Party Site Placements,'' HQ 70–6.2.8, AD 10–24 (Jan. 8, 2010) (rescinded).

[146] *See Matter of M,* 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Ltd.,* 17 I&N Dec. 530 (Comm'r 1980); *Matter of Tessel,* 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980).

[147] *See* 56 FR 61112 (Dec. 2, 1991) (adding a definition of the term ''United States employer'' in the final rule to include ''a person''); *see also* 57 FR 12179 (Apr. 9, 1992) (interim rule) (maintaining ''a person'' (but eliminating ''which suffers or permits a person to work within the United States'') from the definition of ''United States employer'').

joint submission, expressing strong support for the NPRM's proposal and reasoning, similarly wrote that the flexibility would allow beneficiaries to drive business growth with confidence through responsibilities not reflected in their specialty occupation duties, such as by pitching to investors to raise funds and negotiating contracts. The joint commenters concluded that these business responsibilities are essential for maintaining the viability of companies. Likewise, another joint submission wrote that permitting beneficiaries to perform duties outside the scope of their specialty occupation would provide them with greater opportunities to grow and succeed. A professional association similarly supported agency efforts to clarify that beneficiary-owners may perform non-specialty-occupation work on a limited basis, reasoning that founders in the medical sector must perform other duties outside of direct patient care. The association said that the clarification around non-specialty-occupation work is a ''reasonable and helpful modification'' to ensure that physician-owners can carry out necessary administrative tasks for providing clinical care.

A joint submission expressed support for the proposed changes establishing a ''majority of the time'' framework on the basis that it would give clarity to economically significant start-ups and entrepreneurs and provide a workable framework for beneficiary-owners to perform their duties in startup entities and as entrepreneurs. The commenters wrote that the changes could encourage the use of specialty occupation workers in critical industries and meet USCIS' policy goals of reducing barriers to entry for startups. The commenters agreed with DHS's ''commonsense explanations'' around the proposed provision and wrote that the proposed framework would allow beneficiary-owners to wear the various ''hats'' that they may undertake. The commenters commended DHS for moving towards a framework of increased flexibility, thereby allowing entrepreneurs to consider specialty occupation workers to develop their businesses while expanding and innovating the U.S. economy. Echoing the above remarks, another law firm reasoned that the proposed approach would offer flexibility for beneficiary-owners while maintaining program requirements, striking a balance between promoting entrepreneurship and preventing misuse of the H–1B program. Another commenter generally requested more relaxation on non-specialty occupation related duties for beneficiary-owners, reasoning that this would give more opportunities for job creation.

Response: DHS agrees with commenters that it is important to clarify that the beneficiary may perform non-specialty occupation duties that are directly related to owning and directing the petitioner's business to allow beneficiaries to drive business growth with confidence through responsibilities not reflected in their specialty occupation duties. DHS acknowledges the reality of beneficiary-owners' responsibilities outside of specialty occupation tasks and clarifies that this is permitted as long as the beneficiary performs specialty occupation duties authorized under the petition during a majority of the time. As stated in the NPRM, the goal is to ensure that a beneficiary who is the majority or sole owner and employee of a company would not be disqualified by virtue of having to perform duties directly related to owning and directing their own company. 88 FR 72870, 72906 (Oct. 23, 2023). The ''majority of the time'' standard is also necessary to ensure that a beneficiary who is the majority or sole owner and employee of a company would still be ''coming temporarily to the United States to perform services . . . in a specialty occupation'' as required by INA section 101(a)(15)(H)(i)(b). Therefore, DHS declines to expand this flexibility any further.

Comment: A joint submission requested clarification on non-specialty occupation job duties for beneficiary-owners that ''must be directly related to owning and directing the business'' and expressed concern over potential disagreement over what are considered to be directly related to owning and directing a business. The commenters requested additional guidance as to what duties are considered to be directly related to owning and directing a business to facilitate consistent decision making.

Response: As discussed in the NPRM, DHS recognizes that, similar to other H–1B petitions, a beneficiary-owner may perform some incidental duties, such as making copies or answering the telephone. 88 FR 72870, 72905 (Oct. 23, 2023). In addition, DHS expects a beneficiary-owner would need to perform some non-specialty occupation duties when growing a new business or managing the business. Notwithstanding incidental duties, non-specialty occupation duties must be directly related to owning and directing the business. These duties may include, but are not limited to: signing leases, finding investors, and negotiating contracts. Other examples might include developing a business plan, engaging with potential suppliers and other stakeholders, or talent acquisition. These examples are non-exhaustive and may not apply in every case. DHS does not believe that additional guidance or explanation of which duties are ''directly related to owning and directing the business'' is necessary because it is a fact-specific determination that will require a case-by-case determination. As stated in the NPRM, the goal is to ensure that a beneficiary who is the majority or sole owner and employee of a company would not be disqualified by virtue of having to perform duties directly related to owning and directing their own company, while also ensuring that the beneficiary would still be ''coming temporarily to the United States to perform services . . . in a specialty occupation'' as required by INA section 101(a)(15)(H)(i)(b). 88 FR 72870, 72906 (Oct. 23, 2023). Thus, in each case, USCIS will analyze all of the job duties—specialty occupation duties and non-specialty occupation duties—which the petitioner must accurately describe in the petition along with the expected percentage of time to be spent performing each job duty, and, for extensions, the time spent performing these duties in the preceding petition's validity period, to determine whether the job would be in a specialty occupation and to determine whether the non-specialty occupation duties are directly related to owning and directing the business. If the beneficiary would spend a majority of their time performing specialty occupation duties, and if the non-specialty occupation duties are directly related to owning and directing the business, then the position may qualify as a specialty occupation.

DHS emphasizes that nothing in this final rule would change DOL's administration and enforcement of statutory and regulatory requirements related to LCAs, including requirements concerning the appropriate prevailing wage and wage level when the proffered position involves a combination of occupations. *See* 8 U.S.C. 1182(n); 20 CFR part 655, subparts H and I.

For example, in some cases the petition might involve a combination of occupations that can affect the petitioner's wage obligation, as detailed in DOL's wage guidance.[148] Generally, when an H–1B employer requests an optional prevailing wage determination from DOL, the National Prevailing Wage Center will assign to the position the occupational code that has the higher of the prevailing wages amongst the combination of occupations. Under this final rule, a petitioner may be authorized to employ a beneficiary-owner in a combination of occupations, provided that the petitioner pays the required wage, consistent with existing DOL wage guidance, even when the beneficiary-owner is performing non-specialty occupation duties as authorized by USCIS in accordance with this final rule.

Comment: A joint submission expressed appreciation for the clarification that beneficiary-owners may seek concurrent H–1B employment with multiple qualifying specialty occupation roles as long as the ''majority of the time'' framework applies to those situations. An advocacy group similarly supported DHS's clarification that beneficiary-owners are not prohibited from engaging in concurrent employment. A commenter expressed that H–1B beneficiary owners should be able to form a C corporation while working with their current employer. A different commenter suggested an H–1B beneficiary could be employed by a Fortune 500 company and own a firm, enabling H–1B visa holders to have a regular job while having the opportunity to engage in entrepreneurial activities. The commenter also suggested an initial ''filter'' to allow concurrent employment only for limited companies, such as Fortune 500 companies and those that work with the Federal Government.

Response: DHS agrees with the commenters that it is helpful to petitioners to clarify that beneficiary-owners may seek concurrent H–1B employment with multiple qualifying specialty occupation roles as long as the ''majority of the time'' framework applies to those situations where the beneficiary spends time working in the beneficiary-owner position. While a beneficiary may be able to form and hold a controlling interest in a business, whether organized as a C corporation or another type of legal entity, the beneficiary would generally not be authorized to work for that business until authorized to do so (*e.g.,* upon approval of a petition filed by that business or, if eligible for H–1B portability, upon the filing of an H–1B petition by that business). As explained in the NPRM, the beneficiary-owner provision does not preclude the beneficiary from being authorized for concurrent employment with two or more entities (including another entity where the beneficiary is also an owner with a controlling interest) so long as each entity has been approved to employ the beneficiary in a specialty occupation and the individual otherwise satisfies all eligibility requirements. 88 FR 72870, 72905 (Oct. 23, 2023). Therefore, under these circumstances, an H–1B beneficiary could seek authorization to work for a business in which they have a controlling interest while concurrently working for another employer authorized to employ the beneficiary as an H–1B nonimmigrant. However, DHS disagrees that initial ''filters'' or limitations are necessary, such as limiting concurrent employment to working for Fortune 500 companies or companies that work with the Federal Government. The commenter did not explain the purpose such restrictions would serve and there is nothing to suggest that restricting the eligibility of beneficiary-owners in this way would enhance program integrity or otherwise be beneficial to the H–1B program.

Comment: Several commenters expressed support for limiting the validity period for initial petitions and extensions to 18 months. For example, a commenter acknowledged the practicality of the cautionary rules for a shorter visa extension.

Response: DHS agrees that it is important to add certain safeguards to prevent program abuse and is limiting the first two validity periods to 18 months each as a safeguard against possible abuse or fraud.

Comment: Numerous commenters expressed opposition to the proposed 18-month validity period for initial petitions and extensions. A commenter stated that this provision will enhance exploitation and outsourcing and that having ''no string attached'' before an 18-month visa is granted is a long time to inflict substantial damage, while another commenter suggested that the 18-months validity period is too short for new start-ups and businesses to become profitable and generate employment for U.S. citizens. Another commenter said that there should be no minimum investment since there are other programs available (like EB–5) to those start-ups, and it would discourage other individuals from contributing to the U.S. economy. An advocacy group requested further clarification as to how individuals would continue to invest in the economy when their initial stay is limited to 18 months and how entrepreneurs may obtain permanent residency in the United States through the H–1B program.

A commenter said that the 18-month validity period would not reduce fraud but would discourage other potential entrepreneurs since they would have little negotiation power when seeking venture capital. An advocacy group wrote that the 18-month validity period is unnecessary and said that start-ups often take long periods of time to become profitable; requiring founders to renew their visas frequently would impair them when securing investors. An advocacy group said it would be detrimental to an H–1B visa holder if they had to leave the United States to renew their visa, and even more detrimental if they were simultaneously filling a specialty role at their companies, making it impossible to secure funding for their start-up. An attorney reasoned that if all other H–1B requirements remain the same for beneficiary-owners, the limiting measure is unnecessary and would create an administrative burden on the agency by requiring more frequent adjudications and increasing processing times. The attorney also stated that the areas of potential fraud that the 18-month limit would protect against are not identified. Another joint submission stated that the 18-month validity period places an undue burden of unnecessary oversight on beneficiary-owned entities which detrimentally impacts their operations, and that the validity period does not prevent fraudulent H–1B petitions. The commenters in the submissions reasoned that the 18-month limit would be expensive, since an initial petition can cost up to $4,960. One of the joint submissions additionally noted that there are other visa categories available to entrepreneurs and the 18-month limit would cause the H–1B visa to be less attractive and could cause unneeded stress to founders, entrepreneurs, and petitioners. A research organization

[148] DOL, ''Round 3: Implementation of the Revised Form ETA–9141 FAQs'' at 1 (July 16, 2021) (When there is a combination of occupations, the SOC code with the highest wage is assigned.), *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWC%20Round%203%20Frequently%20Asked%20Questions%20-%20Implementation%20of%20Revised%20Form%20ETA-9141.pdf*; DOL, ''Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs Revised November 2009'' at 4 (If the employer's job opportunity involves a combination of occupations, the National Prevailing Wage Center should list the relevant occupational code for the highest paying occupation.), *https://www.flcdatacenter.com/download/npwhc_guidance_revised_11_2009.pdf* (last visited Oct. 3, 2023).

stated that limiting the first two validity periods to 18 months as a safeguard against possible fraudulent petitions is not feasible for a nonprofit entity or a nonprofit research organization that must obtain approval by the IRS.

A business association wrote that the 18-month validity period would adversely affect small businesses that have less resources to comply with the H–1B program's requirements and that there are already sufficient tools and guardrails in place to combat fraud. The association also stated that competing firms that have no beneficiary ownership would only need to apply for an H–1B worker once, while the beneficiary owned firm would have to petition twice as many times during the same period. A different commenter stated that limited validity period would actually discourage founders from focusing on innovating and founding companies since the H–1B renewal process is time-consuming, expensive, and adds instability for founders. A couple of commenters reasoned that the 18-month validity period would be burdensome, have unnecessary costs, and would generate more petitions for the agency to adjudicate. A professional association recommended that only the initial H–1B visa be limited to 18 months and that any subsequent filings should be granted up to the full 3-year limit. A joint submission stated that early-stage companies have the least available bandwidth for effective compliance and any additional legal and compliance costs would be a burden unique to startups with an immigrant founder or key early hire.

In light of the above concerns, some commenters proposed alternative validity periods for beneficiary owners. For example, commenters suggested that a standard 36-month validity period should be applied, reasoning that an across-the-board reduction in the validity period would severely impact founders' ability to innovate, experiment with new technologies, and secure investment. The commenters also said that the change to the validity period could encourage start-up founders to go to other countries. A commenter stated that a longer visa period and fewer renewals would improve the regulatory process for startups and recommended that the H–1B program follow the 30-month period for the International Entrepreneur Parole (IEP) pathway which allows a longer timeline to support success. A joint submission also noted that the 30-month timeline for IEP would make it a more attractive option for entrepreneurs, deterring them from the H–1B process. A couple of commenters mentioned that the limitation of the initial visa length and first renewal to 18 months is far too restrictive and should be retained at 3 years.

Response: DHS understands that filing petitions more frequently may cause an administrative burden. However, DHS disagrees that limiting the initial and first extension validity period to 18 months is unnecessary; rather, it is an important safeguard against possible abuse or fraud. As stated in the NPRM, while DHS sees a significant advantage in promoting the H–1B program to entrepreneurs, DHS believes that guardrails for beneficiary-owner petitions are necessary to mitigate the potential for abuse of the H–1B program. 88 FR 72870, 72906 (Oct. 23, 2023). Limiting the first two validity periods to 18 months each will allow DHS adjudicators to review beneficiary-owned petitions more frequently, and limiting the nature of non-specialty occupation duties that may be performed will deter potential abuse and help maintain the integrity of the H–1B program. DHS selected 18 months for the first two validity periods as a balance between promoting entrepreneurship and maintaining program integrity. As an additional clarification, while a beneficiary's initial stay is limited to 18 months, they may request an extension for an additional 18 months, and additional extensions for up to 3 years after that, for a maximum total of 6 years (unless eligible for an exception to the 6-year period of authorized admission limitation) like other H–1B workers. Further, DHS did not propose a minimum investment amount for beneficiary owners and is not adding one through this rulemaking.

Comment: A few commenters suggested that DHS clarify rules for beneficiary-owner petitions, suggesting additional clarification around who is qualified to start a business, the type of businesses allowed, and who can sponsor themselves for an H–1B visa. A joint submission noted that the NPRM preamble explained that controlling ownership interest means ''the beneficiary owns more than 50 percent of the petitioner or [ ] the beneficiary has majority voting rights in the petitioner,'' [149] but expressed concern that ''controlling interest'' lacks a precise regulatory definition in the proposed rule. The joint commenters suggested that DHS codify the definition within the regulations to ensure clarity as to which beneficiary-owners would be subject to this framework, rather than defining this in future USCIS Policy Manual guidance. The commenters recommended that the definition of ''control'' align with the alternatives provided in the L–1 intracompany nonimmigrant visa category (*e.g.,* at least 50 percent ownership; 50 percent ownership in a 50–50 joint venture with equal control and veto power, and less than 50 percent ownership with a controlling interest).

Response: DHS agrees that additional clarification would be beneficial in the regulatory text and is clarifying in new 8 CFR 214.2(h)(9)(iii)(E) that ''controlling interest'' means that the beneficiary owns more than 50 percent of the petitioner or when the beneficiary has majority voting rights in the petitioner. Whether the beneficiary has majority voting rights in the petitioner will depend on the bylaws and other governing documents of the petitioning entity (*e.g.,* if there are preferred shares that give certain owners greater voting rights than other owners with common shares), but it will generally reflect who controls the direction and management of the petitioning entity, including decisions pertaining to the employment of executives, which could include the beneficiary-owner's employment. DHS declines to adopt definitions from the regulations relating to the L–1 nonimmigrant classification as those regulations relate to establishing a qualifying relationship for purposes of establishing eligibility for L–1 classification and may not readily apply in the context of a beneficiary-owner. Further, beneficiaries may still qualify as H–1B nonimmigrants even where they do not have a controlling ownership interest in the petitioner.

Comment: Another commenter suggested that USCIS clarify the definition of ''owner'' and ''control,'' reasoning that these terms are not clear in the context of nonprofit organizations. Specifically, the commenter said that DHS did not provide clarity regarding for-profits and nonprofits and how sole ownership of a nonprofit would function under the proposed rule. The commenter warned that this lack of clarity could lead to confusion and the inconsistent application of the proposed regulations. Additionally, a research organization expressed concern that DHS failed to distinguish between nonprofit and for-profit corporations and their structures. The commenter said that if owning a ''controlling interest'' is interpreted as ownership of stock or shares, the proposed rule would not apply to a noncitizen sole director of a nonprofit corporation that does not issue capital stock or shares for ownership. The

[149] 88 FR 72870, 72905.

commenter requested that DHS expand the definition to include sole directors who incorporate a nonprofit or nonstock corporation as a United States employer with an EIN, and suggested a new definition.

A couple of commenters expressed concern that the proposed provisions and requirements related to ''controlling interest'' do not account for high-growth companies at the later stages of the startup lifecycle during which an entrepreneur ''will typically hold smaller ownership stakes in the company.'' Specifically, a joint submission said that, at this later stage, the owner's stake shrinks as the start-up sells equity to investors. The commenters wrote that the LCA wage requirements force many entrepreneurs to take on entry-level roles, as start-ups have limited cash reserves to pay market-rate salaries for CEO and other C-Suite roles. Additionally, the commenters reasoned that maintaining equity ownership provides greater economic benefit to owners compared with taking a higher salary. Thus, the joint commenters encouraged DHS to create a process allowing early-stage, high-growth entrepreneurs to hold CEO or other C-Suite titles while protecting against fraud and abuse. The commenters concluded that immigration processes need to account for start-up growth, reasoning that incentivizing entrepreneurs to maintain their equity stake to benefit from the regulations would disincentivize job creation.

Response: As explained in the NPRM, DHS is setting reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity to better ensure program integrity. 88 FR 72870, 72906 (Oct. 23, 2023). These proposed conditions will apply when a beneficiary owns a controlling interest, meaning that the beneficiary owns more than 50 percent of the petitioner or when the beneficiary has majority voting rights in the petitioner. DHS is specifically addressing situations where a potential H–1B beneficiary owns a controlling interest in the petitioning entity and is not imposing any restrictions regarding who is qualified to start a business, or the type of businesses allowed to petition for a beneficiary-owner.

With respect to non-profit organizations, DHS recognizes that, in some cases, a beneficiary might not be able to establish a controlling interest in a non-profit organization, meaning the beneficiary owns more than 50 percent of the petitioner or has majority voting rights in the petitioner. However, the non-profit entity may still petition for the beneficiary as an H–1B nonimmigrant worker even where the beneficiary does not possess a controlling interest. Thus, DHS does not believe it is necessary to revise the provisions relating to beneficiary-owners to account for non-profit organizations.

With respect to ''high growth companies'' where a potential beneficiary-owner may hold a smaller ownership in the company, DHS notes that the beneficiary-owner provisions would apply where the beneficiary has majority voting rights in the petitioner. Further, the entity may still file an H–1B petition on behalf of the beneficiary where the beneficiary does not possess a controlling interest in the petitioning entity. Therefore, DHS does not believe it is necessary to make changes to the beneficiary-owner provisions in response to this comment.

Comment: A few commenters suggested additional measures to address fraud and abuse related to beneficiary-owned H–1B petitions. For example, a law firm proposed that when a company files an initial petition for a beneficiary-owner, it must submit a detailed business plan, and when the company files an extension on behalf of the beneficiary-owner, it must explain the progress made on the achievement of the goals specified in the business plan. While expressing concerns with program abuse by beneficiary-owned H–1B petitioners, another commenter suggested that beneficiary-owners should be required to pay the same wages to a minimum of five U.S. citizens in the company and should not be allowed to have H–1B holders constitute more than 10 percent of the company's workforce. Another commenter suggested that the beneficiary-owners provisions should be complemented with increased site visits, with up-front penalties for those violating the program requirements. To deter program fraud, a commenter proposed that entrepreneurs receive a 2-year Employment Authorization Document (EAD) before applying for an H–1B visa, based on the company's performance. The commenter suggested that success could be measured through capital raised, U.S. citizens employed, jobs created, and revenue, and there could be lower thresholds for non-technology startup companies to avoid skewing applications towards the technology sector.

Response: DHS declines to adopt these additional measures. DHS believes that the conditions discussed in the proposed rule for when the beneficiary owns a controlling interest in the petitioning entity are sufficient to help ensure program integrity. These conditions include the requirement that the beneficiary will perform specialty occupation duties authorized under the petition a majority of the time, that, notwithstanding some incidental duties, non-specialty occupation duties must be directly related to owning and directing the petitioner's business, and limiting the validity period for the initial petition and first extension of such a petition to 18 months each. DHS also notes that this final rule contains a number of provisions that are intended to enhance the integrity of the H–1B program, including provisions on the bona fide job offer requirement, third-party placement and site visits, and that these integrity provisions will be applicable to all H–1B petitions, including those involving beneficiary-owners. However, some of the suggestions, such as expressly requiring a beneficiary-owned petitioner to employ a certain number of U.S. citizens, raise a certain amount of capital, or provide proof of accomplishments towards the business plan, may be too restrictive especially during a new business's beginning stages when resources may be scarce and exact business plans may change. DHS also recognizes that different endeavors may have different capital or personnel needs, and therefore, setting minimum investment or staffing requirements may be too restrictive.

Comment: Several commenters discussed concerns with wage requirements for beneficiary-owners. Specifically, commenters requested that DHS provide additional flexibility to beneficiary-owners in the context of DOL's prevailing wage requirements. One such commenter reasoned that many startups by beneficiary-owners with majority ownership may not see positive cash flow for a long period of time, which makes it challenging for owners to both adhere to wage requirements and make investments to grow their business. A couple of different commenters, echoing this concern, suggested that the prevailing wage requirements ''should be relaxed'' and instead the beneficiary-owner's credentials and expertise should be prioritized in the formative years of a practice. The commenter reasoned that such an approach would encourage entrepreneurs with specialized knowledge to develop their businesses and contribute to the U.S. economy. A different commenter said that the LCA requirements would complicate the proposed revisions for beneficiary owners, as startup founders would be bound to a high base salary despite

needing 2 to 3 years to become self-funded. Similarly, another commenter expressed concern that the rule does not go far enough to address challenges faced by H–1B entrepreneurs, such as minimum salary requirements. Thus, the commenter urged DHS to consider exempting H–1B entrepreneurs from the minimum salary requirements, suggesting an exemption period during the first 2 years of operation. The commenter also proposed that beneficiary-owners should demonstrate financial viability through alternative means, such as secured funding commitments or detailed business plans. The commenter reasoned that these measures would strengthen the H–1B program and encourage the creation of businesses that would contribute to long-term economic prosperity in the United States. Additionally, a joint submission wrote that the LCA wage requirements force many entrepreneurs to take on entry-level roles, as startups have limited cash reserves to pay market-rate salaries for CEO and other C-Suite roles.

Response: DHS emphasizes that nothing in this final rule changes DOL's administration and enforcement of statutory and regulatory requirements related to LCAs, including requirements concerning the appropriate prevailing wage. *See* 8 U.S.C. 1182(n); 20 CFR part 655, subparts H and I. DHS does not have the authority to alter statutory requirements or DOL regulations related to LCAs, including requirements concerning the required wage, and cannot provide any exceptions to beneficiary-owners who are unable to adhere those requirements. Further, the beneficiary-owner provisions in this final rule aim to promote access for H–1B entrepreneurs while setting reasonable conditions to help ensure program integrity. DHS believes that allowing reduced wages for beneficiary-owners, even if lawful, would pose a significant risk to H–1B program integrity. Petitioners must pay the required wage, consistent with all statutory and regulatory requirements.

Comment: Some commenters proposed additional flexibilities for beneficiary-owners. For example, a commenter suggested additional flexibility criteria for startups to allow them to adapt to changing product-market fit or satisfying market demand. A trade association proposed additional flexibilities through reduced hiring costs and application fees for legitimate U.S. startups. Finally, a commenter suggested that beneficiary-owners should not be included under the H–1B cap.

Response: DHS declines to provide additional flexibilities for beneficiary-owners. The commenter did not specify any particular flexibility that would allow petitioners to adapt to changing product-market fit or better satisfy a strong market demand, but to the extent that the commenter is suggesting, for example, a relaxation of requirements relating to amended petitions or maintenance of status, DHS declines to provide any special accommodations for beneficiary-owners with respect to these requirements. When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H − 1B petition with the corresponding LCA. 8 CFR 214.2(h)(2)(i)(E). A change in the terms and conditions of employment of a beneficiary that may affect eligibility under section 101(a)(15)(H) of the Act is a material change. Thus, where there is a material change, USCIS must determine whether the beneficiary will continue to be eligible for H–1B classification under the materially changed conditions. This is true whether or not the beneficiary owns a controlling interest in the petitioner, thus DHS declines to provide any special flexibility for beneficiary-owners with respect to the amended petition requirements. Similarly, beneficiaries, including beneficiary-owners, are required to abide by the terms and conditions of admission or extension of stay, as applicable. For H–1B nonimmigrants, this includes working according to the terms and conditions of the H–1B petition approval on which their status was granted and not engaging in activities that would constitute a violation of status, such as working without authorization.

While commenters included additional suggestions regarding reducing filing fees and not including beneficiary-owners in the cap, DHS is not adopting these suggestions but notes that the USCIS Fee Schedule Final Rule provided reduced fees for nonprofits and small employers for certain applications and petitions.[150] DHS further notes that Congress—not DHS—sets the annual 85,000 H–1B cap as well as the general parameters for cap exemption. *See* INA sec. 214(g)(1), (5).

[150] *See* ''U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,'' 89 FR 6194, 6208 (Jan. 31, 2024) (explaining that businesses with 25 or fewer full-time equivalent employees will pay a $300 Asylum Program Fee instead of $600, and half of the full fee for Form I–129, but nonprofits will pay $0).

13. Site Visits

Comment: A few commenters, including individual commenters, expressed general opposition to the proposed change in the site visit provision without providing additional rationale. An individual commenter stated that site visits are burdensome on businesses. An individual commenter expressing opposition to the site visit provision commented that site visits are a ''violation of represented parties'' per the Model Rule of Professional Conduct 4.2, and USCIS is attempting to ''surprise'' applicants into sharing incriminating information.

Response: As noted in the proposed rule, site visits are important to maintain the integrity of the H–1B program and to detect and deter fraud and noncompliance with H–1B program requirements. 88 FR 72870, 72907 (Oct. 23, 2023). Cooperation with these visits is crucial to USCIS' ability to verify information about employers and workers, and petitioner's compliance with the terms and conditions of the H–1B petition. Although DHS recognizes that site visits can be a burden for petitioners, and take time for USCIS to perform, this rule does not increase the number of site visits or create any new site visit programs. Rather the rule is further clarifying the scope of the visits and consequences of noncompliance with a site visit.

The commenter addressing ''Model Rule of Professional Conduct 4.2'' did not provide context or the text of such rule. To the extent that the commenter is referring to the rules of representation from the American Bar Association, DHS notes that those rules are not applicable to USCIS officers. However, USCIS officers ask permission to speak to a represented individual before proceeding without a representative present. If the represented individual wants their representative present, they can call them and have them present telephonically or request the site visit be rescheduled to occur when the representative is available. USCIS will generally honor such request to reschedule, but if the representative is not present at the agreed upon time and location, or the individual repeatedly requests to reschedule in an apparent attempt to avoid compliance with the site visit review, it is in the officer's discretion to determine if the entity or individual is not complying with this provision by seeking to not cooperate in the site inspection.

Comment: A few individual commenters expressed general support for site visits without providing additional rationale, with some

specifically encouraging site visits at consulting firms. An individual commenter generally remarked that the site visit provision would enhance program transparency, accountability, and integrity. An advocacy group expressing appreciation for USCIS' authority to conduct site inspections urged USCIS to mandate site visits for certain employers, especially when employees are employed at third party work locations. The advocacy group also recommended ''pre-adjudication site checks'' for petitioners that depend on H–1B employees.

Response: DHS agrees that site visits are an important part of ensuring transparency, accountability, and the integrity of the H–1B program. However, DHS did not propose in the NPRM to make site visits mandatory for specific petitioners and declines to do so at this time. Site visits are determined by a number of factors, including both random visits and those predicated on the existence of risk factors or fraud indicators.

Comment: While expressing support for site visits, several commenters stated that USCIS should give employers the opportunity to rebut, provide additional information, or resolve questions raised during site visits prior to arriving at an adverse determination. A couple of these commenters noted that this would be in the best interest of H–1B beneficiaries. Similarly, a trade association suggested USCIS clearly detail the process it will follow after determining a failure or refusal to cooperate. The trade association stated that there are situations in which USCIS' inability to verify facts during a site visit does not necessarily equate to a petitioner intentionally refusing to cooperate, such as a third party misunderstanding. A company suggested that petitioners be able to arrange additional site visits or interviews to address an initial failure or refusal to cooperate, thus codifying a current practice among Fraud Detection and National Security Directorate (FDNS) officers. A legal services provider recommended that the site visit provision require USCIS to provide specific details to petitioners in the form of a report to address issues identified during an inspection. A trade association requested USCIS implement a system that decreases the frequency of site visits for employers that repeatedly demonstrate compliance.

Response: As is current practice and captured in existing regulations, USCIS will generally not revoke an approval or deny a petition based on information from a site visit or inability to verify facts based on a lack of cooperation at a site visit without first giving the petitioner the opportunity to rebut and provide information on their behalf. *See* 8 CFR 103.2(b)(16), 214.2(h)(10) and (11). There may be instances where information from a pre-adjudication site visit or the inability to verify facts based on a lack of cooperation at a pre-adjudication site visit could result in the denial of the petition without additional notice to the petitioner, if the information uncovered or the inability to verify facts was derogatory information of which the petitioner was aware. DHS declines to add specific regulatory text concerning this issue, as site visits and subsequent adjudicative actions will continue to be governed by existing practice and existing regulations at 8 CFR 103.2(b)(16) and 214.2(h)(10) and (11) which govern the notice requirements. Petitioners will therefore generally have the opportunity to resolve issues that may arise during the site visit, including those identified by commenters. DHS declines to use a specific form to report issues that arise during a visit. Rather, USCIS officers will continue to issue NOIDs or NOIRs that provide sufficient derogatory information and details for the petitioner to respond to. DHS further notes that it is not a national practice for FDNS officers to always arrange additional site visits or interviews to address an initial failure or refusal to cooperate. However, it is in the officer's discretion to allow such a request, and if a petitioner is otherwise cooperative and requests to schedule a follow-up visit, FDNS may allow such a request.

USCIS determines the frequency of site visits based on a number of factors, including random selection as part of the ASVVP. Although USCIS officers make efforts to reduce duplicative visits, DHS notes that each petition stands alone and information that is petition specific, such as the job location and duties, would not have been previously verified. As such, the successful completion of a prior site visit is not indicative that future problems will not exist.

Comment: A trade association requested that USCIS clarify in the NPRM what actions constitute a refusal or failure to comply with USCIS site visits. A law firm also suggested that USCIS clarify the expectations and process for site visits under the proposed rule, including establishing a standard timeframe between site visits and any subsequent actions taken, and subjecting any revocations to appeal. The law firm added that revocations should be based on a '''clear and convincing evidence' standard.'' Lastly, the law firm emphasized the importance of collecting the names and title of any interviewees during site visits to ensure full transparency on the record.

Response: As discussed in the proposed rule, DHS's goal is to provide transparency to the compliance review process so that entities and individuals subject to those processes understand that USCIS' inability to verify pertinent facts, including for failure to cooperate, may result in denial or revocation of the approval of a petition. 88 FR 72870, 72908 (Oct. 23, 2023). With this rule, DHS is codifying its existing authority and clarifying the scope of inspections and the consequences of a refusal or failure to fully cooperate with these inspections. To ''fully cooperate'' in this context means that entities will comply with the scope of the reviews, including: granting access to the premises, to include the employer's place of business and any site where the work is performed, making a representative of the petitioner or employer available for questions, submitting or allowing review of pertinent records, providing access to workers and allowing interviews with such employees to take place in the absence of the employer or employer's representative and at a location mutually agreed to by the employee and USCIS officers, which may or may not be on the employer's property.

As described in the proposed rule, a petitioner or employer failing or refusing to cooperate ''could include situations where one or more USCIS officers arrived at a petitioner's worksite, made contact with the petitioner or employer and properly identified themselves to a petitioner's representative, and the petitioner or employer refused to speak to the officers or were refused entry into the premises or refused permission to review human resources records pertaining to the beneficiary. Failure or refusal to cooperate could also include situations where a petitioner or employer agreed to speak but did not provide the information requested within the time period specified, or did not respond to a written request for information within the time period specified.''

DHS declines to add ''within the reasonable time specified'' to the regulations regarding site visit compliance and cooperation. USCIS issuance of notice and adjudicative decisions is already governed by existing regulations at 8 CFR 103.2(b)(16) and 214.2(h)(10) and (11). These regulations do not include a timeframe within which USCIS must issue a notice or decision. The amount of time that lapses between when a site visit takes place and when a notice or

decision is issued can vary depending on the specific facts of the case. Such factors could include time for additional USCIS fact finding or additional time for petitioners to reschedule a visit or respond with requested documentation. As such, DHS will not limit USCIS' ability to take action on a petition simply because a specific amount of time has lapsed since a site visit was undertaken. If USCIS officers need to request additional information from petitioners after the site visit, the deadline for submitting such information will be provided to the petitioner in writing. Additionally, per 8 CFR 214.2(h)(12), revocation on notice under 8 CFR 214.2(h)(11)(iii) of an H–1B petition's approval may be appealed to the Administrative Appeals Office.

DHS declines to add a new standard of proof for revocations after site visits, as it remains the petitioner's burden to demonstrate eligibility for H–1B classification by a preponderance of the evidence. If USCIS is unable to verify pertinent facts required to demonstrate the petitioner's eligibility and continued compliance with the terms and conditions of the petition, and the petitioner does not overcome these findings and demonstrate eligibility by a preponderance of the evidence, then the petition's approval would be rightly revoked. The authority of USCIS to conduct on-site inspections, verifications, 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. *See* 8 CFR 103.2(b).[151] Moreover, USCIS has the authority to administer and enforce the INA, including provisions pertaining to the H–1B nonimmigrant classification. *See* INA 103(a)(1) and (3).[152]

Regarding the request to collect names and titles of any interviewees, DHS notes that USCIS officers keep records of the individuals with whom they speak. To the extent practicable, USCIS seeks to protect the privacy of workers when using the information they have provided to support any adjudicative decision. However, USCIS must also adhere to 8 CFR 103.2(b)(16)(i), which states that for any decision based on derogatory information unknown to the petitioner, the petitioner will be advised of this and offered an opportunity to rebut the information, and to the extent that this information is necessary for the petitioner to respond to and rebut any identified deficiencies, USCIS will disclose that information in the notice of intent to deny or notice of intent to revoke.

Comment: A law firm expressing support for the use of site visits to ensure program integrity noted that FDNS officers should be limited to inspecting whether the H–1B worker is: located where they are supposed to be per the LCA and visa petition, doing the work represented in the petition, and being compensated according to the petition. The law firm added that any data beyond these points are not appropriate to collect (*e.g.,* the H–1B filing history of the petitioner). Similarly, a legal services provider urged USCIS to limit the scope of site visits to not include ''any other records'' or ''any other individuals'' that the investigating official deems pertinent. A company recommended that employers or third parties should be able to refuse government representatives access to certain facilities or records for ''reasonable business purposes.'' Similarly, the same company remarked that the NPRM should limit the types of documentation that can be requested in a compliance review in order to protect sensitive business information.

Response: DHS declines to further limit the types of documents that can be reviewed or requested as part of the USCIS verification efforts. The purpose of a USCIS site visit is to verify the information provided by the petitioner, confirm that eligibility for the petition approval has been demonstrated by a preponderance of the evidence and to ensure that the beneficiary is or will be employed in accordance with the terms and conditions of the petition. The language of the new regulations makes clear that USCIS officers will limit their review to pertinent information, which includes information that was provided by the petitioner, material to eligibility, or needed to make a determination on continued compliance with the terms and conditions of the petition. This universe of information will vary according to the specific petition being reviewed. Because DHS does not limit the evidence used by petitioners to demonstrate eligibility and compliance with the terms and conditions of the petition, DHS likewise will not limit the types of evidence that may be requested by USCIS officers, as long as such evidence is pertinent to their inquiry.

Concerning disclosure of ''sensitive business information,'' when requested evidence contains sensitive business information, 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 they believe it is too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of denial if alternative evidence is insufficient to establish eligibility. *Cf. Matter of Marques,* 16 I&N Dec. 314, 316 (BIA 1977) (in refusing to disclose material and relevant information that is within his knowledge, the respondent runs the risk that he may fail to carry his burden of persuasion with respect to his application for relief).

Comment: A trade association stated that the proposed rule lacks a ''reasonableness standard'' and allows officials to request information or documentation at their discretion, even if it is not pertinent to the petition at hand; the trade association remarked that petitioners that resist potentially unnecessary lines of questioning could be deemed non-cooperative and have the petition in question, as well as others, unfairly revoked. The trade association also commented that the lack of a reasonableness standard creates a vague and indefinite time period for petitions to undergo review following site visits, which could hinder employers' ability to hire employees and perform work.

Response: As noted in the proposed rule, site visits may include review 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 petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H–1B program. *See* new 8 CFR 214.2(h)(4)(i)(B)(*2*). DHS declines to add any additional ''reasonableness standard,'' as the new regulations sufficiently limit the universe of information that could be addressed in a site visit to that which is pertinent to eligibility and continued compliance with the terms and conditions of the petition. Further,

[151] ''In evaluating the evidence, 'the truth is to be determined not by the quantity of evidence alone but [also] by its quality.' '' *See Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010) (quoting *Matter of E–M–,* 20 I&N Dec. 77, 80 (Comm'r 1989)).

[152] *See also* INA 235(d)(3), 8 U.S.C. 1225(d)(3) (authorizing ''any immigration officer'' . . . ''to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of [the INA] and the administration of [DHS]'').

although USCIS follows up on site visits as soon as practicable, DHS will not add any timeframe requirement for those actions, as each case will be different, and could involve return visits at the petitioner's request that would be unnecessarily limited if a timeframe for action was implemented. It is also unclear how USCIS' timeline after a site visit would limit a petitioner's ability to hire and perform work, as there would be no impact until adjudicative action is taken and such action would be preceded by a NOID or NOIR.

Comment: An advocacy group expressed opposition to the proposed changes to site visit policy, writing that it would give officers excessive authority to enter businesses or homes without prior notice and potentially invalidate many visas if one individual does not, or cannot, comply with requests. The advocacy group added that this power could be used to intimidate immigrant populations, who may be more wary of scams and fraud.

Response: DHS notes this rule does not change the way that site visits are conducted and does not extend USCIS' authority to conduct site visits beyond what is already allowed in statute and regulations. The purpose of a site visit is to verify the information that was provided in the petition with review of an accurate and unrehearsed view of the work being performed. As such, site visits are generally unannounced. However, as part of the site visit program, USCIS officers do not enter businesses or homes without permission. USCIS officers carry identification that can be confirmed and as noted above, interviewees may request that the petitioner or representative join an interview telephonically or in person, or reschedule for a time where the representative can be present. As stated previously, failure or refusal to cooperate with a site visit may result in denial or revocation of the approval of any petition for workers who are or will be performing services at the location or locations that are a subject of inspection or compliance review. *See* new 8 CFR 214.2(h)(4)(i)(B)(*2*).

Comment: A professional organization urged USCIS to amend 8 CFR 214.2(h)(4)(i)(B)(*2*)(*i*) and redefine ''inability to verify facts'' to ''inability to verify material facts,'' and ''compliance'' to ''substantial compliance'' when referring to the adjudication of the petition and compliance with H–1B petition requirements. The organization proposed additional amendments to 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(*2*), suggesting that DHS change ''inaccurate'' to ''materially inaccurate.''

Response: DHS notes that the commenter refers to 8 CFR 214.2(h)(4)(i)(B)(*2*)(*i*) but quotes language from 8 CFR 214.2(h)(4)(i)(B)(*2*)(*ii*), and as such our response is in reference to 8 CFR 214.2(h)(4)(i)(B)(*2*)(*ii*). DHS declines to add ''material'' to the new regulation at 8 CFR 214.2(h)(4)(i)(B)(2)(*ii*) because the regulation already states that the petition may be denied or an approval revoked if USCIS is unable to verify facts related to the adjudication of the petition and compliance with H–1B petition requirements. Consistent with the language of the regulation, USCIS officers will limit their review to pertinent information, which includes information that was provided by the petitioner, is material to eligibility, or is needed to make a determination on continued compliance with the terms and conditions of the petition. DHS likewise declines to add ''substantial'' to this language because DHS is interested in the petitioner's continued compliance with all conditions and requirements of the H–1B petition.

DHS also declines to amend 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(*2*). The grounds of denial and revocation regarding inaccurate statements work in conjunction with the certifications on the petition, H–1B registration, temporary labor certification, and labor condition application, which all require the petitioner or employer to certify that the information contained in those submissions is true and accurate. Inaccuracies in these submissions that may not by themselves be material to eligibility can raise doubts as to the accuracy and veracity of the overall submission. Such inaccuracies would also violate the certifications signed by the petitioner or employer. As such, inaccurate information and statements made as part of these submissions, which are required precursors to or part of the petition filing, may be a sufficient ground for denial or revocation of an approved petition. These provisions are intended to enhance program integrity, and DHS believes that amending them as suggested by commenters would introduce ambiguity and narrow their application in a manner that would contradict their purpose. Therefore, USCIS will retain the text of 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(*2*) as it was finalized in ''Improving the H–1B Registration Selection Process and Program Integrity,'' 89 FR 7456 (Feb. 2, 2024).

Comment: Multiple commenters asked USCIS to provide notice to an employer or their attorney of record prior to a site visit. Several commenters requested that company representatives be present during and facilitate H–1B beneficiary interviews with USCIS, with a trade association remarking that this would deter scams. A couple of these commenters, including an advocacy group and a company, noted that the employer's presence could be at the employee's request.

Response: USCIS site visits are intended to be an unrehearsed view of an employer's business and the beneficiary's work. As such, DHS will not require that notice be given to employers or representatives prior to any site visit. DHS likewise declines to require that employer representatives be present at the interview of beneficiaries or other individuals with pertinent facts. However, any individual being interviewed by USCIS officers may request the presence of their employer or their representative. The employer or representative may join the visit in person, telephonically, or request that an interview be rescheduled.

DHS recognizes that workers providing information to USCIS officers during interviews can place the worker in a precarious position, but each individual will have their own preference as to whether or not to have their employer or representative present. USCIS will not ignore the individual's preference or request that the employer or their legal representative be present.

Comment: A joint submission of attorneys commented that language in the NPRM noting that the presence of employers at inspection interviews can induce a chilling effect on H–1B employees is misplaced, as unannounced government inspections are more likely to induce such a chilling effect in employees. The joint submission further expressed concern that while the NPRM included language allowing such interviews to be conducted ''at a neutral location agreed to by the interviewee and USCIS away from the employer's property,'' the stress associated with potential visa revocation reduces a worker's comfort with voicing their true preference.

Response: DHS disagrees with the commenters' assertions. Providing an employee the option to speak without the employer or employer's representative is important to ensuring the employee feels free to discuss concerns with USCIS. For example, an H–1B beneficiary who is not being paid the required wage by the petitioner may be more comfortable discussing this outside the presence of the employer. Although DHS appreciates that participating in site visit interviews can

be stressful for beneficiaries, allowing each individual the choice of whether to be interviewed either with or without their employer present allows individuals to participate in the interview at their greatest possible comfort level. DHS cannot presume to know each individual's preference.

DHS understands that interviews by government officials can be an intimidating experience and that the outcome could impact the interviewees' immigration status. Interviews may also provide H–1B beneficiaries with an avenue to report fraud and abuse by unscrupulous employers, which is harmful to U.S. workers and H–1B beneficiaries. The proposed rule balances DHS's interest in maintaining the integrity of the H–1B program with interests of the petitioners and beneficiaries.

Comment: Several commenters expressed concern with the proposed provision to expand site visits to employees' homes. While expressing support for USCIS' authority to conduct site visits to maintain the integrity of the H–1B program, multiple commenters urged USCIS to state that site visits would happen at the workplace or another location whenever possible, even for remotely working beneficiaries, but not at an employee's residence, due to safety and privacy concerns. A few of these commenters, including a business association, a joint submission and a trade association, stated that workers should be able to decline site visits at their home without it resulting in an adverse determination. The commenters provided sample language recommendations on the subject for incorporation into the final rule.

A company expressed opposition to conducting site visits at worker residences without the support of the employer, stating that pertinent information such as duties, working conditions, wages, and qualifications can be verified at a company facility, while an employee's language, culture, or personal barriers may hinder efforts to glean compliance information at the employee's home and potentially lead to an unfair ''refusal to comply'' finding. A couple of companies urged USCIS to limit site visits to the workplace to reduce the risk of scams on H–1B beneficiaries. An individual commenter stated that site visits at employee residences would be an additional burden on employees.

Several commenters stated that if site visits must occur at a beneficiary's home, workers should receive significant prior notice. A professional association added that beneficiaries should receive the option of a pre-arranged live video interaction rather than being required to allow government representatives to enter their home. An advocacy group similarly remarked that employees should be able to coordinate the ''timing, location and manner'' of an interview.

An attorney suggested that the proposed provision could have a chilling effect on H–1B workers, as they may forgo remote work opportunities due to privacy concerns regarding home visits. The attorney therefore recommended that USCIS clarify if a site visit to a home office would require access beyond the physical workspace or the company-issued computer.

Response: DHS declines to add a requirement that employees be given notice prior to a site visit at their residence. As noted, the purpose of a site visit is to verify the information that was provided in the petition with review of an accurate and unrehearsed view of the work being performed. As such, site visits are generally unannounced. DHS further declines to otherwise restrict the ability of USCIS officers to visit and interview employees at their assigned work location, including if it is the employee's residence. To do otherwise would create a loophole wherein any petitioner may exempt themselves from their evidentiary burden simply by locating workers at their residences. DHS appreciates the additional considerations that individuals might have when granting access to their home, but DHS finds that the ability to visit and interview at work sites is so integral to ensuring the integrity of the H–1B program, that it outweighs those considerations. Additionally, DHS notes that USCIS officers currently routinely visit individuals' residences in compliance visits for H–1B and a variety of other benefit requests, and as such, this is not a new activity for USCIS. As noted above, any time USCIS officers conduct a site visit or interview, the officers will request the individuals' permission to undertake the visit and interview, and if the individual is represented and wishes to have their representative present, they may ask their representative to join telephonically or reschedule the visit at a later time. USCIS officers also carry official identification which they will display to those being interviewed, regardless of where the interview is being conducted. If a beneficiary is unsure of the authenticity of the identification or whether the officer is acting in their official capacity, FDNS officers can provide supervisory contact information to verify their identities and official nature of the inquiry. With regards to the areas of a residence that might be accessed, USCIS officers would need only to access the work area and any portion of the residence that must be accessed to reach the work area.

Comment: Several commenters, remarking specifically on third party facilities and records, stated that a third party employee's refusal or failure to speak with FDNS officers, grant them access to facilities, lead them to the correct worker, or permit them to review records, should not lead to a finding of noncompliance for the petitioner as petitioners are not responsible for third party actions. The company and a law firm added that inaccurate adverse findings from such situations can lead to significant consequences for businesses, and DHS should notify petitioners ahead of third party site visits so that petitioners can facilitate cooperation. The advocacy group expressed concern that this would have repercussions for H–1B visa holders, who could have their visa revoked due to third party noncompliance. Similarly, a couple of commenters urged USCIS to notify petitioners of planned visits to third party work locations, in the event that the third party does not communicate to the petitioner that a site visit occurred. Additionally, a law firm said that the third-party placement provision could create at least two difficulties for both the FDNS officer and the service provider in the case of site visits, including that the receptionist for the building owned by the end-client may have no knowledge of the presence of a contractor employee who is working remotely most of the time and that the service provider has no control over who the end-client may grant access to its premises. The end-client receptionist may deny admission to the FDNS officer. The commenter recommended that in this case, the FDNS officer should not automatically infer that the petition is fraudulent. A joint submission urged USCIS to protect petitioners and beneficiaries with regard to third party placements, such that findings regarding unaffiliated on-site H–1B beneficiaries employed by a third party do not impact the petitioner or beneficiaries that are not the subject of the visit. A trade association remarked that the proposed provision could be invoked unfairly, as requiring third parties to provide evidence in support of another employer's petition could be used to ''argue a joint-employer relationship exists,'' even when one does not. An advocacy group expressed concern towards employees at third party sites being asked to share sensitive

information about individuals that are not their direct employees, adding that it is unreasonable to impose this potential liability on them.

Response: As noted in the NPRM, DHS is clarifying that an inspection may take place at the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including the beneficiary's home, or third-party worksites, as applicable. 88 FR 72870, 72907 (Oct. 23, 2023). DHS's ability to inspect various locations is critical because the purpose of a site inspection is to confirm information related to the petition, and any one of these locations may have information relevant to a given petition that cannot be ascertained by only visiting the petitioner's headquarters. The work performed by the beneficiary is a key element of H–1B eligibility and as such, the worksite is pertinent. There is no requirement that a petitioner place the beneficiary at a third-party location; however, if a petitioner chooses to petition for a beneficiary that is placed at a third-party location, it remains the petitioner's burden to demonstrate eligibility, meet all requirements of the H–1B petition, and employ the H–1B worker consistent with the terms of the approved petition. To allow otherwise would create an exemption wherein placing a beneficiary at a third party would allow a petitioner to circumvent the requirements of the H–1B program by rendering the beneficiary outside the scope of the compliance review process. The language of this rule makes clear the responsibilities of both the petitioner and any third-party client and such transparency will allow all parties to make decisions regarding their level of cooperation with full knowledge of the potential implications of a lack of cooperation.

As previously noted, the purpose of a site visit is to observe an unrehearsed version of the beneficiary's work, the petitioner's organization, and the operations of a third-party, if applicable. As such, site visits are generally unannounced and DHS declines to add a requirement to notify petitioners before third-party sites are visited. However, petitioners can inform third-party clients of the possibility of a site visit for any H–1B worker that is placed at a third-party location, so that the third-party client can be prepared for how to handle a visit and cooperate during the visit. Moreover, the petitioner will be given notice of any deficiency identified before USCIS takes any adjudicative action based on the results of a site visit to a third-party location. Further, if USCIS is unable to verify pertinent facts to confirm eligibility and compliance with the terms and conditions of the H–1B petition, including due to noncooperation at a third-party work site, USCIS may consider those findings beyond the petition that was subject to the site visit, if those findings call into question whether other petitions that list the same worksite demonstrate eligibility and continued compliance. However, as noted, USCIS generally will not take any adjudicative action based on site visit findings on any petition without providing the petitioner with notice and the opportunity to rebut the findings.

Regarding concerns that cooperation during a site visit at a third-party site could render the third party to assume some liability or be considered a joint employer, DHS notes that USCIS currently undertakes site visits at third party locations and the commenters have provided no evidence that such a problem exists under the current site visit process. This rule is not increasing or changing the parameters of site visits, but rather is adding transparency about the potential consequences of non-cooperation if USCIS is unable to verify pertinent facts about the petition. It is unclear how cooperation with a USCIS site visit, including providing information about a beneficiary's work for a third-party client, would create a joint employer relationship where one does not already exist under applicable laws. Likewise, it is unclear how providing information concerning a beneficiary that is placed at a third-party worksite would indicate that the third-party client was assuming any liability beyond what exists currently in the business relationship with the petitioner, and the commenter does not elaborate or provide any examples of such a concern. If third-party clients or petitioners are concerned about such liability, this rule provides the transparency for what both parties can expect with regards to site visits and consequences, and petitioners and third-party clients are welcome to utilize this information to structure their relationships in a way that would alleviate these concerns.

Comment: A few organizations stated that audit and enforcement powers for the H–1B program should lie with DOL; a research organization supported the need for site visits, citing statistics on fraud uncovered in FDNS inspections, but clarified that an agency focused on labor standards should conduct them. A few commenters expressed that the site visit provision oversteps USCIS' authority, writing that site visits or inspections should fall within the purview of Immigration and Customs Enforcement (ICE). Similarly, a research organization urged DHS to rescind its policy memorandum *Guidelines for Enforcement Actions in or Near Protected Areas,* stating that no ''robust worksite enforcement'' can take place while ICE is constrained by that memo.

Response: DHS disagrees with commenters who claim that H–1B site visits should be conducted only by DOL. Both USCIS and DOL have important roles to play in the oversight of the H–1B program. USCIS officers conduct verification and compliance reviews, including on-site verifications to ensure eligibility for petition approval and compliance with the terms and conditions of the H–1B petition filed with USCIS. The focus of these reviews is on information that is needed by USCIS to verify facts related to the adjudication of the petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H–1B program. Such information goes beyond the labor standards overseen and enforced by DOL. The occurrence of a review by another agency does not absolve the employer of its responsibility to cooperate with USCIS verification and compliance reviews, including on-site inspections. It remains the petitioner's burden to demonstrate eligibility for the benefit sought.[153]

DHS further disagrees with the assertion that conducting site visits oversteps USCIS' authority and that such visits should be conducted by ICE. As noted in the NPRM, USCIS has the authority to conduct site visits under INA sections 103(a), 214(a), 235(d)(3), and 287(b), 8 U.S.C. 1103(a), 1184(a), 1225(d)(3) and 1357(b); sections 402, 428, and 451(a)(3) of the HSA, 6 U.S.C. 202, 236, and 271(a)(3); and 8 CFR 2.1. As noted in the NPRM, USCIS has the authority to conduct site visits under INA sections 103(a), 214(a), 235(d)(3), and 287(b), 8 U.S.C. 1103(a), 1184(a), 1225(d)(3) and 1357(b); sections 402, 428, and 451(a)(3) of the HSA, 6 U.S.C. 202, 236, and 271(a)(3); and 8 CFR 2.1. 88 FR 72870, 72906 (Oct. 23, 2023). USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a petitioner and beneficiary are eligible for the benefit sought and that the petitioner is in compliance with all laws

[153] *See* INA sec. 291, 8 U.S.C. 1361; *Matter of Simeio Solutions, LLC,* 26 I&N Dec. 542, 549 (AAO 2015) (''It is the petitioner's burden to establish eligibility for the immigration benefit sought.''); *Matter of Skirball Cultural Ctr.,* 25 I&N Dec. 799, 806 (AAO 2012) (''In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.'').

before and after approval of such benefits. Importantly, USCIS inspections, verifications, and compliance reviews are not enforcement actions, but are rather conducted for the purpose of information gathering to ensure that entities remain in compliance with the terms and conditions of the H–1B petition that was filed with USCIS.

Regarding the mentioned policy memorandum, USCIS does not anticipate that the requirements of that memorandum would interfere with the activities of USCIS officers conducting on-site inspections in a way that would limit their ability to interview pertinent individuals. To the extent that the commenter is discussing only the impact of the memo on ICE, that is outside the scope of this rule.

Comment: A few commenters stated that the site visit provision and the possibility of arriving at an adverse determination following a site visit denies petitioners and beneficiaries due process under the law. A joint submission of attorneys further clarified that authorizing site inspections without the presence of the employer or their representatives violates employees' due process rights.

Response: As noted above, any represented individual may request that their legal representative be present during an interview. This could be accomplished by the representative joining the interview in person or telephonically or requesting to have the interview rescheduled to a later time when the representative could be present. Furthermore, as previously stated, no denial or revocation for USCIS' inability to verify pertinent facts from a site visit would occur without the petitioner first being given notice of USCIS' finding of noncompliance and an opportunity to rebut such a finding in compliance with 8 CFR 103.2(b)(16). Furthermore, as previously stated, no denial or revocation for USCIS' inability to verify pertinent facts from a site visit would occur without the petitioner first being given notice of USCIS' finding of noncompliance and an opportunity to rebut such a finding in compliance with 8 CFR 103.2(b)(16).

Comment: A few commenters expressed concern that the proposed site visit provision is unlawful under the Homeland Security Act of 2002 (HSA), writing that the HSA authorizes USCIS for adjudicative functions only and not investigative or interrogative functions. The commenters also remarked that the NPRM also violates E.O. 12988, as the site visit provision does not minimize litigation, provide a clear legal standard, or reduce burdens. The joint submission of attorneys added that INA sec. 235(d)(3) does not authorize USCIS to conduct site visits, but rather ''to 'administer oaths . . . and consider evidence of or from any person' '' without an administrative subpoena; the commenters also noted that in the case of neglect or refusal to respond to a subpoena during a site visit, the correct course of action is to involve any court of the United States.

Response: As discussed in detail above, DHS disagrees with commenters' assertion that it lacks legal authority to conduct on-site inspections through the USCIS Fraud Detection and National Security (FDNS) Directorate. The site visits and inspections conducted by FDNS are authorized through multiple legal authorities. The Secretary of Homeland Security is authorized to administer and enforce the immigration laws. INA sec. 103(a); 8 U.S.C. 1103(a).[154] USCIS also has the ''authority to interrogate aliens and issue subpoenas, administer oaths, take and consider evidence, and fingerprint and photograph aliens under sections 287(a), (b), and (f) of the INA, 8 U.S.C. 1357 and under 235(d) of the INA, 8 U.S.C. 1225(d).'' [155] Further, regulations support the FDNS activities that are described in this rule. For example, 8 CFR 1.2, defines ''immigration officer'' to include a broad range of DHS employees including immigration agents, immigration inspectors, immigration officers, immigration services officers, investigators, investigative assistants, etc. As duly appointed immigration officers, FDNS officers may question noncitizens based on the authority delegated by the Secretary of Homeland Security. Furthermore, 8 CFR 287.8 specifically sets out standards for interrogation and detention not amounting to arrest, wherein immigration officers can question anyone so long as they do not restrain the freedom of the person they are questioning.

The Board of Immigration Appeals has recognized that the reports produced by FDNS based on site visits and field investigations are ''especially important pieces of evidence.'' [156] These investigations and reports that result from them help ensure that *adjudicative* decisions are made with confidence by providing information that would otherwise be unavailable to USCIS.[157]

14. Third-Party Placement (Codifying Policy Based on Defensor v. Meissner (5th Cir. 2000))

Comment: Numerous commenters voiced general support for the third-party placement provision on the grounds that it would increase accountability, decrease fraud, and protect American workers. An advocacy group voiced support for DHS's efforts to reduce fraud in the H–1B program and to ''ensure that petitioners are not circumventing specialty occupation requirements,'' by making it clear that the work an individual performs for a third party must be in a specialty occupation and that the work for the third party is subject to the same oversight as direct employers. An individual commenter stated that USCIS should ''tie the requirements to the end client.'' A research organization also voiced support for considering the ''third-party job'' as the relevant job for ''specialty occupation'' determination.

An attorney writing as part of a form letter campaign cited *Defensor* v. *Meissner,* 201 F.3d 384 (5th Cir. 2000), and the example provided in the NPRM describing an employee who is placed full time by the petitioner in a third party organization, rather than merely providing a service to the third party on behalf of the petitioner. The attorney said that in such a scenario, it is reasonable to rely on the third party's requirements for the position and to require petitioners to include information about the third party's requirements. The campaign supported the third-party placement provision as consistent with the adjudication of H–1B petitions that involve placement of an employee at a third party for a substantial part of their employment following *Defensor.*

Response: DHS agrees with the commenters that this provision will help clarify H–1B eligibility requirements and maintain H–1B program integrity, specifically by ensuring that petitioners are not circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party. In

[154] Additionally, pursuant to 8 CFR 2.1, all authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security, including delegation through successive redelegation, or to any employee of the United States to the extent authorized by law.

[155] See Delegation 0150.1(II)(S).

[156] *Matter of P. Singh,* 27 I&N Dec. 598, 609 (BIA 2019).

[157] *Mestanek* v. *Jaddou,* 93 F.4th 164, 172 (4th Cir. 2024) (holding in the context of marriage fraud in the I–130 immigrant petition context that ''[i]n allocating USCIS a set of nonexhaustive functions, Congress did not intend to hamstring USCIS's ability to fulfill the statutory mandate to investigate cases before adjudicating them.'').

Defensor v. *Meissner,* 201 F.3d 384 (5th Cir. 2000), the court recognized that, if only the petitioner's requirements are considered, then any beneficiary with a bachelor's degree could be brought to the United States in H–1B status to perform non-specialty occupation work, as long as that person's employment was arranged through an employment agency that required all staffed workers to have bachelor's degrees. Therefore, DHS agrees that, at times, it is reasonable to rely on the third party's minimum requirements rather than those of the employer responsible for placement.

Comment: A couple of individual commenters voiced general opposition to the provision, stating ''USCIS seeks to eliminate staffing companies from the (H–1B) visa category.''

Response: DHS disagrees that the third-party placement provision will eliminate staffing companies from the H–1B visa program. As stated in the NPRM, the third-party placement provisions are consistent with longstanding USCIS practices and are intended to clarify that, where a beneficiary is staffed to a third party, USCIS will look to that third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation. 88 FR 72870, 72908 (Oct. 23, 2023). This will help ensure that petitioners are not circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party. The rule does not prohibit staffing companies, or other third-party arrangements, from participating in the H–1B program. Rather, the rule clarifies the circumstances under which it is reasonable for USCIS to consider the requirements of the third party as determinative of whether the position is a specialty occupation.

Comment: Several commenters called the third-party placement provision confusing for petitioners and adjudicators and said that it creates the risk of arbitrary and inconsistent enforcement, with higher rates of RFEs and NOIDs. The commenters said that the ''staffing'' versus ''providing services'' distinction is novel and lacks foundation in law and historical practice. The commenters, along with an advocacy group and a trade association stated that the distinction between ''staffing'' and ''providing services'' could easily be misinterpreted by adjudicators such that every time an H–1B professional is placed at a third-party company, the adjudicator would want to look at what is required for similar roles at that company. Several of these commenters said, for example, that adjudicators might mistakenly conclude that the third party does not normally require a degree or its equivalent for the beneficiary's position simply because it does not require so from less-skilled employees within its own workforce, relying on foreign talent on H–1B visas to satisfy its needs for higher-skilled labor. The advocacy group voiced concern that the provision would require IT services companies to prove they provide services and not ''staffing,'' given the significant distinction in requirements proposed for the two types of firms. Another law firm voiced concern that the binary distinction between an H–1B ''service provider'' versus a ''staffed worker'' who becomes part of that third party's organizational hierarchy by filling a position in that hierarchy, with the commenter saying that, in practice, H–1B workers are integrated in the end-client's organizational hierarchy on a ''continuum.''

Response: DHS disagrees that the provision ''lacks foundation in law or historical practice.'' As stated in the NPRM, this provision is generally consistent with longstanding USCIS practice and is also consistent with the decision in *Defensor* v. *Meissner,* 201 F.3d 384 (5th Cir. 2000). 88 FR 72870, 72909 (Oct. 23, 2023). This provision is consistent with the statute and relevant to determining whether the beneficiary will be employed in a specialty occupation.

DHS also disagrees that the distinction in new 8 CFR 214.2(h)(4)(i)(B)(*3*) between a beneficiary being staffed to a third party and providing services to a party is unclear or that it will lead to inconsistent adjudications. As explained in the NPRM, a beneficiary who is ''staffed'' to a third party becomes part of that third party's organizational hierarchy by filling a position in that hierarchy, even when the beneficiary technically remains an employee of the petitioner. 88 FR 72870, 72908 (Oct. 23, 2023). By contrast, DHS explained that, for example, a beneficiary would be providing services to a third-party where they were providing software development services to that party as part of the petitioner's team of software developers on a discrete project, or where they were employed by a large accounting firm providing accounting services to various third-party clients. In these examples, the beneficiary is not ''staffed'' to the third-party because the third-party does not have employees within its organizational hierarchy performing those duties in the normal course of its business and does not have a regular, ongoing need for the work to be performed. USCIS will make the determination as to whether the beneficiary would be ''staffed'' to a third party on a case-by-case basis, taking into consideration the totality of the relevant circumstances. As is consistent with current practice, USCIS will review documentation in the petition including the petitioner's description of the services to be provided to determine if there are indications that a beneficiary is filling an otherwise permanent position at the third-party rather than simply providing services or work on a discrete project for that third party. In USCIS's experience, it is rare that a beneficiary is staffed to a third party rather than providing services for them.

Comment: A trade association voiced concern over the case-by-case approach and the limited examples provided to determine whether a beneficiary is ''staffed'' to a third party which the commenter said leaves ambiguity and makes it challenging to predict how USCIS will treat a particular scenario and what documentation would be necessary to establish that a beneficiary is not ''staffed.'' The commenter said that in the current business environment, companies often outsource tasks without integrating external service providers into their organizational structure, and the dynamics of collaboration and separation of roles are often not explicitly detailed in the contracts governing the relationship between entities. The commenter said that in such a scenario, it is unclear how USCIS would distinguish between staffing arrangements and the provision of services, placing an excessive burden not only on employers but also on USCIS in the form of increased RFEs.

Response: DHS disagrees with the commenters. USCIS will assess and weigh all relevant aspects of the relationships between the different entities receiving the beneficiary's services. If the beneficiary will work for a third party and become part of that third party's organizational hierarchy by filling a position in that hierarchy, the beneficiary will be considered ''staffed'' to the third party. In this scenario, the actual work to be performed by the beneficiary must be in a specialty occupation based on the requirements of the third party. Alternatively, in a scenario where a beneficiary provides services to various third-party clients on discrete projects or is merely providing services to various third-party clients without becoming a part of a third

party's regular operations, the third-party provision would not apply.

DHS does not anticipate an increase in RFEs since this provision is consistent with long-standing USCIS practice. In *Defensor* v. *Meissner,* 201 F.3d 384 (5th Cir. 2000), the court recognized that, if only the petitioner's requirements are considered, then any beneficiary with a bachelor's degree could be brought to the United States in H–1B status to perform non-specialty occupation work, as long as that person's employment was arranged through an employment agency that required all staffed workers to have bachelor's degrees. This result would be the opposite of the plain purpose of the statute and regulations, which is to limit H–1B visas to positions that require specialized education to perform the duties.

Comment: A joint submission stated that the reference to third-party staffing arrangements and their job descriptions is not legally relevant to a petition to employ a specialty occupation worker. The commenters said that a ''bedrock principle'' of the H–1B program is that the merits of a petition should be considered based on the circumstances of the specific job offer that is extended to the beneficiary in that petition and that the placement of a worker at a third-party location is not directly connected or correlated to that third-party's hiring practices. The commenters stated that businesses purchase professional services from other businesses specifically because they are unable to perform such services internally, citing the example, among others, of a thoracic surgeon performing ambulatory surgeries for a sister hospital where that specialty does not exist. The commenters said that there is no need for a reference to a specific third-party's job descriptions as they are unlikely to be related to the facts of the petition, adding that such a reference would confuse adjudicating officers and result in inconsistent adjudications that are unsupported by the statutory guidelines.

Response: DHS disagrees with the comment that ''third-party staffing arrangements and their job descriptions are not legally relevant to a petitioner's filing to employ a specialty occupation worker.'' However, DHS agrees that ''the merits of a petition should be considered based on the circumstances of the specific job offer.'' For purposes of clarification, DHS has provided an explanation of the difference between a petitioner who provides services in a specialty occupation to a third party and a petitioner who provides staffing to a third party where the beneficiary will become part of that third party's organizational hierarchy by filling a position in that hierarchy. DHS defines ''staffed'' to mean that the beneficiary would be contracted to fill a position in the third party's organization. Using the commenter's example, where a thoracic surgeon performs ambulatory surgery services for a sister hospital, USCIS generally would not consider the requirements of the third-party sister hospital as determinative of whether the position is a specialty occupation, provided that there is no vacant permanent position for an ambulatory surgeon in the third party's organization, the beneficiary's services are specialized, individualized, or otherwise outside the normal operations of the sister hospital, or the beneficiary is not considered to be filling a position in the third party's organization.

Comment: A company stated that it is unclear how DHS would determine whether a beneficiary has become ''part of the third party's organizational hierarchy'' and what specific indicators would be used to make this determination, other than to assert that it would take into consideration ''the totality of the relevant circumstances,'' and that it is unknown whether DHS plans to consider the source of pay, employee benefits, work equipment, work schedules, and work location for the contract worker. The commenter said that it appears that DHS plans to focus primarily on supervisory and reporting relationships within the third-party organizational hierarchy and consequently, would not be able to distinguish staffing from contract service positions.

The joint submission said that there is no clear explanation in the preamble or the proposed regulatory language of what ''filling a position'' in the organizational hierarchy of a client means or what parameters apply, voicing concern that it is not clear how USCIS would ensure that adjudicators flesh out the distinction between a staffing arrangement and the provision of services consistently to determine which party should be called upon to state the degree requirements.

Response: DHS acknowledges that there are differences between staffing companies and corporate entities with which another entity has engaged for the delivery of specialty occupation services. To provide additional clarity, USCIS considers factors such as the nature of the petitioning entity's and receiving third party's normal business activities, the general services provided by the involved parties, the work that the beneficiary will perform, and the organizational structure of the petitioning entity and receiving third party.[158] This does not generally include analyzing the source of pay, employee benefits, work equipment, work schedules, and work location for the contract worker. Rather, USCIS would typically consider evidence such as master services agreements, statements of work, letters from end clients, organizational charts, staffing descriptions, and company descriptions to determine if the beneficiary will become part of that third party's organizational hierarchy by filling a position in that hierarchy.

For example, an IT consulting company specializes in software development and has been contracted to provide services to a third-party real estate company to develop a software program that meets the real estate company's specific needs. In assessing whether the position qualifies as a specialty occupation, although the petitioning entity will provide services to a third party, it would not be reasonable to look to the real estate agency's (third party's) degree requirements as determinative of whether the work to be performed will be a specialty occupation. The petitioning IT consulting company normally offers software development services, and the real estate agency's normal business hierarchy does not include software developers. In this scenario, because the beneficiary will perform services in software development, not real estate, USCIS would look to the petitioner's degree requirements as determinative of whether the work to be performed at the real estate agency will be a specialty occupation.

In another example, the AAO has found that where an end-client is familiar with and normally employs personnel in the proffered position (*e.g.,* the client needs supplemental contracted personnel to augment their regular staff), the client likely possesses the knowledge of what duties the beneficiary would engage in, and the requirements in which to perform those responsibilities.[159] This is a scenario in which the duties and the qualifications to perform in the proffered position as required by the third party entity where the beneficiary would actually perform their work would be controlling. In such

[158] *See, e.g., In re 31014012,* 2024 WL 3667879, at *2 (AAO May 6, 2024) (''The nature of a petitioner's business operations along with the specific duties of the proffered job are also considered. We must evaluate the employment of the individual and determine whether the position qualifies as a specialty occupation. *See Defensor,* 201 F.3d 384.'').

[159] *In re 5037859,* 2019 WL 6827396 (AAO Nov. 7, 2019).

a case, USCIS may request additional evidence to determine the requirements for the position and to confirm whether the beneficiary will be staffed to the end client such that the end-client's requirements would control.

Comment: A couple of commenters said that the proposed third-party placement provision would lead to administrative burdens for petitioning employers and their clients, with a trade association and a law firm stating that it would be difficult for the sponsoring employer to obtain such documentation from a client. One of the individual commenters, along with a business association, also stated that the provision would be arbitrary and capricious because it disregards established departmental policy without explanation and lacks evidentiary support. The individual commenter specifically cited text from a 1995 Policy Memo: ''The submission of [contracts between the employer and the alien work site] should not be a normal requirement for the approval of an H–1B petition filed by an employment contractor. Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation'' and ''[t]he mere fact that a petitioner is an employment contractor is not a reason to request such contracts.'' The commenter said that under the proposed rule—and unlike the *Defensor*-based scheme—adjudicators would be required to decide in every case involving third-party placements whether the beneficiary would be ''staffed'' to or merely ''provide services'' to a third party, contradicting the 1995 Policy Memo. The commenter, along with a law firm, said that the provision would also be arbitrary and capricious due to lacking adequate justification. The commenter, along with the business association said that DHS's concern that petitioners are circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party is ''rank speculation.'' The commenters added that DHS ''offers no explanation'' as to why it is concerned that some employers might ''impos[e] token requirements'' and fails to justify the burden this provision would impose on all contractors who utilize the H–1B visa program and their clients.

Response: DHS disagrees that the third-party placement provision would lead to administrative burdens for petitioning employers and their clients. Petitioners should be able to provide evidence of the third party's requirements for the beneficiary's position through documents that are generated in the normal course of the relationship (*e.g.,* a Master Services Agreement or statement of work) or are reasonably obtainable from the third party (*e.g.,* a letter from the client). Documents showing the third party's requirements for the position will only be necessary in cases where the beneficiary is being staffed to the third party. DHS also disagrees that the third-party provision is ''arbitrary and capricious'' and that it disregards established departmental policy without explanation. To the contrary, this provision is consistent with longstanding USCIS practice.[160] Further, in *Defensor* v. *Meisner,*[161] the Fifth Circuit Court of Appeals recognized that if only the petitioner's requirements are considered, then any beneficiary with a bachelor's degree could be brought to the United States in H–1B status to perform non-specialty occupation work, as long as that person's employment was arranged through an employment agency that required all staffed workers to have bachelor's degrees. In the instance of an employer imposing token degree requirements on its employees while having no valid reason, a degree requirement alone is insufficient to establish that the beneficiary will be employed in a specialty occupation. Instead, USCIS must look to the duties that the beneficiary will perform, and the requirements of the end-client to which the beneficiary is being staffed, as relevant and determinative as to whether the beneficiary's position will be in a specialty occupation.

DHS notes that the November 13, 1995 memorandum referenced by the commenter, entitled ''Supporting Documentation for H–1B Petitions,'' was rescinded by the 2018 memorandum ''Contracts and Itineraries Requirements for H–1B Petitions Involving Third-Party Worksites.'' [162] Although the 2018 memorandum was itself rescinded by the ''Rescission of Policy Memoranda'' memorandum published on June 17, 2020,[163] that memorandum did not reinstate the 1995 memoranda.

Comment: A trade association stated that the provision would create confusion among adjudicators and would prompt extensive and burdensome RFEs and NOIDs, increasing inefficiency and unnecessary expense for employers and USCIS. The commenter said that the level of discretion left to adjudicators in determining whether an H–1B worker has been staffed or is merely a service provider creates a high risk that the third-party placement provision would be applied to placements that do not involve staff augmentation, causing employment bottlenecks for U.S. companies and leaving work unfulfilled. The commenter said that third-party companies rely on H–1B workers to perform high-skilled information technology services that their existing workforces cannot provide. The commenter said that the high cost and risk created by the proposal ignores business realities and fails to account for the difficulty petitioners would have in obtaining cooperation from end-clients who have little to no experience with the H–1B process, and adding that the new end-client validation requirements are inconsistent with the principles of H–1B sponsorship which requires the petitioner to makes attestations of the specialty occupation role under penalty of perjury, not the end client. The commenter stated that the LCA along with the information and documentation provided by the petitioning employer should be sufficient.

Response: DHS disagrees that this provision will cause confusion among adjudicators, resulting in unnecessary RFEs and the misapplication of this provision. Adjudicators are accustomed to reviewing the duties of a proposed position in conjunction with the nature of the petitioning entity's business practices, including additional information relating to any relevant third parties. This provision is not a change, but rather codifies longstanding practice with respect to determining eligibility in cases involving third-party placement.

DHS also disagrees that this provision is ''inconsistent with the principles of H–1B sponsorship.'' It has always been

[160] *See, e.g., In re 5037859,* 2019 WL 6827396 (AAO Nov. 7, 2019) (''The scenario in *Defensor* has repeatedly been recognized by Federal Courts as appropriate in determining which entity should provide the requirements of an H–1B position and the actual duties a beneficiary would perform.'') (citing *Altimetrik Corp.* v. *USCIS,* No. 2:18–cv–11754, at *7 (E.D. Mich. Aug. 21, 2019); *Valorem Consulting Grp.* v. *USCIS,* No. 13–1209–CV–W–ODS, at *6 (W.D. Mo. Jan. 15, 2015); *KPK Techs.* v. *Cuccinelli,* No. 19–10342, at *10 (E.D. Mich. Sep. 16, 2019); *Altimetrik Corp.* v. *Cissna,* No. 18–10116, at *11 (E.D. Mich. Dec. 17, 2018); and *Sagarwala* v. *Cissna,* No. CV 18–2860 (RC), 2019 WL 3084309, at *9 (D.D.C. July 15, 2019)).

[161] *See Defensor* v. *Meissner,* 201 F.3d 384 (5th Cir. 2000).

[162] USCIS, Policy Memorandum PM–602–0157, Contracts and Itineraries Requirements for H–1B Petitions Involving Third-Party Worksites (Feb. 22, 2018), *https://www.uscis.gov/sites/default/files/document/memos/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.*

[163] USCIS, Policy Memorandum PM–602–0114, Recission of Policy Memoranda (June 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.*

the petitioner's burden to establish eligibility for the benefit sought. As the commenter states, ''it is the petitioning employer that makes attestations of the specialty occupation role under penalty of perjury.'' Therefore, it is not evident how a petitioner can attest to or certify that a position will be a specialty occupation or comply with DOL labor condition application requirements if the beneficiary will essentially become part of another entity's organization and that third party entity is unwilling or unable to provide specific information about the minimum requirements for the position that the beneficiary will be staffed to fill. Moreover, most petitioners should be able to provide evidence of the third party's requirements for the beneficiary's position through documents that are generated in the normal course of the relationship (*e.g.,* a master services agreement or statement of work) or are reasonably obtainable from the third party (*e.g.,* a letter from the end client).

Comment: An individual commenter said that the third-party placement provision represents a ''major change'' in the way that USCIS deals with third-party placements and that the provision is singling out staffing companies. The commenter stated that the provision for staffing companies to prove job requirements would place the staffing company in an impossible position if the end customer is unwilling to provide the necessary information. The commenter also noted that there may be difficulty in obtaining necessary documents where there are second and third level staffing companies in between the petitioner and the end customer. The commenter added that end customers may ''want no involvement'' with attesting to the requirements for the positions, stating that these end customers have concerns over joint employment liability. The commenter also expressed concerns with respect to petitioners providing fraudulent documentation when documentation from a third party cannot be obtained.

Response: DHS disagrees that this provision will prevent staffing companies from establishing eligibility for H–1B specialty occupation workers. Further, if the petitioner seeks to staff the beneficiary to a third party but is unable to demonstrate the type of work the beneficiary will perform for the third party, it is unclear how the petitioner would be able to establish eligibility for the H–1B petition. Again, it remains the petitioner's burden to establish eligibility for the benefit sought. Petitioners should be able to provide evidence of the third party's requirements for the beneficiary's position through documents that are generated in the normal course of the relationship (*e.g.,* a master services agreement or statement of work) or are reasonably obtainable from the third party (*e.g.,* a letter from the client). Further, DHS clarifies that this rule does not address joint employment liability and this is not relevant to USCIS's determination for H–1B specialty occupation employment. It is also unclear how providing evidence documenting the work to be performed and the requirements for the position would impact joint employment liability in other contexts any more so than the nature of the contracted work itself.

Comment: A trade association said that its members employ H–1B transfers and places them with end clients to complete project teams—referred to as ''staff augmentation''—where multiple IT/engineering professionals, including H–1B workers, are placed with a client to complete a time sensitive, complex project. The commenter said that DHS is attempting to create a distinction where there is often no difference in the nature of the work being performed and added that there is no reason why U.S.-based IT staffing firms should be subject to different requirements than firms employing a different business model. The commenter said that the fundamental and only question should be whether the petitioner is performing work that satisfies the specialty occupation requirement. Similarly, a couple of individual commenters and a company stated that the proposed provision ignores the petitioning companies' long-term term need for particular skill sets and focuses exclusively on the end client's requirements for a short-term project when determining if a position is in a specialty occupation. A law firm said that the provision would be fundamentally incompatible with the IT consulting industry's business model, and that DHS's failure to acknowledge that the rule would upend the IT services industry and upset related reliance interests is arbitrary and capricious. The commenter said that the provision would have negative policy consequences for American businesses, inconsistent with the goals of fueling innovation in technology industries spaces and maintaining a globally premier workforce.

Response: DHS disagrees with the commenters' allegations that it is attempting to create a distinction where there is often no difference in the nature of the work being performed. There is a distinction between a beneficiary who merely provides services to a third party, and a beneficiary who fills a position within a third party's organizational hierarchy. In the former scenario, the petitioner may be better positioned to know the actual degree requirements for the beneficiary's work, whereas in the latter scenario, the third party may be better positioned than the petitioner to be knowledgeable of the actual degree requirements for the beneficiary's work. Thus, in the latter scenario, it is reasonable for USCIS to consider the requirements of the third party as determinative of whether the position is a specialty occupation.

DHS also disagrees with the comments that this provision would be fundamentally incompatible with the IT consulting industry's business model. While IT staffing firms may have to provide additional evidence in some cases, they are still subject to the same fundamental requirement of demonstrating that the beneficiary will perform work in a specialty occupation. *See* INA sec. 101(a)(15)(H)(i), 8 U.S.C. 1101(a)(15)(H)(i). It is exactly for this reason why DHS is codifying the third-party provision to clarify the circumstances when USCIS will consider a third party's requirements. The third-party provision is intended to ensure that petitioners are not circumventing specialty occupation requirements by imposing token requirements that are not relevant or applicable to the proffered position. This provision will help preserve the intent and purpose of the H–1B statute and regulations, which is to limit H–1B visas to positions that require specialized education, or its equivalent, to perform the duties, and theoretical and practical application of a body of highly specialized knowledge.

DHS reiterates that the third-party provision does not eliminate the use of IT staffing companies in the H–1B program. As noted above, consistent with current practice, USCIS will review documentation in the petition to determine if there are indications that a beneficiary is filling an otherwise permanent position at the third-party rather than simply providing services or work on a discrete project for that third party. In USCIS's experience, it is rare that a beneficiary is staffed to the third party rather than providing services for them. If the beneficiary is staffed to a third party the petitioner would need to provide evidence of the third party's requirements for the beneficiary's position through documents that are generated in the normal course of the relationship (*e.g.,* a master services agreement or statement of work) or are reasonably obtainable from the third

party (*e.g.,* a letter from the client). Further, since this provision is consistent with longstanding USCIS practice, DHS does not believe there is a related reliance interest involved.

Comment: A trade association and a law firm said that USCIS' ''reliance'' in the NPRM on *Defensor* is ''misplaced.'' According to the commenters, the *Defensor* court treated the client as a co-employer, whereas the H–1B regulations contemplate only the petitioner as the employer. The commenters said that as *Defensor* involved a staffing agency for nurses that contracted H–1B nurses to hospitals, there is a ''critical distinction'' between the nurses in *Defensor* and a software engineer providing services to the client rather than being staffed to the client. Similarly, a legal services provider said that *Defensor* involved an H–1B petitioner whose purported education requirement exceeded what was normal for the occupation in the industry at that time and exceeded what the third-party normally required, which the commenter said should be distinguished from a position where the employer's requirement is consistent with the normal requirements for the occupation. The commenter expressed concern that in all cases involving end-clients, USCIS will request evidence that the client normally requires a bachelor's degree, regardless of the position or the type of third-party relationship. The commenter said that *Defensor* is well-settled case law, and that proposed provision is unnecessary and likely to lead to more RFEs and thus more work for USCIS.

Response: DHS disagrees that USCIS' reliance in the NPRM on *Defensor* is misplaced. *Defensor* is settled case law and establishes guidelines regarding the educational requirements that are most relevant in assessing whether a position is a specialty occupation in a petition involving a third-party placement. The third-party provision is intended to codify and clarify the *Defensor* analysis so that it is clear such analysis will only apply in situations where the beneficiary will be contracted to fill a position in a third party's organization. Contrary to the commenter's claim, this provision will not apply to every petition involving an end-client and the agency will not always request evidence of the end client's requirements. This provision is intended to codify existing USCIS practice and DHS does not anticipate that it will increase RFEs. Consistent with current practice, USCIS will make the determination as to whether the beneficiary will be ''staffed'' to a third party on a case-by-case basis, taking into consideration the totality of the relevant circumstances.

DHS acknowledges that the fact pattern in *Defensor* may be distinguishable from many other third-party placement scenarios, including those discussed above by the commenters. Nevertheless, reliance on *Defensor* is appropriate because this case illustrates the relevance of third-party requirements for the beneficiary's position, in addition to the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation. The court explained that, if only the petitioner's requirements are considered, any beneficiary with a bachelor's degree could be brought to the United States in H–1B status to perform non-specialty occupation work, as long as that person's employment was arranged through an employment agency that required all staffed workers to have bachelor's degrees. *Defensor,* 201 F. 3d at 388.

Comment: A few commenters stated that the *Defensor* court's analysis that ''it was not an abuse of discretion to interpret the statute and regulations so as to require [the staffing agency] to adduce evidence that the entities actually employing the nurses' services required the nurses to have degrees, which [the staffing agency] could not do'' depended on its view that the hospital was a common-law ''employer'' under the regulations, which the commenters said was removed in the proposed rule. The commenters said that, unlike the adjudicators who have been relying on *Defensor* for more than two decades, the case offers no guidance on how USCIS should decide whether a consulting firm is ''staffing'' H–1B workers to third parties versus ''providing their services,'' which the commenters said is an entirely different question from the existence of an employment relationship under common law. The individual commenter cited legal commentators who have ''rightfully'' asked whether USCIS would ''understand the distinction between the nurse in *Defensor,*'' who filled an identical role as the hospital's own nursing staff, ''and a software engineer providing services to the client rather than being staffed at the client.''

Response: DHS disagrees that the proposed rule includes a new standard without adequate explanation. The requirement that the beneficiary is coming to work in a specialty occupation has been and continues to be the main consideration when making H–1B specialty occupation determinations. DHS looks to *Defensor* as relevant in certain circumstances where a beneficiary will be staffed to a third party. In *Defensor,* the court found that the evidence of the client companies' job requirements is critical if the work is performed for entities other than the petitioner. However, simply being placed at a third party does not always make that third party's requirements determinative. DHS has provided examples in its NPRM and in this rule to help differentiate when a third party's requirements would be more relevant than the petitioner's.

Comment: A few individual commenters requested that USCIS grant H–1B visas only to direct employers and not staffing companies. Similarly, another individual commenter recommended that there not be any third-party placement allowed at all under the H–1B program. Another individual commenter requested that third-party employers be required to do paperwork similar to an LCA or an H–1B petition for accountability purposes.

Response: DHS declines to adopt the suggestion to prohibit staffing companies and employees placed at third party worksites from utilizing the H–1B program, or to subject third party employers to additional paperwork similar to an LCA. DHS is finalizing changes to improve the integrity of the H–1B program, applicable to staffing companies and other H–1B petitioners, such as codifying DHS's authority to conduct site visits and clarifying that refusal to comply with site visits may result in denial or revocation of the petition, codifying its authority to request contracts, requiring that the petitioner establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the requested start date, ensuring that the LCA properly supports and corresponds with the petition, and revising the definition of ''United States employer'' and adding a requirement that the petitioner have a legal presence and be amenable to service of process in the United States. These changes combined address the integrity and fraud concerns raised by the commenters, and will help maintain accountability and insight into employer practices, specifically with respect to the H–1B program, by providing additional measures to identify noncompliance and detect and deter fraud within the H–1B program.

Comment: Several commenters urged DHS to remove the third-party placement provision, indicating that in most circumstances, the petitioning employer's requirements will govern H–1B adjudications. A couple of trade associations and a joint submission recommended that USCIS solicit further feedback from stakeholders on provisions relating to third-party

placement. The trade associations added that the provision, as written, would undermine other provisions in the proposed rule that seek to reduce government and private-sector burdens and bring clarity to the H–1B process. The trade associations added that the lack of clarity regarding the rules for adjudication for third-party employers would leave USCIS susceptible to legal challenges under the Administrative Procedure Act, incurring additional costs for the government and uncertainty for the public.

Response: DHS disagrees that the third-party provision undermines other provisions in this rule or elsewhere, or that the provision will interfere with reducing burdens for the government and private sector. Further, DHS declines to remove the third-party placement provisions or solicit further feedback on it. As explained in responses to other comments, this provision is generally consistent with long-standing USCIS practice and codifies current case law. In codifying this practice and providing numerous examples both in the NPRM and in the responses to comments above, DHS aims to provide additional clarity on this provision.

Comment: A law firm recommended that the adjective ''educational'' should precede the word ''requirements'' in the sentence within the proposed rule, requesting that DHS clarify that it is the third party's requirements, not the petitioning employer's requirements, that are most relevant if the beneficiary will be staffed to a third party. The commenter said that the third-party's educational requirements for the position is reliable, while the third party's experience and skill set requirements are ''notoriously'' unreliable. The commenter stated that it is a common practice for recruiters to describe the ideal or dream candidate while rarely describing their employers' actual experience and skill set requirements for the position.

Response: DHS declines to adopt the commenter's suggestion to add the word ''education'' before the word ''requirements'' in the regulatory text. The word ''requirements'' is intended to include requirements in addition to education, which may include experience or training relevant to the proffered position, and may be relevant in assessing eligibility, including whether the proffered position qualifies as a specialty occupation.

Comment: A law institute cited third-party placements of H–1B workers as a ''common feature'' in H–1B fraud, defeating the purpose of H–1B program as a means to provide labor when U.S. workers are not available. The commenter stated that as long as DHS permits third-party placement of H–1B workers, DHS is not serious about reducing abuse in the H–1B program. Similarly, a union requested that staffing companies be barred from the H–1B program.

Response: As stated in the NPRM, the third-party placement provisions are consistent with longstanding USCIS practice and are intended to clarify that, where a beneficiary is staffed to a third party, USCIS will look to that third party's requirements for the position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation. 88 FR 72870, 72908 (Oct. 23, 2023). This will help ensure that petitioners do not circumvent specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party. DHS did not propose to eliminate third-party placement arrangements, and notes that such placements are permissible under the INA.[164] As explained throughout this rule, DHS is finalizing a number of provisions intended to enhance the integrity of the H–1B program including by (1) codifying its authority to request contracts; (2) requiring that the petitioner establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the requested start date; (3) ensuring that the LCA supports and properly corresponds with the petition; (4) revising the definition of ''United States employer'' by codifying the existing requirement that the petitioner has a bona fide job offer for the beneficiary to work within the United States as of the requested start date and adding requirements of legal presence and amenability to service of process in the United States. Therefore, DHS declines to make changes in response to these comments.

15. Other Comments on Program Integrity and Alternatives

Comment: Several commenters generally discussed concerns related to misuse of the H–1B program and emphasized the need to uphold the integrity of the program. For example, a professional association noted unemployment rates for recent college graduates, and stated that the proposed rule revisions ''do not set enforcement consequences should the [] business cut corners to hire foreigners instead of Americans.'' The commenter further stated that DHS ''should focus on employing unemployed and underemployed Americans before employing non-citizens.'' A union stated that DHS should unambiguously state that it is illegal to replace a U.S. worker with an H–1B guestworker under any circumstances, whether directly or through secondary displacement.

Response: DHS appreciates the commenters' concerns about preserving the integrity of the H–1B program. With respect to the comments about recruiting or hiring U.S. workers before utilizing H–1B workers, DHS notes that the INA does not require a traditional labor market test for the H–1B program, and therefore, there is no specific requirement for a U.S. employer to first recruit U.S. workers before opting to hire H–1B workers instead of U.S. workers. Instead, Congress required U.S. employers seeking to utilize the H–1B program to obtain a certified LCA, attesting that the employment of H–1B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Further, Congress specifically subjected certain petitioners (H–1B dependent employers and willful violators) to additional attestations, including that they did not and will not displace a U.S. worker and that they have taken good faith steps to recruit U.S. workers in the United States before filing the LCA.[165]

Comment: A joint submission recommended that USCIS clarify the requirement that the H–1B petition be non-frivolous. The commenters elaborated that ''non-frivolous'' should be defined consistently with the tolling provision of INA sec. 212(a)(9)(B)(iv) for foreign nationals who do not accrue unlawful presence after their Form I–94 expires if there is a timely filed, non-frivolous extension or change of status pending, or for H–1B portability when a non-frivolous H–1B change of employer petition is filed under INA sec. 214(n).

Response: The term ''non-frivolous'' is well-understood and currently exists within multiple regulations. *See* 8 CFR 214.2(h)(2)(i)(H)(*1*)(*ii*). DHS notes that

[164] *See, e.g.,* INA sec. 212(n)(1)(F), 8 U.S.C. 1182(n)(1)(F) (prescribing certain requirements and obligations pertaining to non-displacement when an H–1B worker will be performing duties at the worksite of another employer).

[165] *See* INA sec. 212(n)(1)(E), (G), 8 U.S.C. 1182(n)(1)(E), (G). These attestation requirements apply only to H–1B dependent employers, as defined at INA section 212(n)(3), 8 U.S.C. 1182(n)(3). H–1B dependent employers are not subject to these additional requirements, however, if the only H–1B nonimmigrant workers sought in the LCA receive at least $60,000 in annual wages or have attained a master's or higher degree in a specialty related to the relevant employment. *See* INA sec. 212(n)(1)(E)(ii) and (n)(3)(B), 8 U.S.C. 1182(n)(1)(E)(ii) and (n)(3)(B).

the term ''frivolous,'' means that there is no arguable basis in law and fact, and believes this term is generally understood and sufficiently clear.[166] Therefore, DHS declines to separately define ''non-frivolous'' in this rule. USCIS will continue to review each filing on its own merits, on a case-by-case basis, according to the facts presented.

G. Request for Preliminary Public Input Related to Future Actions/Proposals

16. Use or Lose

Comment: An advocacy group recommended that beneficiaries be permitted a minimum 6-month timeframe after being issued an H–1B visa to enter the United States and begin working in accordance with the terms of such visa, with a provision for exceptions in compelling situations (*e.g.* family illness/death). Additionally, the commenter recommended providing students with 1 year due to the uncertainty surrounding finishing coursework and research. The commenter also recommended 6 months for local petitioners. A couple of companies urged DHS to structure any use or lose system such that unused H–1B numbers can be reassigned.

A few commenters, including associations and companies, recommended continued engagement with stakeholders to determine the best way to ensure that the limited number of H–1B cap-subject visas are used for bona fide job opportunities, adding that there are several legitimate reasons why there may be a delay in the beneficiary commencing employment. Several commenters stated that DHS fails to acknowledge some legitimate reasons for delays, including individuals who are already in the United States under another nonimmigrant visa category who may choose to delay commencing their H–1B employment. Another commenter recommended providing petitioning employers with the option to notify DHS that the employee is currently working under a different status and will eventually switch to H–1B.

A company and a joint submission said that the frequency of ''speculative employment'' is likely not as pervasive as expressed in the NPRM, and therefore, the solutions suggested by DHS are not required. For example, a couple of companies said that focusing on consular processing data may have been misplaced, as the majority of H–1B cap petitions do not request consular processing.

A trade association noted that while the data in Table 9 of the NPRM, which shows data on H–1B cap-subject petitions that selected consular processing into the United States, may be correct, DHS failed to acknowledge the causal relationship between government action/inaction and the percentage of employees who had entered the United States within 6 months of the validity date. For example, according to the commenter, average processing times for H–1B petitions in 2017 were over one year, guaranteeing that employees would not be available for the beginning of the validity period. The commenter stated that this problem was exacerbated by staffing decreases at USCIS in 2017 and COVID–19. The commenter noted that Table 10 of the NPRM, which shows data on H–1B beneficiaries who went through consular processing, who arrived more than 90 days after their DOS visa validity start date, also failed to acknowledge impacts of COVID–19.

A joint submission expressed opposition to the use or lose provision. The commenters said that the proposed beneficiary-based registration system is ''a less burdensome and more effective measure to increase H–1B cap usage,'' negating the need for a use or lose provision. Additionally, the commenters stated that post-approval use or lose mechanisms would be overbroad, burdensome, and would not deter bad actors.

A research organization inquired why DHS proposed having employers report by a set deadline when DHS already possesses this information, as demonstrated in Tables 9 and 10, which show data on H–1B cap-subject petitions that selected consular processing into the United States and data on H–1B beneficiaries who went through consular processing, who arrived more than 90 days after their DOS visa validity start date, respectively. The commenter suggested that DHS should systematically check which petitions are associated with workers who have not entered the country after 90 days or 6 months. Additionally, the commenter reasoned that without punitive action beyond revocation of such petitions, the use or lose provision would not deter fraud. The commenter suggested that DHS review public documents from Federal lawsuits where visa-ready and travel-ready strategies were discussed by executives, and then audit firms with large numbers of H–1B workers who have not come to the United States, as well as firms with H–1B workers who have left the United Stated and not returned in over 30 days. Finally, the commenter stated that the proposed solution would require employers to self-report such fraud.

Response: In the NPRM, DHS stated that it wants to ensure that the limited number of H–1B cap-subject visas and new H–1B grants that are statutorily available each fiscal year are used for non-speculative job opportunities. 88 FR 72870, 72909 (Oct. 23, 2023). DHS further stated that it is looking for the most effective ways to prevent petitions for speculative H–1B employment from being approved, and to curtail the practice of delaying H–1B cap-subject beneficiary's employment in the United States until a bona fide job opportunity materializes. DHS is not making any final regulatory changes as a result of the request for comments in the NPRM, but will take into consideration the input provided by commenters as it continues to research and consider the feasibility, benefits, and costs of various options to achieve its stated goals.

17. Beneficiary Notification

Comment: A trade association requested clarification on the agency's policy goals regarding beneficiary notification. The association expressed an interest in discussing potential solutions that would balance the government's objectives without placing an undue burden and risk on petitioners.

Response: As explained in the NPRM, DHS is exploring ways to provide H–1B and other Form I–129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf, including receipt notices for a petition to extend, amend, or change status filed on their behalf. 88 FR 72870, 72913 (Oct. 23, 2023). Enabling Form I–129 beneficiaries to verify their own immigration status could improve worker mobility and protections. DHS is not making any final regulatory changes as a result of the request for preliminary input in the NPRM, but will take into consideration the input provided by commenters as it continues to research and consider the feasibility, benefits, and costs of various options to achieve its stated goals.

Comment: A few commenters expressed support for the proposal to notify beneficiaries of USCIS actions taken on petitions filed on their behalf. One of these commenters expressed appreciation for the proposal and stated that it did not anticipate any substantial additional costs associated with the proposed change, as most large employers provide H–1B employees with USCIS notices as part of standard

[166] According to Black's Law Dictionary, ''frivolous'' means lacking a legal basis or legal merit; manifestly insufficient as a matter of law.

procedure. A company highlighted the importance of allowing the option of electronic notification and considering a petitioner's reasonable attempts to contact a former employee as reasonable compliance with the regulations. A trade association urged DHS to change the regulations to afford beneficiaries the chance to respond to any allegation that could affect their status. An advocacy group remarked that beneficiaries who are located in the United States must rely on petitioners to provide them with their Form I–94 Arrival-Departure Record, while beneficiaries who are outside of the United States receive this information or documentation directly. As such, the commenter recommended that the Department communicate with both the beneficiary as well as petitioner. A legal services provider suggested that USCIS should use its premium processing electronic notification system to provide receipt notices and approval notices by email to petitioners, beneficiaries, and attorneys. The commenter also stated that the use of an email system would save the agency administrative time, costs, and other expenses by eliminating the need to mail physical copies of documents to parties.

A few commenters cited the Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman) recommendation in response to USCIS' request for preliminary public input on ways to provide beneficiaries with notice of USCIS actions taken on petitions filed on their behalf. A union cited the Ombudsman recommendation and urged DHS to implement it, stating that all information pertaining to an employee's visa process should be accessible and available in real-time to each employee. The commenter reasoned that only providing such information to the employer leaves employees vulnerable to exploitation. A research organization expressed their support for notifications to be sent to H–1B and other nonimmigrant workers and stated that there was ample time and opportunity to include a provision in the final rule to address this issue. The organization suggested that notifications could be sent directly to beneficiaries through text and via WhatsApp, making information more accessible to workers. A group of Federal elected officials agreed that petitioners should provide notices to beneficiaries and also encouraged DHS to include a provision requiring beneficiary notification in the final rule. The commenters cited the CIS Ombudsman recommendation and further reasoned that there would be no significant cost or burden since the agency already sends notification to the petitioning employer.

A joint submission said that DHS's policy suggestion appears to be in response to the CIS Ombudsman recommendation and expressed support that beneficiaries receive direct notification. Thus, the commenters suggested the following:

- USCIS modify its online portal, akin to the U.S. CBP online system for obtaining Form I–94, allowing beneficiaries to access their status information directly;
- Interested beneficiaries create a MyUSCIS account to which USCIS could upload documentary information accessible to the beneficiary;
- USCIS send a copy of the notice to the beneficiary at the address listed in the Form I–129; and
- USCIS email notification to the beneficiary's email address listed in the Form I–129.

Response: In the NPRM, DHS stated that it was seeking preliminary public input on ways to provide H–1B and other Form I–129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf as well as other suggestions regarding ways to ensure adequate notification to beneficiaries of actions taken with respect to petitions filed on their behalf. 88 FR 72870, 72913 (Oct. 23, 2023). As indicated in the NPRM, the feedback was sought to inform potential future action, and DHS did not propose a particular approach in the NPRM. Therefore, DHS is not making any regulatory changes as a result of the request for preliminary input in this final rule but will take into consideration the input provided by these commenters as it continues to research and consider the feasibility, benefits, and costs of various options separate and apart from this final rule.

H. Other Comments on the Proposed Rule

Comment: Some commenters, including joint submissions, a trade association, professional associations, a research association, and a company, cited research on labor shortages of STEM professionals, projected growth, and additional labor needs as general support for the need to modernize the H–1B program. The commenters stated that foreign STEM talent is necessary for the U.S. economy and current immigration policies negatively impact the ability to attract and retain talent. A trade association said that immigration policies must enable firms to hire global talent when the number of U.S. engineering graduates does not meet demand.

Response: DHS shares the commenters concern with ensuring that immigration policies support the United States and U.S. employers in attracting and retaining foreign STEM talent and filling labor needs across all industries.

Comment: Some commenters included remarks regarding the exploitation of noncitizen and U.S. workers through the H–1B program. An advocacy group and a research organization remarked that H–1B visa holders are not necessarily working in highly technical fields and stated that they tend to hold ''ordinary skills'' that are abundantly available in the U.S. labor market. Additionally, the commenters expressed that companies are exploiting the program by paying foreign workers below market levels, which in turn drives down wages of American workers.

Response: The H–1B 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 at least a bachelor's or higher degree in the specific specialty, or its equivalent. *See* INA secs. 101(a)(15)(H)(i)(b) and 214(i), 8 U.S.C. 1101(a)(15)(H)(i)(b) and 1184(i). Therefore, DHS disagrees with the commenters' assertion that H–1B nonimmigrants tend to work in fields that are not highly technical or hold ''ordinary skills.''

With respect to wages, per DOL regulations at 20 CFR 655.731, an employer seeking to employ an H–1B worker in a specialty occupation must attest on the LCA that it will pay the H–1B worker the higher of either the prevailing wage for the occupational classification in the geographic area of intended employment or the actual wage paid by the employer to individuals with similar experience and qualifications for the specific employment in question. H–1B petitions for a specialty occupation worker must include a certified LCA from DOL, and failure to comply with DOL LCA requirements may impact eligibility.

Comment: A research organization said that there are several structural and programmatic flaws with the H–1B program. For example, the organization said that employers are not required to recruit U.S. workers before hiring H–1B workers. Additionally, the commenter said that employers can legally underpay H–1B workers and that there is evidence that DOL is failing to enforce the requirement to pay H–1B workers the ''actual wage'' they pay U.S.

workers. The same commenter also expressed that H–1B workers are exploited and lack job mobility to leave these underpaying jobs, due to recruitment fees and the inability to self-petition for an H–1B visa. Finally, the commenter stated that outsourcing companies use the H–1B program to offshore jobs, replace U.S. workers with underpaid H–1B workers, and ultimately degrade the labor standards for skilled workers. A union made similar statements, citing several sources. The commenter urged DHS to pursue ''bolder structural changes'' to the H–1B program instead of ''tinkering at the edges'' of the program.

Response: DHS acknowledges the general concerns that some unscrupulous employers abuse the H–1B visa program. To prevent fraud and abuse and strengthen H–1B program integrity, DHS is finalizing this rule, which: (1) codifies DHS's authority to request contracts; (2) requires that an H–1B petitioner establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the requested start date; (3) ensures that the LCA supports and properly corresponds with the petition; (4) revises the definition of ''United States employer'' by codifying the existing requirement that the petitioner has a bona fide job offer for the beneficiary to work within the United States as of the requested start date, consistent with current DHS policy, and adds a requirement that the petitioner have a legal presence and be amenable to service of process in the United States; (5) clarifies that beneficiary-owners may be eligible for H–1B status, while setting reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity; (6) codifies USCIS' authority to conduct site visits; (7) clarifies that refusal to comply with site visits may result in denial or revocation of the petition; and (8) clarifies that, if an H–1B worker will be staffed to a third party, meaning they will be contracted to fill a position in the third party's organization, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. DHS disagrees with the suggestion that these changes are not significant. These changes strike an appropriate balance between improving program integrity without being unduly onerous to H–1B employers.

DHS also recognizes the commenters' concerns regarding what they perceive as structural flaws in the H–1B program. However, DHS is unable to make the types of structural changes to fundamentally change the H–1B program the commenters suggested. For example, as noted above in this preamble, the statute generally does not require a labor market test for the H–1B program, and therefore, there is no general statutory requirement for an H–1B petitioner to first recruit U.S. workers before opting to hire H–1B workers instead of U.S. workers.

Comment: Some individual commenters stated that DHS needs to address current backlogs before moving forward with additional applications. A different individual commenter said that many H–1B employees are on these temporary visas due to backlogs, not by personal choice. A trade association encouraged USCIS to continue to explore actions that would reduce backlog and costs, such as reinstituting the ''Known Employer'' Initiative. An advocacy group expressed concern that changes, such as redefining ''specialty occupation,'' increasing requirements for third-party employers, and expanding the authority of investigators to conduct site visits could increase backlogs.

Response: DHS is committed to reducing backlogs for all immigration benefit requests. However, it is unclear to which backlogs the commenters referred. H–1B petitions have historically been adjudicated within a median processing time of 0.2 to 4.7 months depending on whether they were filed with a premium processing request.[167]

In terms of the Known Employer (KE) pilot, USCIS made the decision to end the KE pilot in 2020, based on a combination of operational, technical, and regulatory issues.[168] The lengthy process of clearing KE predeterminations, combined with no discernible time savings for USCIS during the adjudication of petitions using the KE process, meant that time savings were negligible. While reducing the paperwork burden for the agency and petitioners was one of the goals, such a reduction was not observed in any meaningful way because of the low participation rate from most participants. Developing a permanent KE program of similar design would divert resources away from current technology development priorities, add complexity to operations by creating additional petition ingestion processes, create differing adjudication processes, require additional personnel, and require the creation of additional electronic systems that would need to be maintained.

DHS further declines to make changes to this final rule owing to concerns that strengthening the integrity of the H–1B program may cause adjudication delays that increase backlogs. While DHS aims to eliminate backlogs and improve program efficiency, DHS must also balance the need to address fraud and abuse in the H–1B program.

Comment: An advocacy group said that the final rule should address USCIS' legal opinion issued after the enactment of Public Law 114–113. The commenter recommended that the fee for H–1B petitions should be extended to all employers. According to the commenter, the increased revenue would fund the entry/exit system, per the statute. Another commenter suggested additional fees for premium processing. A different commenter said that increasing fees or higher taxes on companies with a substantial H–1B workforce could be a deterrent to using the program. A company said that H–1B fees have gone towards programs that support growth of the domestic technology workforce. The commenter recommended continued funding for these programs by USCIS and encouraged DOL to reopen the ''H–1B One Workforce'' and the ''Apprenticeships: Closing the Skills Gap'' grant programs, or open similar grant programs.

Response: DHS declines to adopt the commenters' suggestions concerning fees and funding, as such suggestions are beyond the scope of this rulemaking. DHS notes that it also issued an NPRM on June 6, 2024, proposing changes to the regulations and applicability of the Public Law 114–113 fee to better ensure that the entry/exit system is fully funded.[169]

Comment: A law firm said that they look forward to USCIS issuing guidance and training to ensure adoption of these provisions. An advocacy group urged quick implementation of the updated provisions related to the registration process, deference, and clarified eligibility for entrepreneurs and cap-exempt organizations. Similarly, some individual commenters urged quick

[167] DHS, USCIS, Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year 2019 to 2024 (up to Feb. 28, 2024), *https://egov.uscis.gov/processing-times/historic-pt* (last visited Apr. 8, 2024) (showing that the 2024 median processing time for premium-processed H–1B petitions was 0.2 months, and for non-premium-processed H–1B petitions was 2.6 months).

[168] DHS, USCIS, *Trusted Employer Program Fiscal Year 2022 Report to Congress* (Aug. 11, 2022), *https://www.dhs.gov/sites/default/files/2022-09/USCIS%20-%20Trusted%20Employer%20Program.pdf.*

[169] *See* ''9–11 Response and Biometric Entry-Exit Fee for H–1B and L–1 Visas,'' 89 FR 48339 (June 6, 2024).

implementation of the proposed rule. A trade association recommended further clarification regarding the effective date of the rule as it relates to the impact of the upcoming H–1B cap season and the then-proposed increases in fees. The association emphasized the need for USCIS to coordinate the implementation of these two rules, carefully considering their combined impact on petitioners and beneficiaries.

Response: DHS appreciates the commenters' concerns about the timely implementation of this final rule. As with all final rules, DHS will ensure that adjudicators receive any necessary guidance and training in a timely manner to properly adjudicate the forms that this final rule will affect. This final rule will be effective January 17, 2025, and will apply to petitions filed on or after that date. DHS published a final rule to make changes to the registration process, including beneficiary-centric selection, on February 2, 2024 (89 FR 7456), and those changes went into effect for the registration period for the FY 2025 cap season.

Comment: A joint submission cited research and ''urged Congress to find common ground on high-skilled immigration and border reform and reduce critical STEM talent gaps by recapturing unused visas, creating a startup visa for entrepreneurs, exempting advanced graduates in STEM fields from green card caps, and eliminating outdated and arbitrary per-country caps on green cards that no longer track to economic need.'' A couple of individual commenters urged USCIS to lobby Congress for further enhancements to professional immigration policy. A couple of individual commenters urged USCIS to lobby Congress for further enhancements to professional immigration policy.

Response: DHS will not make responsive changes to this final rule to address these suggestions, as such suggestions are beyond the scope of this rulemaking. DHS will continue to support requests from Congress for technical assistance with legislative proposals.

Comment: A professional association recommended maintaining or reducing the number of visas due to increased unemployment rates. The commenter reasoned that more Americans are qualified for the positions that employers need to fill, and prioritizing the hiring of Americans would decrease unemployment, homelessness, crime, and mental health issues.

Response: DHS declines to adopt the commenter's suggestions concerning visa numbers, as such suggestions would require a legislative change and as such, are beyond the scope of this rulemaking.

I. Out of Scope

DHS received many comments that were unrelated to the proposed revisions in the NPRM. Many of these comments would require congressional action or separate regulatory action by DHS. Other comments suggested revisions within the purview of DOL or other departments and agencies. Although DHS has summarized the comments it received below, DHS is not providing substantive responses to those comments as they are beyond the scope of this rulemaking. Comments from the public outside the scope of this rulemaking concerned the following issues:

Numerous commenters discussed the immigrant visa process and backlog. These comments included the following:

- General concerns about the immigrant visa backlog for those adjusting status via an approved employment-based immigrant visa petition;
- Requests that USCIS provide an EAD and advance parole document to those with an approved Form I–140;
- Requests to remove the per-country cap on immigrant visas;
- Requests to not count dependents of principal immigrant visa beneficiaries when determining immigrant visa usage;
- Suggestions to clear the current immigrant visa backlogs.
- Requests to remove delays within the immigrant visa process;
- A comment that increasing cap exemptions without expanding immigrant visa numbers would exacerbate backlog issues and be unfair to H–1B workers currently waiting for an employment-based immigrant visa number to become available in the United States;
- Several commenters provided suggestions related to the statutory H–1B cap, such as:
- Requests to increase the H–1B cap or exempt certain groups of individuals, unrelated to the proposed revisions to cap exemptions (including requests to ''prioritize'' specific groups);
- Requests to eliminate the H–1B cap altogether;
- Requests to lower the H–1B cap.
- A request that additional cap exemptions be provided for H–1B positions in U.S. AI programs, citing articles detailing the importance of foreign born talent for AI innovation. An individual commenter generally stated that cap exemptions should be provided for graduates working in STEM fields or AI, as well as entrepreneurs. Similarly a company requested that DHS work with Congress to consider increasing the H–1B visa cap and exempt STEM fields from the H–1B cap.

Several commenters suggested that USCIS bar or place a cap on prospective beneficiaries from certain countries, including:

- Implementing a country cap for H–1B;
- Banning certain countries from the H–1B program;
- Introducing a new visa classification for countries like India and China.

Some commenters provided remarks related to DOL rulemakings and DOL authorities, including:

- Recommendations that the prevailing wage be adjusted;
- A suggestion that employers must file multiple LCAs for H–1B employees who work a hybrid schedule involving work from home and on-site elements;
- A suggestion that DHS change its procedures to ensure that LCAs for an H–1B petition are submitted no earlier than 6 months before the start date of intended employment, thus ensuring consistency between H–1B application processes and LCA validity;
- A suggestion that DHS promulgate a new H–1B wage methodology rule through DOL.

Several commenters provided remarks on dependents or derivatives of H–1B visa holders, such as:

- Comments and concerns related to H–4 visas;
- Recommendations to implement protections for dependents who age out of their immigration status and/or eligibility for an immigrant visa;
- Removing dual intent from H–1B visas.

Several commenters discussed topics related to F–1 OPT and Curricular Practical Training (CPT) programs outside the scope of the rule, including:

- General comments related to the F–1 visa program;
- Requests to add additional oversight to or end the OPT system;
- A request that F–1 OPT interns/volunteers of 501(c)(3) organizations not be treated as ''employees,'' and allow them to be charged a fee/tuition;
- A request that USCIS promulgate regulations to extend H–1B cap gap benefits to F–1 students seeking to apply for the O–1B classification, reasoning that recent graduates pursuing arts careers would benefit from extended OPT;
- A request that USCIS extend the provision allowing OPT students who are in the cap-gap to travel before their

H–1B effective date, reasoning that they may also need to travel for personal or professional reasons prior to their H–1B status taking effect;

- Requests to give additional time for non-stem OPT individuals to find a sponsorship;
- A comment that extending the cap-gap for OPT students would help ''weed out'' the issue of Day 1 CPT schools; and
- A suggestion that USCIS work with labor agencies to ensure workers have adequate protection against retaliation when they exercise collective bargaining rights and that USCIS should take proactive measures to prevent threats by employers of nonimmigrant visa holders.

Several Commenters discussed program integrity and made suggestions to improve it that were outside the scope of the rulemaking, including:

- Requests to improve immigration policy overall, including congressional immigration reform;
- Requests for companies to receive harsher punishments when they violate H–1B rules or other labor laws along with clarity on how they would be prosecuted;
- A request for transparency as to how companies are using the H–1B program, so that there can be public scrutiny as to which companies may be abusing it;
- A commenter recommended revisions to support the integrity of the program, including:
- Require petitioners to remain in good standing with Federal, State, and local laws;
- Prohibit part-time and concurrent employment for H–1B visa holders.

Finally, numerous commenters offered remarks on other topics outside the scope of the proposed rule, including:

- Requests to make it mandatory for entities to provide evidence that they were unable to find qualified individuals in the United States for positions before using the H–1B program;
- Requests for domestic renewal of visas;
- Request to add additional grace period if an H–1B holder loses employment;
- Requests for investigations and more oversight of IT and consulting firms;
- Requests to allow H–1B employees to change employers;
- Requests for changes to the maximum period of stay in H–1B status and changes to the calculation of the maximum period of stay (eliminating recapture of time spent outside the U.S.);
- A comment that cap-exempt entities should be required to disclose any Federal spending that is related to the job listed in I–129 filings or if the beneficiaries' work at a secondary employer is federally funded. The commenter added that cap-exempt positions should include strong worker protections to promote the public interest and allow for labor mobility of petitioners, require Level 3 or 4 wages, and prohibit outsourcing companies from placing H–1B beneficiaries at cap-exempt employers;
- Recommendations that DHS modernize H–1B licensure requirements, reasoning that the current regulations requiring H–1B licensing are impractical since licensing requirements vary by State and occupation;
- A suggestion for a three-phase modernization process, which would involve a five percent cap on non-U.S. citizens at any company while providing training to U.S. citizens; conducting an audit of H–1B employers whose employees were selected for a position over U.S. citizens, and if no suspicious activity was found, then H–1B holders could be permitted to apply for residency after 5 years;
- A request that DHS provide concrete status protections to noncitizen workers that report potential company abuse of the system, since workers often have the most knowledge and evidence of petitioner efforts to offer speculative employment;
- A suggestion that foreign labor recruiters should be prohibited from charging fees to workers;
- A request for clarification regarding ''when a beneficiary is considered counted towards the cap;''
- A few individual commenters recommended the following:
- Raise the minimum wage for H–1B workers to $150,000;
- Require employers to certify that there are not American workers available for the position;
- Require Employers to pay 10 to 15 percent of their total H–1B payroll expenses into a fund that would be used to train and educate American students;
- Prohibit H–1B dependent companies from requesting additional H–1B visas without hiring more Americans;
- Prohibit companies who reported layoffs from using H–1B for the next 2 years;
- Add a provision that would convert all contractors to full time after 90 days, similar to provisions implemented by the Illinois DOL;
- Emphasize that each F–1 student can only submit one H–1B application at a time.

J. Statutory and Regulatory Requirements

1. Administrative Procedure Act

Comment: While expressing support for DHS's effort to improve the H–1B program, a few commenters including trade associations, an advocacy group, and an individual commenter urged the Department to incorporate the concerns, suggestions, and expertise of the regulated community, such as the higher education and legal industries. A research organization remarked that DHS should provide a public analysis of the program change impacts and their scale at the NPRM stage. The commenter noted that under the Administrative Procedure Act, the public should have the opportunity to understand and comment on the proposed change after reviewing a detailed analysis. A trade association expressed concern that USCIS has decreased engagement with regulated industry, and suggested that increasing engagement with industry would improve compliance and trust in the system. A business association similarly requested that USCIS host listening sessions with stakeholders and publish additional **Federal Register** notices.

Response: DHS provided sufficient analysis of the impacts of the proposed rule in the NPRM published in the **Federal Register** on October 23, 2023 (88 FR 72870), and provided a 60-day period for the public to provide comments on the proposed rule. In finalizing this rulemaking, DHS has considered all of the concerns and suggestions made in each comment and incorporated changes, where appropriate. DHS disagrees that USCIS has decreased engagement with the regulated public. Rather, USCIS regularly conducts public engagements on the national and local level on a variety of topics, including topics related to the H–1B program.

Comment: A company expressed support for the decision to seek public input on the proposed rule. A couple of commenters remarked that the proposed changes should be subject to a ballot measure, in order to effectively engage U.S. citizens. A couple of commenters also expressed concern that many people may not be aware of the proposed rule or its comment period. An individual commenter expressed that only citizens should be involved in the public participation process. An individual commenter expressed concern that the purpose of the comment period is minimized if review and finalization of the rule takes several years.

Response: This final rule complies with the Administrative Procedure Act. DHS provided notice to the public by issuing a proposed rule in the **Federal Register** on October 23, 2023 (88 FR 72870). USCIS also announced publication of the proposed rule on its website.[170] DHS accepted public comments on the proposed rule through December 22, 2023, a period of 60 days. Submission of comments was not limited to U.S. citizens, and DHS notes that there is no basis for such limitation. With respect to the commenter's concerns regarding the passage of time from the publication of the NPRM and the comment period to the issuance of the final rule, DHS notes that this rulemaking has proceeded on a fast schedule given the breadth and complexity of the issues covered; within a year from the closing of the comment period, DHS has issued two final rules addressing the proposals contained in the NPRM.[171]

2. Comments on the Regulatory Impact Analysis (RIA) (E.O. 12866 and E.O. 13563)

Comment: An individual commenter, expressing support for the proposed rule, said that while the proposed changes may lead to the costs outlined in the summary of costs and benefits, the long-term benefits to the H–1B program including robustness, fairness, and transparency would outweigh these costs.

Response: DHS agrees that this rule will provide significant long-term benefits to the H–1B program.

Comment: An attorney remarked that by extending OPT, the proposed rule would have negative economic impacts such as deflecting employment opportunities from U.S. workers and suppression of wages. To support this, the commenter provided several statistics on employment in the United States from a Center for Immigration Studies report, a 2016 National Academy of Sciences study, and an article from the Washington Examiner.

Response: Regulatory impact analyses completed by USCIS regularly consider two competing scenarios in which employers are or are not assumed to be able to find reasonable labor substitutes such as U.S. workers to perform work. Treating each scenario as equally likely, USCIS would describe the impact of policies that result in increased labor supply as partly a transfer of wages from hypothetically willing and able U.S. workers—whether actively seeking employment or not—to the foreign workers, and partly a benefit to employers or consumers from foreign workers performing work that otherwise could not be completed without significant training and search costs. From these analyses, USCIS observes that replacement costs are significant, often prohibitively so for higher skilled and higher-wage positions.[172] With regard to this rule's provision granting up to six additional months employment authorization to a foreign student who has already worked one or more years for an employer and who has already been approved for an H–1B visa, the commenter's baseline assumption that employers would hire other U.S. workers for this gap period between training and employment is unreasonable and not supported by the general discussion in the sources cited. USCIS sought public comment on estimates of the population expected to benefit from the expansion of cap-gap, but no commenters provided information on this or evidence of how students working between graduation and the start of H–1B work deflects employment opportunities for other reasonable labor substitutes.

Comment: A few commenters including a joint submission of attorneys, a trade association, and a company commented that the NPRM's estimate of a 1.08-hour burden for site visits split evenly between the H–1B beneficiary and their supervisor is an underestimate, as other internal or third-party personnel such as human resources and legal are often involved. The commenters also stated that the statistics the NPRM presents relating to noncompliance and fraud are inaccurate, both because the NPRM does not provide raw data about the instances categorized as noncompliant or fraudulent, and because in some cases the NPRM conflates noncompliance with fraud.

Response: The average 1.08-hour burden is based on a calculation from data provided by the USCIS Fraud Detection and National Security Directorate. *See* 88 FR 72870, 72945 (Oct. 23, 2023). DHS acknowledges that the duration of individual site visits varies. The commenter noted that, in addition to beneficiaries and their supervisors, various parties such as in-house and third-party counsel may spend time preparing for a site visit. While noting that the 5-year average burden increased to 1.09 hour when adding data for FY 2023, DHS declines to further increase the estimate of an average site visit. DHS notes that the Form I–129 burden captures the estimated time to gather, prepare, attach, and submit required documentation related to beneficiary's employment. The Form I–129 instructions also note that DHS may verify any information submitted to establish eligibility through methods including ''making unannounced physical site inspections of residences and locations of employment.'' While some petitioners may elect to have additional managers, legal counsel, or executives prepare for or participate in a site visit, DHS believes that the methodology in the NPRM reasonably estimates the additional resources for the site visit provision and declines to estimate the opportunity cost of time for these additional parties.

Comment: An individual commenter expressed concern that the proposed rule would disproportionately impact small nonprofits, due to having fewer resources to comply with the new requirements. The commenter urged USCIS to mitigate impacts on small nonprofits.

Response: DHS acknowledges that a high percentage of entities impacted by this rule are small but notes that the net impacts of the final rule result in cost savings.

Comment: A company remarked that the 10-year net impact of the proposed rule is justified given that it would result in greater robustness and equity in the H–1B program. The company added that the benefits of the program include mitigating deterrents to working or studying in the United States, which would increase talent in student and employment pools, leading to advancements in research and technology.

Response: DHS agrees with the commenter that the benefits of this rule justify the costs.

K. Severability

All of the provisions of this rule are severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule would remain in effect as to any other person or circumstance. Specifically, DHS intends that the provisions which streamline requirements for the H–1B program such as revising the regulatory definition and criteria for a ''specialty occupation''; clarifying that ''normally'' does not mean ''always'' within the criteria for a specialty occupation; and clarifying that a position may accept a range of qualifying degree fields as sufficient to qualify for the position, although there must be a direct

[170] *https://www.uscis.gov/newsroom/news-releases/dhs-issues-proposed-rule-to-modernize-the-h-1b-specialty-occupation-worker-program.*

[172] *See* 89 FR 24655.

relationship between the required field(s) and the duties of the position all be severable from one another and from all of the other provisions in this rule. In addition, DHS intends that the provision clarifying when an amended or new petition must be filed due to a change in an H–1B worker's place of employment, the provisions addressing USCIS' deference policy, the provision requiring that evidence of maintenance of status to be included with the petition if a beneficiary is seeking an extension or amendment of stay, and the provision eliminating the itinerary requirement, impacting all H classifications, as well as that allowing petitioners to amend requested validity periods where the requested validity expires before adjudication all be severable from one another. None of these provisions are dependent on one another and can function independently if any are invalidated. In the severability clause at new 8 CFR 214.2(h)(33), DHS has identified the second level paragraphs (for example, paragraph (h)(2)) in which the severable amended provisions contained in this final rule can be found. These references along with the date of the final rule are intended to better identify the severable provisions and differentiate them from the existing provisions in 8 CFR 214.1 and 214.2 that are not being impacted by this final rule.

IV. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Orders (E.O.) 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has designated this final rule a ''significant regulatory action'' as defined under section 3(f) of E.O. 12866, as amended by Executive Order 14094, but it is not significant under section 3(f)(1) because its annual effects on the economy do not exceed $200 million in any year of the analysis. Accordingly, OMB has reviewed this final rule.

1. Summary of Changes From NPRM to Final Rule

As discussed in the preamble, the purpose of this rulemaking is to modernize and improve the regulations governing the H–1B program by: (1) streamlining the requirements of the H–1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures.

Following careful consideration of the public comments received, this final rule adopts the provisions proposed in the NPRM, with revisions as described above relating to *Specialty Occupation Definition and Criteria, Bar on Multiple Registrations Submitted by Related Entities, Contracts, Bona fide employment,* and *Beneficiary-Owners.*

DHS analyzed two baselines for this final rule, the no action baselines and the without-policy baseline. The primary baseline for this final rule is the no action baseline. For the 10-year period of analysis of the final rule DHS estimates the annualized net cost savings of this rulemaking will be $333,835 annualized at 2 percent. DHS also estimates that there will be annualized monetized transfers of $1.4 million from newly cap-exempt petitioners to USCIS and $38.8 million from other employees to F–1 workers, both annualized at a 2 percent discount rate. Table 1 provides a more detailed summary of the final rule provisions and their impacts.

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Table 1. Summary of Provisions and Impacts of the Final Rule

Final Rule Provisions	Description of the Final Change to Provisions	Estimated Costs/Transfers of Provisions	Estimated Benefits of Provisions
1. Specialty Occupation Definition and Criteria	☐ DHS codifies and clarifies the specialty occupation standard, including by: - codifying the "directly related" requirement in the definition and criteria, and clarifying this as meaning "a logical connection" - codifying current practice that a generalized degree is not sufficient - codifying current practice that a position may allow for a range of qualifying degree fields.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ **No-Action Baseline:** None ☐ **Without-Policy Baseline:** Petitioners may have taken time to provide job descriptions or other evidence of a specialty occupation. DHS/USCIS – ☐ None	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ **No-Action Baseline:** There may be transparency benefits due to this change. ☐ **Without-Policy Baseline:** None DHS/USCIS – None
2. Amended Petitions	☐ DHS clarifies when an amended or new H-1B petition must be filed due to a change in an H-1B worker's place of employment.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ None	Quantitative: Petitioners - ☐ DHS estimates the total annual cost savings to petitioners will be $385,559 (undiscounted) DHS/USCIS - ☐ None Qualitative: Petitioners –

		DHS/USCIS – □ None	DHS/USCIS – □ None
3. Deference	□ DHS codifies and clarifies its existing deference policy.	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ None	Quantitative: Petitioners - □ **No-Action Baseline:** None □ **Without-Policy Baseline:** DHS estimates the total annual cost savings to petitioners will be $308,836 (undiscounted) DHS/USCIS - □ None Qualitative: Petitioners – □ **No-Action Baseline:** None □ **Without-Policy Baseline:** None DHS/USCIS – □ None
4. Evidence of Maintenance of Status	□ DHS clarifies that evidence of maintenance of status is required for petitions where there is a request to extend or amend the beneficiary's stay.	Quantitative: Petitioners - □ None	Quantitative: Petitioners - □ None

		DHS/USCIS - □ None Qualitative: Petitioners – □ None DHS/USCIS – □ None	DHS/USCIS - □ None Qualitative: Petitioners – □ DHS anticipates that codifying and providing clarification of the requirements for maintenance of status requests will at least render some RFEs and NOIDs unnecessary; therefore, may save the petitioner's time. DHS/USCIS – □ This will in turn reduce the added burden on adjudicators associated with receiving, responding to, and adjudicating RFEs and NOIDs, and decrease the number of RFEs and NOIDs
5. Eliminating the Itinerary Requirement for H Programs	□ DHS eliminates the H programs' itinerary requirement.	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ None	Quantitative: Petitioners - □ DHS estimates the total annual cost savings to petitioners will be $653,162 (undiscounted). DHS/USCIS - □ None

		DHS/USCIS – □ None	Qualitative: Petitioners – □ This may benefit petitioners who have beneficiaries at alternative worksites and petitions filed by agents. DHS/USCIS – □ None
6. Validity Expires Before Adjudication	□ DHS allows H-1B petitions to be approved or have their requested validity period dates extended if USCIS adjudicates and deems the petition approvable after the initially requested validity period end-date, or the period for which eligibility has been established, has passed. This typically will happen if USCIS deems the petition approvable upon a favorable motion to reopen, motion to reconsider, or appeal.	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ Increased cost of receiving an RFE and spending time to review it. USCIS may issue an RFE asking whether the petitioner wants to update the dates of intended employment. This change may increase the number of RFE's; however, it may save petitioners from having to file another H-1B petition and USCIS from having to intake and adjudicate another petition. □ Reduced cost of filing new petition.	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ This change may save the petitioners the opportunity cost of time and the fee to file an additional form. DHS/USCIS – □ None

		DHS/USCIS – □ None	
7. H-1B Cap Exemptions	□ DHS is revising the requirements to qualify for H-1B cap exemption when a beneficiary is not directly employed by a qualifying institution, organization, or entity. □ DHS is revising the definition of "nonprofit research organization", "governmental research organization" and "non-profit or tax exempt organization"	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ Affected petitioners will avoid the cap lottery and $215 H-1B Registration Fee but may choose to incur additional I-129 fees to file a petition that would not have been possible if not selected in the cap lottery. □ Additional cost savings on ACWIA fees associated with initial cap-subject petitions are possible. DHS/USCIS – □ None	Quantitative: Petitioners - □ None DHS/USCIS - □ None Qualitative: Petitioners – □ Affected petitioners may benefit from greater access to high skilled talent. □ Increase in population of research organizations eligible for cap exemption. DHS/USCIS – □ None
8. Automatic Extension of Authorized Employment "Cap-Gap"	□ DHS is revising the automatic cap-gap extension end date from October 1 to	Quantitative: Transfers -	Quantitative: Petitioners -

	April 1 of the fiscal year for which H-1B status is being requested.	☐ Transfer payments of $38.8 million from other employees to F-1 workers	☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ This change may benefit petitioners and students, as the automatic extension end date from October 1 to April 1 of the relevant fiscal year will avoid disruptions in employment authorization that some F-1 nonimmigrants seeking cap-gap extensions have experienced over the past several years. DHS/USCIS – ☐ None
9. Provisions to Ensure Bona Fide Job Offer for a Specialty Occupation Position	☐ DHS is codifying USCIS' authority to request contracts, work orders, or similar evidence.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ **No-Action Baseline:** None ☐ **Without-Policy Baseline:** Petitioners may have taken time to	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ **No-Action Baseline:** There may be transparency benefits due to this change.

		find provide contracts or legal agreements, if available, or other evidence including technical documentation, milestone tables, or statements of work. DHS/USCIS – ☐ None	☐ **Without-Policy Baseline:** None DHS/USCIS – None
10. Beneficiary-Owners	☐ DHS is codifying a petitioner's ability to qualify as a U.S. employer even when the beneficiary possesses a controlling interest in that petitioner.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ Petitioners for beneficiary-owned businesses may experience costs associated with limiting the validity period of extensions. DHS/USCIS – ☐ None	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ This change may benefit H-1B petitions for entrepreneurs, start-up entities, and other beneficiary-owned businesses. DHS/USCIS – None
11. Site Visits	☐ DHS is modifying the H-1B regulations to codify its existing authority to conduct site visits and clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections.	Quantitative: Petitioners - ☐ Failure to cooperate during site visits or other compliance reviews may result in denial or revocation of any petition for workers performing services at the location or locations that are a	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None

		subject of inspection or compliance review. Such action, in turn, may result in opportunity costs of time to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.09 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit. ☐ Employers that do not cooperate will face denial or revocation of their petition(s), which could result in costs to those businesses. ☐ DHS estimates the total annual cost of the H-1B worksite inspections to be $704,886 (undiscounted) for this rule. DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ None DHS/USCIS – ☐ None	Qualitative: Petitioners – ☐ None DHS/USCIS – ☐ USCIS will have clearer authority to deny or revoke a petition if unable to verify information related to the petition. ☐ Existing USCIS enforcement activities will be more effective by additional cooperation from employers.
12. Third-party placement (Codifying *Defensor*)	☐ In this provision, when the beneficiary will be staffed to a third party,	Quantitative:	Quantitative:

	USCIS will look at the third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation.	Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ **No-Action Baseline:** None ☐ **Without-Policy Baseline:** Petitioners may have taken time to demonstrate that the worker will perform services in a specialty occupation, which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty. DHS/USCIS - ☐ None	Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ **No-Action Baseline:** There may be transparency benefits due to this change. This provision will improve program integrity. ☐ **Without-Policy Baseline:** None DHS/USCIS – ☐ None ☐

In addition to the impacts summarized above, and as required by OMB Circular A–4, Table 2 presents the prepared accounting statement showing the costs and benefits that will result in this final rule.[173]

Table 2. OMB A-4 Accounting Statement ($ millions, FY 2023)
Time Period: FY 2024 through FY 2033

Category	Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation
BENEFITS				
Monetized Benefits	N/A			Regulatory Impact Analysis (RIA)
Annualized quantified, but unmonetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	DHS anticipates that codifying and providing clarification of the requirements for maintenance of status applications will at least render some RFEs and NOIDs unnecessary; therefore, may save the petitioner's time. In addition, these changes will improve the integrity of the H-1B program by preventing certain abuses. DHS will change the automatic extension end date from October 1 to April 1 of the relevant fiscal year to avoid disruptions in employment authorization that some F-1 nonimmigrants seeking cap-gap extensions have been experiencing over the past several years.			RIA
COSTS				
				RIA
Annualized monetized costs (2%)	-$0.3			
Annualized quantified, but unmonetized, costs	N/A			
Qualitative (unquantified) costs	Changes to the site visit provision may affect employers who do not cooperate with site visits who will face denial or revocation of their petition(s), which could result in costs to those businesses. Petitioners may face financial losses because they may lose access to labor for extended periods, which could result in too few workers, loss of revenue, and some could go out of business. DHS expects program participants to comply with			RIA

[173] OMB, *Circular A–4* (Sept. 17, 2003), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf* (last viewed June 1, 2021).

	program requirements, however, and notes that those that do not could experience significant impacts due to this rule. DHS expects that the rule will hold certain petitioners more accountable for violations, including certain findings of labor law and other violations.	
TRANSFERS		
Annualized monetized transfers: From newly cap-exempt petitioners to USCIS	(2%) 1.4	RIA
Annualized monetized transfers: From other employees to F-1 workers in the form of compensation	(2%) 38.8	RIA
Miscellaneous Analyses/Category	***Effects***	***Source Citation***
Effects on State, local, or Tribal governments	None	RIA
Effects on small businesses	None	RIA
Effects on wages	None	None
Effects on growth	Aside from the reduction in transfers from not having to pay the registration fee, petitioners that qualify under the cap exemptions will also benefit from not having to wait for H-1B cap season to commence employment. This may allow approved petitioners to have their H-1B workers commence employment earlier, prior to the beginning of the fiscal year on October 1.	RIA

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2. Background

The purpose of this rulemaking is to modernize and improve the regulations relating to the H–1B program by: (1) streamlining the requirements of the H–1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures. Some of the provisions will narrowly impact other nonimmigrant classifications.

3. Costs, Transfers, and Benefits of the Final Rule

viii. Specialty Occupation Definition and Criteria

In response to commenters' concerns, DHS is modifying the definition of specialty occupation. After carefully considering the comments, DHS is not finalizing the proposed regulatory text of ''[t]he required specialized studies must be directly related to the position,'' as this language may be misread as stating that USCIS would only consider a beneficiary's specialized studies. The ''directly related'' requirement is, however, being retained in the definition of ''specialty occupation'' and in the criteria.

DHS is also adding regulatory text to clarify the level of connection needed to meet the ''directly related'' requirement by adding the sentence, ''directly related means that there is a logical connection between the degree, or its equivalent, and the duties of the position,'' to the regulatory text. Further, DHS is adding a reference to the ''duties of the position'' to the prior sentence about allowing a range of qualifying degree fields to assure stakeholders that this practice has not changed.

To address commenters' various concerns about not relying on degree titles, DHS is removing the references to ''business administration'' and ''liberal arts.'' These changes recognize that title of the degree, alone, is not determinative and that titles may differ among schools and evolve over time.

DHS is also making some minor, non-substantive revisions to 8 CFR 214.2(h)(4)(iii)(A), which include: changing the word ''are'' to ''is'' in 8 CFR 214.2(h)(4)(iii)(A)(*4*); revising 8 CFR 214.2(h)(4)(iii)(A)(*2*) from ''United States industry'' to ''industry in the United States''; and revising 8 CFR 214.2(h)(4)(iii)(A)(*2*) and (*3*) by adding ''to perform the job duties for'' rather than just the word ''position''.

Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline petitioners may have taken time to provide position descriptions or other evidence of connection between a degree, or its equivalent, and the duties of the position.

ix. Amended Petitions

DHS is clarifying when an amended or new H–1B petition must be filed due to a change in an H–1B worker's place of employment. Specifically, this rule will clarify that any change of work location that requires a new LCA is itself considered a material change and therefore requires the petitioning employer to file an amended or new petition with USCIS before the H–1B worker may perform work under the changed conditions.

This change will clarify requirements for H–1B amended petitions by codifying *Matter of Simeio Solutions, LLC*[174] and incorporating DOL rules on when a new LCA is not necessary. DHS estimates that this change will save petitioners filing amended petitions 5 minutes for each petition (0.08 hours).

USCIS received a low of 64,385 amended petitions in FY 2019, and a high of 77,255 amended petitions in FY 2023. Based on the 5-year annual average, DHS estimates that 71,141 petitioners file for an amended petition each year shown in Table 3. DHS does not know if all of these amended petitions are due to a change in an H–1B worker's place of employment. Because of this, DHS cannot estimate how many of these new and amended petitions will benefit by consolidating existing requirements and providing clearer regulatory text pertaining to when a petitioner must submit an amended or new petition with or without a new LCA.

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Table 3. Form I-129 H-1B Classification Amended Petitions, Petition for a Nonimmigrant Worker, FY 2019 through FY 2023

Fiscal Year	Form I-129 H-1B Receipts Received without Form G-28	Form I-129 H-1B Receipts Received with Form G-28	Total	Percentage of Form I-129 H-1B filed with Form G-28
2019	17,039	47,346	64,385	74%
2020	21,081	51,480	72,561	71%
2021	19,124	46,494	65,618	71%
2022	20,239	55,648	75,887	73%
2023	23,340	53,915	77,255	70%
5-year Total	**100,823**	**254,883**	**355,706**	**72%**
5-year Annual Average	**20,165**	**50,977**	**71,141**	**72%**

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), CLAIMS3 and ELIS databases, May 23, 2024.

DHS conducted a sensitivity analysis to estimate the number of petitions that may benefit from this change. Table 4 presents the lower and upper bound number of petitions filed annually for amended petitions and for new petitions, which corresponds to a range of 10 to 90 percent.

Table 4. Estimated Annual Number of Form I-129 H-1B Petitions that Are New or Amended

	Petitioners	Lower Bound (10%)	Upper Bound (90%)
Estimated Annual Amended Petitions	71,141	7,114	64,027

Source: USCIS analysis

Using the lower and upper bounds of the estimated annual population for the petitioners who will file amended petitions, DHS estimates the cost savings based on the opportunity cost of time of gathering and submitting information by multiplying the estimated time burden savings for those filing an amended petition (5 minutes or 0.08 hours) by the compensation rate of an HR specialist, in-house lawyer, or outsourced lawyer, respectively.

In order to estimate the opportunity costs of time for completing and filing an H–1B amended petition DHS assumes that a petitioner will use an HR specialist, an in-house lawyer, or an outsourced lawyer to prepare an H–1B

[174] *See* USCIS, ''USCIS Final Guidance on When to File an Amended or New H–1B Petition After *Matter of Simeio Solutions, LLC*,'' PM–602–0120 (July 21, 2015), *https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf.*

amended petition.[175] DHS uses the mean hourly wage of $36.57 for HR specialists to estimate the opportunity cost of the time for preparing and submitting the H–1B amended petition.[176] Additionally, DHS uses the mean hourly wage of $84.84 for in-house lawyers to estimate the opportunity cost of the time for preparing and submitting the H–1B amended petition.[177]

DHS accounts for worker benefits when estimating the total costs of compensation by calculating a benefits-to-wage multiplier using the BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full opportunity cost per petitioner, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, retirement, etc.[178] DHS multiplied the average hourly U.S. wage rate for HR specialists and in-house lawyers by 1.45 to account for the full cost of employee benefits, for a total of $53.03 [179] per hour for an HR specialist and $123.02 [180] per hour for an in-house lawyer. DHS recognizes that a firm may choose, but is not required, to outsource the preparation of these petitions and, therefore, presents two wage rates for lawyers. To determine the full opportunity costs of time if a firm hired an outsourced lawyer, DHS multiplied the average hourly U.S. wage rate for lawyers by 2.5 for a total of $212.10 to approximate an hourly cost for an outsourced lawyer to prepare and submit an H–1B amended petition or LCA.[181]

DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Table 5 shows that the total annual cost savings will range from $77,111 to $694,006. DHS estimates the total cost savings to be the average between the lower bound and the upper bound estimates. Based on this, DHS estimates the average cost savings from this provision to be $385,559.

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

[176] See BLS, ''Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2022, 13–1071 Human Resources Specialists,'' *https://www.bls.gov/oes/2023/may/oes131071.htm* (last visited August 23, 2024).

[177] *See* BLS, ''Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2022, 23–1011 Lawyers,'' *https://www.bls.gov/oes/2023/may/oes231011.htm* (last visited August 23, 2024).

[178] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) ($45.42 Total Employee Compensation per hour)/($31.29 Wages and Salaries per hour) = 1.45158 = 1.45 (rounded). *See* BLS, Economic News Release, ''Employer Costs for Employee Compensation—December 2023,'' Table 1. ''Employer Costs for Employee Compensation by ownership [Dec. 2023],'' *https://www.bls.gov/news.release/archives/ecec_03132024.htm* (last visited Aug. 21, 2024). The Employer Costs for Employee Compensation measures the average cost to employers for wages and salaries and benefits per employee hour worked.

[179] Calculation: $36.57 * 1.45 = $53.03 total wage rate for HR specialist.

[180] Calculation: $84.84 * 1.45 = $123.02 total wage rate for in-house lawyer.

[181] Calculation: $84.84 * 2.5 = $212.10 total wage rate for an outsourced lawyer.

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), *https://www.federalregister.gov/documents/2018/05/31/2018-11732/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2018-numerical-limitation-for-the*, used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages.

The DHS ICE rule ''Final Small Entity Impact Analysis: 'Safe-Harbor Procedures for Employers Who Receive a No-Match Letter' '' at G–4 (Aug. 25, 2008), *https://www.regulations.gov/document/ICEB-2006-0004-0922*, also uses a multiplier. The methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule.

Table 5. Estimated Annual Cost Savings to Form I-129 H-1B Petitioners				
	Affected Population	Time Burden (Hours)	Compensation Rate	Total Annual Cost Savings
	A	B	C	D=A×B×C
Lower Bound				
Estimated Number of Petitions (Lower Bound)				
HR specialist	1,992	0.08	$53.03	$8,451
In-house lawyer	5,122	0.08	$123.02	$50,409
Outsourced lawyer	5,122	0.08	$212.10	$86,910
Total Average - Lower Bound	7,114			**$77,111**
Upper Bound				
Estimated Number of Petitions (Upper Bound)				
HR specialist	17,928	0.08	$53.03	$76,058
In-house lawyer	46,099	0.08	$123.02	$453,688*
Outsourced lawyer	46,099	0.08	$212.10	$782,208*
Total Average - Upper Bound	64,027			**$694,006**
Total Cost Savings Average				**$385,559**

Source: USCIS analysis

*Note: DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Calculations for In-house/Outsourced lawyer totals are averaged then added to the HR Specialist, for the total averages. For example (lower bound) Average ($50,409 + $86,910)/2 = $68,660 + $8,451 = $77,111 and

(upper bound) Average ($453,688 + 782,208)/2 = $617,948 + $76,058 = $694,006. The total cost savings is the average of the lower and upper bound average totals = ($77,111 + $694,006)/2 = $385,559.

x. Deference to Prior USCIS Determinations of Eligibility in Requests for Extensions of Petition Validity

DHS is codifying and clarifying its existing deference policy at amended 8 CFR 214.1(c)(5). Deference has helped promote consistency and efficiency for both USCIS and its stakeholders. The deference policy instructs officers to consider prior determinations involving the same parties and facts, when there is no material error with the prior determination, no material change in circumstances or in eligibility, and no new material information adversely impacting the petitioner's, applicant's, or beneficiary's eligibility. This provision is codifying the deference policy [182] dated April 27, 2021. Relative to the no-action baseline there are no costs to the public. The benefit of codifying this policy is that there may be some transparency benefits to having the policy in the CFR. Relative to a without-policy baseline petitioners may need to take time to familiarize themselves with those changes made in the 2021 deference policy memo. The provision applies to all nonimmigrant classifications for which form I–129 is filed to request an extension of stay (*i.e.,* E–1, E–2, E–3, H–1B, H–1B1, H–2A, H–2B, H–3, L–1, O–1, O–2, P–1, P–1S, P–2, P–2S, P–3, P–3S, Q–1, R–1, and TN nonimmigrant classifications). The deference policy had been in effect since 2004 but was rescinded in 2017 until 2021, when it was reinstated in the USCIS Policy Manual. After USCIS rescinded deference in 2017, the number of RFEs and denials increased.

Table 6 shows the number for Form I–129 RFEs filed for an extension of stay or amendment of stay, that are requesting a continuation of previously approved employment or a change in previously approved employment from FY 2019 through FY 2023. USCIS received a low of 8,381 RFEs for Form I–129 classifications in FY 2023, and a high of 43,435 RFEs for Form I–129 classifications in FY 2020. Based on a 5-year annual average, 26,192 petitioners who filed for an extension of stay or amendment of stay are requesting a continuation of previously approved employment or a change in previously approved employment receive an RFE for Form I–129 per year.

[182] *See* USCIS, ''Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity, Policy Alert,'' PA–2021–05 (April 27, 2021), *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf* (last visited on Mar. 23, 2023).

Table 6. Total Form I-129 Receipts Filed for an Extension of Stay or Amendment of Stay, That Are Requesting a Continuation of Previously Approved Employment or a Change in Previously Approved Employment, FY 2019 Through FY 2023			
Reported Fiscal Year	**RFE Count**	**Non-RFE Count**	**Total**
2019	42,071	122,435	164,506
2020	43,435	142,617	186,052
2021	23,447	138,933	162,380
2022	13,624	126,603	140,227
2023	8,381	116,515	124,896
5-year Total	**130,958**	**647,103**	**778,061**
5-year Annual Average	**26,192**	**129,421**	**155,612**
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024. Note: FY19-22 RFE counts and Non-RFE counts fluctuated nominally since the Mar. 13, 2023 query presented in the NPRM. Fluctuations of this magnitude in USCIS Administrative Data are common and do not materially affect the analysis.			

DHS will codify the deference policy that applies to the adjudication of a petition. Relative to a without-policy baseline, this change could affect the number of RFEs that USCIS sends for Form I–129. USCIS estimates that there may be a reduction in RFEs, as officers adjudicating a Form I–129 involving the same parties and the same underlying facts will typically be able to defer to a prior approval, given there is no new material information or a material error. The reduction in RFEs may save time and make the overall process faster for petitioners and USCIS.

Table 7 shows the number of Form I–129 receipts, submitted concurrently with a Form G–28, filed for a continuation of previously approved employment or a change in previously approved employment, and requesting an extension of stay or amendment of stay, on which USCIS issued an RFE. Based on the 5-year annual average, DHS estimates that 20,049 petitioners who received an RFE filed with a Form G–28 and 6,142 petitioners who received an RFE filed without a Form G–28.

Table 7. Form I-129, Petition for a Nonimmigrant Worker Receipts Filed for an Extension of Stay or Amendment of Stay, That Are Requesting a Continuation of Previously Approved Employment or a Change in Previously Approved Employment, with an RFE Submitted Concurrently with Form G-28, FY 2019 Through FY 2023				
Fiscal Year	**Form I-129 Receipts Received without Form G-28**	**Form I-129 Receipts Received with Form G-28**	**Total Form I-129 Receipts Received with RFE**	**Percentage of Form I-129 filed with Form G-28**
2019	13,450	28,621	42,071	68%
2020	9,132	34,303	43,435	79%
2021	3,883	19,564	23,447	83%
2022	2,300	11,324	13,624	83%
2023	1,947	6,434	8,381	77%
5-year Total	**30,712**	**100,246**	**130,958**	**77%**
5-year Annual Average	**6,142**	**20,049**	**26,192**	**77%**
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.				

DHS conducted a sensitivity analysis to estimate the number of petitions that may benefit from codifying and clarifying its existing deference policy. Table 8 presents the lower and upper bound number of petitions filed annually for amended petitions and for new petitions, which corresponds to a range of 10 to 90 percent.

Table 8. Estimated Number of Form I-129 Petitions with RFEs			
	Petitioners	Lower Bound (10%)	Upper Bound (90%)
Estimated RFE Petitions	26,192	2,619	23,572
Source: USCIS analysis			

Using the lower and upper bounds of the estimated annual population for the petitioners who may no longer have to provide duplicative data, DHS estimates the cost savings based on the opportunity cost of time of gathering and submitting duplicative information by multiplying the estimated time burden to gather information 10 minutes (0.167 hours) by the compensation rate of an HR specialist, in-house lawyer, or outsourced lawyer, respectively. DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Table 9 shows that the total annual cost savings due to the codifying and clarifying its existing deference policy will range from $61,772 to $555,900. DHS estimates the total cost savings to be the average between the lower bound and the upper bound estimates. Based on this DHS estimates the average cost savings from this provision to be $308,836.

Table 9. Estimated Annual Cost Savings to Form I-129 Petitioners due to Codifying and Clarifying the Deference Policy				
	Affected Population	Time Burden (Hours)	Compensation Rate	Total Annual Cost Savings
	A	B	C	D=A×B×C
Lower Bound				
Estimated Number of Petitions (Lower Bound)				
HR specialist	602	0.167	$53.03	$5,331
In-house lawyer	2,017	0.167	$123.02	$41,438
Outsourced lawyer	2,017	0.167	$212.10	$71,444
Total Average - Lower Bound	**2,619**			**$61,772**
Upper Bound				
Estimated Number of Petitions (Upper Bound)				
HR specialist	5,422	0.167	$53.03	$48,017
In-house lawyer	18,150	0.167	$123.02	$372,880*
Outsourced lawyer	18,150	0.167	$212.10	$642,886*
Total Average - Upper Bound	**23,572**			**$555,900**
Total Cost Savings Average				**$308,836**
Source: USCIS analysis * Note: DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Calculations for In-house/Outsourced lawyer totals are averaged then added to the HR Specialist, for the total averages. For example (lower bound) Average ($41,438 + $71,444)/2 = $56,441 + $5,331 = $61,772 and (upper bound) Average ($372,880 + $642,886)/2 = $507,883 + $48,017 = $555,900. The total cost savings is the average of the lower and upper bound average totals = ($61,772 + $555,900)/2 = $308,836.				

xi. Evidence of Maintenance of Status

DHS is clarifying current requirements and codifying practices concerning evidence of maintenance of status at 8 CFR 214.1(c)(1) through (7). Primarily, DHS seeks to clarify that evidence of maintenance of status is required for petitions where there is a request to extend or amend the beneficiary's stay.

This change will list examples of additional evidence types that petitioners may provide but will not limit petitioners to those specific evidence types. The form instructions further state that if the beneficiary is employed in the United States, the petitioner may submit copies of the beneficiary's last two pay stubs, Form W–2, and other relevant evidence, as well as a copy of the beneficiary's Form I–94, passport, travel document, or Form I–797. This change may decrease the number of RFEs and NOIDs by clearly stating what types of supporting documentation are relevant and clarifying that petitioners should submit such supporting documentation upfront, rather than waiting for USCIS to issue a request for additional information.

This may benefit petitioners by saving them the time to review and respond to RFEs and NOIDs.

DHS is codifying into regulation the instructions that, when seeking an extension or amendment of stay, the applicant or petitioner must submit supporting evidence to establish that the applicant or beneficiary maintained the previously accorded nonimmigrant status before the extension or amendment request was filed. Additionally, DHS will remove the sentence: ''Supporting evidence is not required unless requested by the director.'' *See* amended 8 CFR 214.2(h)(14). *See also* amended 8 CFR 214.2(l)(14)(i) (removing ''Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director.''); amended 8 CFR 214.2(o)(11) and amended 8 CFR 214.2(p)(13) (removing ''Supporting documents are not required unless requested by the director.''). DHS expects that these changes will reduce confusion for applicants and petitioners, clarify what evidence is required for all extension or amendment of stay requests, and simplify adjudications by decreasing the need for RFEs and NOIDs.

Based on the 5-year annual average, DHS estimates that 292,324 Form I–129 petitions are filed requesting an extension of stay. Of those total filed petitions, DHS estimates that 48,064 petitioners who requested an extension of stay received an RFE and the remaining 244,260 did not receive and RFE as shown in Table 10.

Table 10. Form I-129 Extension of Stay, Petition for a Nonimmigrant Worker, FY 2019 through FY 2023

Fiscal Year	RFE Count	Non-RFE Count	Total
2019	83,417	199,450	282,867
2020	71,811	247,945	319,756
2021	41,003	270,370	311,373
2022	26,989	280,547	307,536
2023	17,101	222,987	240,088
5-year Total	**240,321**	**1,221,299**	**1,461,620**
5-year Annual Average	**48,064**	**244,260**	**292,324**

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.

DHS estimates that 26,344 petitions are filed requesting to amend the stay. Of those, DHS estimates that 5,802 petitions that are filed requesting to amend the stay receive an RFE and 20,542 do not receive an RFE.

Table 11. Form I-129 Amend the Stay, Petition for a Nonimmigrant Worker, FY 2019 through FY 2023

Fiscal Year	RFE Count	Non-RFE Count	Total
2019	14,625	16,938	31,563
2020	7,235	20,058	27,293
2021	2,824	20,355	23,179
2022	2,323	23,671	25,994
2023	2,005	21,686	23,691
5-year Total	**29,012**	**102,708**	**131,720**
5-year Annual Average	**5,802**	**20,542**	**26,344**

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.

DHS estimates that 84,164 petitions are filed requesting to change status and extend the stay. Of those, DHS estimates that 22,867 petitions that are filed requesting to change status and extend the stay receive an RFE and 61,298 do not receive an RFE.

Table 12. Form I-129 Petition for a Nonimmigrant Worker Requesting New Employment with a COS, FY 2019 through FY 2023			
Fiscal Year	**RFE Count**	**Non-RFE Count**	**Total**
2019	44,095	50,880	94,975
2020	23,947	65,948	89,895
2021	18,360	61,629	79,989
2022	16,436	70,644	87,080
2023	11,495	57,388	68,883
5-year Total	**114,333**	**306,489**	**420,822**
5-year Annual Average	**22,867**	**61,298**	**84,164**
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.			

It is important to note that issuing RFEs and NOIDs takes time and effort for adjudicators—to send, receive, and adjudicate documentation—and it requires additional time and effort for applicants or petitioners to respond, resulting in extended timelines for adjudications.[183] Data on RFEs and NOIDs related to maintenance of status are not standardized or tracked in a consistent way, limiting USCIS's ability to accurately or reliably observe the relationship between specific circumstances and RFEs; however, the data demonstrate that these requests and notices continue to occur at nontrivial rates.

DHS anticipates that USCIS adjudicators may issue fewer RFEs and NOIDs related to maintenance of status under this rule due to clarity of what types of supporting documentation are relevant and clarification that petitioners and applicants should submit such supporting documentation upfront, rather than waiting for USCIS to issue a request for additional information, which will reduce the burden on applicants, petitioners, and adjudicators, and save time processing applications and petitions.

xii. Eliminating the Itinerary Requirement for H Programs

DHS will eliminate the H programs' itinerary requirement. *See* amended 8 CFR 214.2(h)(2)(i)(B) and (F). Current 8 CFR 214.2(h)(2)(i)(B) states that ''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 and must be filed with USCIS as provided in the form instructions.'' In addition, current 8 CFR 214.2(h)(2)(i)(F) contains additional language requiring an itinerary for H petitions filed by agents as the petitioner.

DHS recognizes this change may affect H–1B petitioners filing for beneficiaries performing services in more than one location and submitting itineraries.[184] However, due to the absence of detailed data on petitioners submitting itineraries, DHS estimates the affected population as the estimated number of petitions filed annually for workers placed at off-site locations. DHS assumes the petitions filed for workers placed at off-site locations are likely to indicate that beneficiaries may be performing services at multiple locations and, therefore, petitioners are likely to submit itineraries. Eliminating the itinerary requirement will reduce petitioner burden and promote more efficient adjudications, without compromising program integrity. This change may benefit petitioners who have beneficiaries at alternative worksites.

Table 13 shows the total number of Form I–129 H–1B Receipts with and without Form G–28, FY 2019 through FY 2023. USCIS received a low of 386,598 Form I–129 H–1B Receipts in FY 2023, and a high of 474,311 Form I–129 H–1B Receipts in FY 2022. Based on the 5-year annual average, DHS estimates that there are 421,421 Form I–129 H–1B petitioners each year.

[183] The regulations state that when an RFE is served by mail, the response is timely filed if it is received no more than 3 days after the deadline, providing a total of 87 days for a response to be submitted if USCIS provides the maximum period of 84 days under the regulations. The maximum response time for a NOID is 30 days. *See* USCIS Policy Manual, Vol. 1, ''General Policies and Procedures,'' Part E, ''Adjudications,'' Chap. 6, ''Evidence,'' *https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6*.

[184] USCIS does not currently apply the itinerary requirement to H–1Bs working at multiple locations. *See* 88 FR 72870, 72882.

Table 13. Total Form I-129 H-1B Receipts with and without Form G-28, FY 2019 through FY 2023				
Fiscal Year	**Form I-129 H-1B Receipts Received without Form G-28**	**Form I-129 H-1B Receipts Received with Form G-28**	**Total Form I-129 H-1B Receipts**	**Percentage of Form I-129 H-1B filed with Form G-28**
2019	90,845	329,777	420,622	78%
2020	90,192	337,097	427,289	79%
2021	79,195	319,090	398,285	80%
2022	90,574	383,737	474,311	81%
2023	83,670	302,928	386,598	78%
5-year Total	**434,476**	**1,672,629**	**2,107,105**	**79%**
5-year Annual Average	**86,895**	**334,526**	**421,421**	**79%**
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.				

Table 14 shows the average number of Form I–129 H–1B petitions approved in FYs 2019 through 2023 for workers placed at off-site locations. Approximately 27 percent of approved petitions were for workers placed at off-site locations. DHS uses the estimated 27 percent as the proportion of both the population of received petitions and the population of approved petitions that are for workers placed at off-site locations.

Table 14. Form I-129 H-1B Petitions for Workers Placed at Off-site Locations, FY 2019 through FY 2023			
FY	**Total Approved Petitions for Workers Placed at Off-site locations**	**Total Approved Petitions**	**Percent Placed at Off-site locations**
2019	118,779	332,084	36%
2020	136,142	357,636	38%
2021	95,414	339,768	28%
2022	66,844	382,244	17%
2023	66,538	361,142	18%
5-year Total	**483,717**	**1,772,874**	**27%**
5-year Annual Average	**96,743**	**354,575**	**27%**
Source: USCIS, Office of Policy and Strategy, PRD. May 15, 2024			

DHS conducted a sensitivity analysis to estimate the number of H–1B petitions filed annually for workers placed at off-site locations that may contain itineraries (113,784).[185] Table 15 presents the lower and upper bound number of petitions filed annually for workers placed at off-site locations who may submit itineraries, which corresponds to a range of 10 to 90 percent.

[185] DHS uses the proportion of petitions approved for off-site workers (27 percent from Table 14) as an approximate measure to estimate the number of petitions received annually for off-site workers from the total number of petitions filed. 113,784 petitions filed requesting off-site workers = 421,421 petitions filed annually × 27 percent.

Table 15. Estimated Number of Form I-129 H-1B Petitions Who May Submit Itineraries		
Estimated Number of Petitions Filed Annually for Workers Placed at Off-site Locations	Estimated Number of Petitions Submit Itineraries among Workers Placed at Off-site Locations	
	Lower Bound (10%)	Upper Bound (90%)
A	B=A×10%	C=A×90%
113,784	11,378	102,406
Source: USCIS analysis		

Using the lower and upper bounds of the estimated annual population for H–1B petitioners who may no longer be required to gather and submit itinerary information, DHS estimates the cost savings based on the opportunity cost of time of gathering and submitting itinerary information by multiplying the estimated time burden to gather itinerary information (0.08 hours) by the compensation rate of an HR specialist, in-house lawyer, or outsourced lawyer, respectively. Table 16 shows that the total annual cost savings due to the itinerary exemption will range from $130,631 to $1,175,692. Since the itinerary information normally is submitted with the Form I–129 H–1B package, there will be no additional postage cost savings. DHS estimates the total cost savings to be the average between the lower bound and the upper bound estimates. Based on this DHS estimates the average cost savings from this provision to be $653,162.

Table 16. Estimated Cost Savings to Form I-129 H-1B Petitioners due to Not Submitting an Itinerary

	Affected Population	Time Burden (Hours)	Compensation Rate	Total Annual Cost
	A	B	C	D=A×B×C
Lower Bound				
Estimated Number of Petitions Submit Itineraries (Lower Bound)				
HR specialist	2,389	0.08	$53.03	$10,135
In-house lawyer	8,989	0.08	$123.02	$88,466
Outsourced lawyer	8,989	0.08	$212.10	$152,525
Total - Lower Bound	**11,378**			**$130,631**
Upper Bound				
Estimated Number of Petitions Submit Itineraries (Upper Bound)				
HR specialist	21,505	0.08	$53.03	$91,233
In-house lawyer	80,901	0.08	$123.02	$796,193
Outsourced lawyer	80,901	0.08	$212.10	$1,372,724
Total - Upper Bound	**102,406**			**$1,175,692**
Total Cost Savings Average				**$653,162**

Source: USCIS analysis

HR specialist (2,389) = Total-lower bound (11,378) × Percent of petitions filed by HR specialist (21%)

In-house lawyer (8,989) = Total-lower bound (11,378) × Percent of petitions filed by in-house lawyer (79%)

Outsourced lawyer (8,989) = Total-lower bound (11,378) × Percent of petitions filed by outsourced lawyer (79%)

DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average.

HR specialist (21,505) = Total-upper bound (102,406) × Percent of petitions filed by HR specialist (21%)

In-house lawyer (80,901) = Total- upper bound (102,406) × Percent of petitions filed by in-house lawyer (79%)

Outsourced lawyer (80,901) = Total- upper bound (102,406) × Percent of petitions filed by outsourced lawyer (79%)

Calculations for In-house/Outsourced lawyer totals are averaged then added to the HR Specialist, for the total averages. For example (lower bound) Average ($88,466 + $152,525)/2 = $120,496 + $10,135 = $130,631 and (upper bound) Average ($796,193 + $1,372,724)/2 = $1,084,459 + $91,233 = $1,175,692. The total cost savings is the average of the lower and upper bound average totals = ($130,631 + $1,175,692)/2 = $653,162.

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DHS acknowledges the elimination of the itinerary requirement may also affect H petitions filed by agents as well as H–2 petitions filed for beneficiaries performing work in more than one location or for multiple employers, however, DHS has not estimated these cost savings here.

xiii. Validity Period Expires Before Adjudication

DHS will allow H–1B petitions to be approved or have their requested validity period dates extended if USCIS adjudicates and deems the petition approvable after the initially requested validity period end-date, or the period for which eligibility has been established, has passed. This typically will happen if USCIS deemed the petition approvable upon a favorable motion to reopen, motion to reconsider, or appeal.

If USCIS adjudicates an H–1B petition and deems it approvable after the initially requested validity period end-date, or the last day for which eligibility has been established, USCIS may issue an RFE asking whether the petitioner wants to update the dates of intended employment. This change may increase the number of RFE's; however, it may save petitioners from having to file another H–1B petition and USCIS from having to intake and adjudicate another petition.

If in response to the RFE the petitioner confirms that it wants to update the dates of intended employment and submits a different LCA that corresponds to the new requested validity dates, even if that LCA was certified after the date the H–1B petition was filed, and assuming all other eligibility criteria are met, USCIS will approve the H–1B petition for the new requested period or the period for which eligibility has been established, as appropriate, rather than require the petitioner to file a new or amended petition. Under a no-action baseline, the requirement to file an amended or new petition results in additional filing costs and burden for the petitioner. DHS expects that this change will save

petitioners the difference between the opportunity cost of time and the fee to file an additional form, and the nominal opportunity cost of time and expense associated with responding to the RFE. This change will benefit beneficiaries selected under the cap, who will retain cap-subject petitions while their petition validity dates are extended or whose petitions now may be approved rather than denied based on this technicality.

xiv. H–1B Cap Exemptions

DHS is revising the requirements to qualify for H–1B cap exemption when a beneficiary is not directly employed by a qualifying institution, organization, or entity at 8 CFR 214.2(h)(8)(iii)(F)(*4*). These final changes intend to clarify, simplify, and modernize eligibility for cap-exempt H–1B employment, so that they are less restrictive and better reflect modern employment relationships. The changes also intend to provide additional flexibility to petitioners to better implement Congress's intent to exempt from the annual H–1B cap certain H–1B beneficiaries who are employed at a qualifying institution, organization, or entity.

DHS is revising 8 CFR 214.2(h)(19)(iii)(C), which states that a nonprofit research organization is an entity that is ''primarily engaged in basic research and/or applied research,'' and a governmental research organization is a Federal, State, or local entity ''whose primary mission is the performance or promotion of basic research and/or applied research.'' DHS is replacing ''primarily engaged'' and ''primary mission'' with ''a fundamental activity'' in order to permit a nonprofit entity or governmental organization that conducts research as a fundamental activity but is not primarily engaged in research to meet the definition of a nonprofit research entity or a governmental research organization. This will likely increase the population of petitioners who are now eligible for the cap exemption and, by extension, will likely increase the number of petitions that may be cap-exempt.

Petitioners who qualify for a cap exemption for their employees under the final rule will no longer have to register for the cap lottery or pay the $215 registration fee. Some affected petitioners may avoid ACWIA fees that would have been applicable to their initial cap-subject petitions. While DHS does not have administrative data to estimate precisely how many additional petitioners will now qualify for these cap exemptions, the RIA presented estimates that the modest expansion in I–129 petitions and approved beneficiaries results from cap-subject registrants, many of whom would not have been randomly selected in the lottery, become eligible to petition directly for cap-exempt researchers.

Aside from the reduction in transfers from not having to pay the registration fee, petitioners that qualify under the cap exemptions will also benefit from not having to wait for H–1B cap season to commence employment. This may allow approved petitioners to have their H–1B workers commence employment earlier, prior to the beginning of the fiscal year on October 1.

The National Science Foundation's (NSF) Nonprofit Research Activities (NPRA) Survey of nonfarm businesses filing IRS tax form 990 as tax-exempt organizations with payroll of $500,00 or more, estimated there were 2,835 nonprofits with research and development (R&D) activity accounting for $27B in FY2021 R&D expenditures.[186] This equals $9.6M R&D expenditures per nonprofit with R&D activity in 2021.[187] The largest share of nonprofits' R&D expenditures were made possible by Federal Government funds (43%), followed by other sources of funds (30%) and internal funds (28%). While data on the specific activities of individual research nonprofits is not available to DHS or the public, NSF NPRA Tables 1, 2, and 3 show that R&D as a share of a research nonprofits' expenditures vary widely. For example, while comparable amounts were spent on research activities by nonprofits in the science and technology (S&T) sector and the healthcare sector ($21M and $22M, respectively), these expenditures comprise 53% of a typical S&T nonprofit's expenditures, but only 2% of a typical healthcare nonprofit's total expenditures.[188] Other research nonprofits outside the S&T or healthcare sectors spent less on research activities ($1M or 5% of total expenditures), but outnumbered both S&T and healthcare sectors combined (1,660 ''other nonprofit organizations'' compared to 514 S&T and 658 healthcare nonprofits with R&D activity). NPRA Tables 8 through 11 show similar results for research employees as a share of total employees (R&D employees comprise 55,527 FTE or 68% of the 81,241 employees of S&T organizations with R&D activity, compared with 2% for healthcare organizations with R&D activity and 8% of other nonprofit organizations with R&D activities. NPRA Table 11 provides additional detail on the mix of researchers, technicians and other support personnel employed to support nonprofits' research activities.

Given the highly competitive nature of the market for research funding, DHS assumes R&D funding is unlikely to be awarded to nonprofits that do not already employ the highly skilled, highly specialized staff required to successfully carry out research requirements.[189] Consequently, any impacts to nonprofits that do not already employ skilled/specialized labor would be constrained by the difficulty of competing for research funding before petitioning for qualified researchers or petitioning for qualified researchers before competing for research funding. A national immigration law-firm with significant experience provided comments agreeing a more significant difference in the number of petitions that fit the parameters of cap exempt eligibility is unlikely.

Furthermore, NSF's NPRA Table 7 shows $0.32 for every $1 of FY2021 nonprofit organizations' research expenditures flowing out in the form of grants, subcontracts or subawards to support R&D by other organizations. While neither DHS nor NSF know the degree to which research activities' employment is structured around interpretations of DHS's requirement of employment at the cap-exempt entity, NPRA Table 7 depicts a highly interconnected research enterprise in which research activities flow between other organizations with research activities.[190] A practical impact of the definition change could be additional flexibility for research organizations and

[186] *See* NSF NPRA Data Table 1 at *https://ncses.nsf.gov/surveys/nonprofit-research-activities/2021#data.* Last accessed 8/6/2024.

[187] $27.19B All R&D expenditures (NPRA Table 3) divided by 2,835 organizations with R&D activity (NPRA Table 1) = $9.6M (rounded).

[188] USCIS analysis. Dividing All R&D expenditures in NPRA Table 3 by total expenses of Science and technology nonprofit organizations in NPRA Table 2 = 53% (rounded) R&D expenditures as a share of a research nonprofits' expenses. This approach yields 2% for Healthcare and 5% for Other nonprofit organizations.

[189] NIH RePORT Research Project Grants: Competing Applications, Awards and Success Rates at *https://report.nih.gov/nihdatabook/report/20* (last accessed 8/6/2024). NIH Data Book shows a 19% success rate defined as the number of grants awarded divided by the number of applications received. Similarly, see National Science Board Report at *https://www.nsf.gov/nsb/news/news_summ.jsp?cntn_id=307818* (last access 8/6/24) reporting an FY2021 funding rate of 26%.

[190] Funds provided by ''Other nonprofit organizations'' to others for R&D ($5.5B in FY2021 from NPRA Table 7) exceeds Total R&D Expenditures by other nonprofit organizations ($2.4B in NPRA Table 6) because providing R&D funding to another organization does not count as an R&D expenditure. Consequently, DHS describes this as $2.28 in research funding to other organizations per $1 of research expenditures rather than 228% of expenditures.

foreign researchers when determining the appropriate employer. For this reason, these changes are assumed to represent a shift from currently cap-exempt organizations to newly exempt organizations rather than a true expansion in the population of cap-exempt visas. DHS agrees, however, with information submitted by a commenter representing postdocs and research organizations that the change ''diversif[ies] international postdocs' available career paths'' and therefore could result in an expansion if cap-exempt H–1B workers' research careers gradually extend more broadly throughout the research enterprise as a result of this flexibility.

In the NPRM, the RIA estimated these modest impacts would accrue to cap subject registrants seeking highly skilled, highly specialized research staff.[191] DHS's assessment that a larger response is unlikely is supported by several factors. Cap subject petitioners have always had the option to access cap-exempt researchers by creating separate research nonprofits or partnerships with cap-exempt universities and research organizations. DHS's high-end estimate, 2,845 additional cap exempt visas, is just higher than the NSF estimated number of nonprofits with R&D activity in FY2021.

Commenters provided no information nor substantive critique of the NPRM RIA's estimated impact, incorrectly alleged no rationale for the proposed changes, and contradicted the NSF NPRA data in asserting, without evidence, that ''all nonprofits do some activity they could labeled as or considered to be research [sic]'' and, therefore the change would ''bust the statutory cap wide open.'' In the absence of information, DHS includes the monetized impacts of 0.3–0.8 percent of cap-subject registrants becoming cap-exempt as shown in Table 17.

Table 17. Estimated Net Transfer Payments to USCIS due to Cap Exemption provision, FY 2025

	Fee	Population	Total fees paid to USCIS
No-Action Baseline			**$ 220,489,895**
Total FY25 Registrations	$215	479,953	$ 103,189,895
Form I-129	$780+$600	85,000	$ 117,300,000
Cap-Exempt Expansion (0.3%)			**$ 221,274,588**
Registrations	$215	478,513	$ 102,880,295
Form I-129	$780+$600	85,000	$ 117,300,000
Newly Exempt Form I-129	$460+$300	1,440	$ 1,094,293
Cap-Exempt Expansion (0.8%)			**$ 222,573,654**
Registrations	$215	476,113	$ 102,364,295
Form I-129	$780+$600	85,000	$ 117,300,000
Newly Exempt Form I-129	$460+$300	3,828	$ 2,909,359

Source: H-1B Electronic Registration Process data as of April 12, 2024 (last accessed 8/27/2024)

Relative to the No-Action baseline where most registrants will not ultimately be selected in the random lottery to petition using Form I–129 H–1B, the estimated 0.3–0.8 percent expansions in cap-exempt research non-profits result in reduced registrations as well as additional Form I–129 H–1B filings and fees from non-profits made exempt by this final rule that would not have been selected in the lottery. These newly cap-exempt Form I–129 fees are discounted from $780 to $460 and the Asylum Program fees are discounted from $600 to $300 consistent with research non-profits.[192] Table 17 shows that cap-exemptions result in $784,693 additional payments from these new cap-exempt petitioners to USCIS under the 0.3-percent scenario and $2,083,759 additional payments from these new cap-exempt petitioners to USCIS under the 0.8-percent scenario. The midpoint of this range describes the primary estimate scenario in which these new cap-exempt petitioners will, on net, pay $1,434,226 to USCIS in additional fee revenue for cap-exempt beneficiaries. Consistent with the NPRM and other USCIS rulemakings, because these payments are made in exchange for existing services provided by USCIS, these payments are described as transfers from newly cap-exempt petitioners to USCIS rather than costs or cost savings.

xv. Automatic Extension of Authorized Employment ''Cap-Gap''

DHS is extending the automatic cap-gap extension at 8 CFR 214.2(f)(5)(vi). Currently, the automatic extension is valid only until October 1 of the fiscal year for which H–1B status is being requested, but DHS extends this until April 1 of the fiscal year. *See* amended 8 CFR 214.2(f)(5)(vi). This change will result in more flexibility for both students and USCIS and will help to avoid disruption to U.S. employers that are lawfully employing F–1 students

[191] *See* 88 FR 72934.

[192] ''U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,'' 89 FR 6194 (Jan. 31, 2024).

while a qualifying H–1B cap-subject petition is pending.

Each year, a number of U.S. employers seek to employ F–1 students via the H–1B program by requesting a COS and filing an H–1B cap petition with USCIS. Many F–1 students complete a program of study or post-completion OPT in mid-spring or early summer. Per current regulations, after completing their program or post-completion OPT, F–1 students have 60 days to take the steps necessary to maintain legal status or depart the United States. *See* 8 CFR 214.2(f)(5)(iv). However, because the change to H–1B status cannot occur earlier than October 1, an F–1 student whose program or post-completion OPT expires in mid-spring has two or more months following the 60-day period before the authorized period of H–1B status begins.

Under current regulations, the automatic cap-gap extension is valid only until October 1 of the fiscal year for which H–1B status is being requested. DHS is changing the automatic extension end date from October 1 to April 1 to avoid disruptions in employment authorization that some F–1 nonimmigrants awaiting the change to H–1B status have been experiencing over the past several years. Table 18 shows the historical pending petition volumes, for F–1 nonimmigrants awaiting H–1B status. Preventing such employment disruptions will also benefit employers of F–1 nonimmigrants with cap-gap extensions. This change in the automatic extension end date will also allow USCIS greater flexibility in allocating officer resources to complete adjudications without the pressure of completing as many change of status (COS) requests as possible before October 1.

Table 18. Historical Form I-129 Petitions Seeking Initial H-1B Status for Beneficiaries Who Are in F-1 Status and Seeking a Change of Status (COS) to H-1B Pending after October 1 Volume, FY 2019 through FY 2023

Fiscal Year	Pending Petitions on October 1
2019	43,975
2020	26,967
2021	23,339
2022	23,282
2023	17,243
5-year Total	**134,806**
5-year Annual Average	**26,961**

Source: USCIS, OP&S PRD, C3 May 20, 2024.

DHS does not have precise data on the number of cap-gap F–1 nonimmigrants who have faced EAD disruptions. Using available administrative data, DHS estimated in the NPRM that between 1 and 5 percent of F–1 nonimmigrants seeking a change of status to H–1B may have faced EAD disruptions.

Current regulations allow OPT F–1 students 60 days to take the steps necessary to maintain legal status or depart the United States. *See* 8 CFR 214.2(f)(5)(iv). However, because the change to H–1B status cannot occur earlier than October 1, an F–1 student whose program or post-completion OPT expires in mid-spring has two or more months following the 60-day period before the authorized period of H–1B status begins. While many F–1 students complete a program of study or post-completion OPT in mid-spring or early summer, some complete their programs at different times of the year, with 60-day grace periods. Additionally, some F–1 nonimmigrants with pending H–1B petitions may not have intended to work during the full period covered by this provision. The labor impacts of this provision of the rule would be constrained in these and other instances not readily available in USCIS's administrative data.

DHS estimates that this change will benefit up to 5 percent (1,348) of the population (26,961) on an annual basis and on the low end 270 (1 percent); however, F–1 students who are beneficiaries of H–1B cap petitions that provide cap-gap relief will be able to avoid employment disruptions while waiting to obtain H–1B status. DHS estimates that an F–1 student who is the beneficiary of an H–1B cap petition makes $46.14 [193] per hour in compensation. This compensation includes wages and salaries, benefits such as paid leave and insurance, and legally required benefits such as Social Security and Medicare.[194]

Based on a 40-hour work week,[195] DHS estimates the potential compensation for each F–1 student who is the beneficiary of an H–1B cap petition to be $47,996 [196] for 6 months of employment from October 1st to April 1st. DHS estimates that this potential compensation may be a benefit to F–1 students who are seeking a COS to a H–1B status. This benefit ranges from $12,958,920 [197] to $64,698,608 [198] annually, with a midpoint of $38,828,764. This midpoint is the primary estimate of transfer payments from other workers to F–1 students who remain employed up to six months longer than under current regulations, in the form of increased compensation during the additional duration of employment. Employers will benefit, as they will be gaining productivity and potential profits that the F–1 students'

[193] $46.14 Total Employee Compensation per hour. *See* BLS, Economic News Release, ''Employer Costs for Employee Compensation—March 2024,'' Table 1. ''Employer Costs for Employee Compensation by ownership [Mar. 2024],'' *https://www.bls.gov/news.release/archives/ecec_06182024.htm* (last visited Aug. 20, 2024).

[194] For a breakout of the components of total compensation, see BLS, Economic News Release, ''Employer Costs for Employee Compensation—March 2024,'' Table 1. ''Employer Costs for Employee Compensation by ownership [Mar. 2024],'' *https://www.bls.gov/news.release/archives/ecec_06182024.htm* (last visited Aug. 20, 2024).

[195] *See, e.g.,* 8 CFR 214.2(f)(5)(vi)(A) (describing cap-gap employment) and (f)(11)(ii)(B) (describing OPT and noting that it may be full-time).

[196] Calculation: $46.14 * 40 hours = $1,846 per week * 26 weeks = $47,996 per 6 months.

[197] Calculation: $47,996 per 6 months * 270 (1 percent of 26,961) F–1 students = $12,958,920.

[198] Calculation: $47,996 per 6 months * 1,348 (5 percent of 26,961) F–1 students = $64,698,608.

continuing employment will provide. Companies may also benefit by not incurring opportunity costs associated with the next best alternative to the immediate labor the F–1 student will provide. DHS does not know what this next best alternative may be for impacted companies. For instance, in the absence of F–1 workers providing this labor, employers may redistribute the work to their other workers either as a part of their regular job duties or require them to work overtime, or companies may need to reprioritize the work, or put off certain work until a later time.

There may be additional transfers due to tax impacts associated with this compensation, but these transfers are difficult to quantify. Foreign students in F–1 status more than five calendar years are typically liable for Social Security and Medicare taxes [199] in addition to Federal and State income taxes.

xvi. Provisions To Ensure Bona Fide Job Offer for a Specialty Occupation Position

a. Contracts

DHS will codify USCIS' authority to request contracts, work orders, or similar evidence. *See* amended 8 CFR 214.2(h)(4)(iv)(C). Such evidence may take the form of contracts or legal agreements, if available, or other evidence including technical documentation, milestone tables, or statements of work. Evidence submitted should show the contractual relationship between all parties, the bona fide nature of the beneficiary's position, and the minimum educational requirements to perform the duties.

While USCIS already has the authority to request contracts and other similar evidence, DHS is amending the regulations for added clarity. By codifying this authority, USCIS is putting stakeholders on notice of the kinds of evidence that could be requested to establish the nature of the beneficiary's work and the minimum educational requirements to perform the duties. This evidence, in turn, could establish that the petitioner has a bona fide job offer for a specialty occupation position for the beneficiary. Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline petitioners may have taken time to provide contracts or legal agreements, if available, or other evidence including technical documentation, milestone tables, or statements of work. DHS cannot estimate how much time it will have taken for petitioners to provide that information.

b. Bona Fide Employment

DHS will codify its requirement that the petitioner must establish, at the time of filing, that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. *See* 8 CFR 214.2(h)(4)(iv)(D). This change is consistent with current USCIS policy guidance that an H–1B petitioner must establish that the purported employment exists at the time of filing the petition and that it will employ the beneficiary in a specialty occupation.[200] Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline petitioners may require time to provide documentation to establish that their position was a bona fide position in a specialty occupation. DHS cannot estimate how much time it takes for petitioners to provide that information.

c. LCA Corresponds With the Petition

DHS will update the regulations to expressly include DHS's existing authority to ensure that the LCA supports and properly corresponds with the accompanying H–1B petition. Relative to the no-action baseline, this change has no costs and may yield transparency benefits due to consistency between regulation and current policy. Relative to the without-policy baseline petitioners may have taken time to provide their LCA to DHS, however DHS cannot estimate how much time it will have taken for petitioners to provide that information.

d. Revising the Definition of U.S. Employer

DHS is revising the definition of ''United States employer.'' First, DHS will eliminate the employer-employee relationship requirement. In place of the employer-employee relationship requirement, DHS will codify the requirement that the petitioner has a bona fide job offer for the beneficiary to work, which may include telework, remote work, or other off-site work within the United States. DHS also will replace the requirement that the petitioner ''[e]ngages a person to work within the United States'' with the requirement that the petitioner have a legal presence and is amenable to service of process in the United States. Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline, petitioners may require time to provide documentation establishing a bona fide job offer for the beneficiary to work. DHS cannot estimate how much time petitioners take to provide that information.

e. Employer-Employee Relationship

DHS will remove from the definition of U.S. employer the reference to an employer-employee relationship requirement, which, in the past, was interpreted using common law principles and was a significant barrier to the H–1B program for certain petitioners, including beneficiary-owned petitioners. This proposed change is consistent with current USCIS policy guidance and will promote clarity and transparency in the regulations. This change will benefit petitioners because it may decrease confusion and increase clarity for stakeholders. Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline petitioners may have taken time to understand the change.

xvii. Beneficiary-Owners

DHS codifies a petitioner's ability to qualify as a U.S. employer even when the beneficiary possesses a controlling interest in that petitioner. To promote access to H–1Bs for entrepreneurs, start-up entities, and other beneficiary-owned businesses, DHS will add provisions to specifically address situations where a potential H–1B beneficiary owns a controlling interest in the petitioning entity. If more entrepreneurs are able to obtain H–1B status to develop their business enterprise, the United States could benefit from the creation of jobs, new industries, and new opportunities.[201] This change will

[199] *See https://www.irs.gov/individuals/international-taxpayers/foreign-student-liability-for-social-security-and-medicare-taxes* (last visited Sep. 26, 2024).

[200] *See* USCIS, ''Rescission of Policy Memoranda,'' PM–602–0114 (June 17, 2020) (citing *Matter of Chawathe,* 25 I&N Dec. 369 (AAO 2010)).

[201] *See, e.g.,* National Bureau of Economic Research, ''Winning the H–1B Visa Lottery Boosts the Fortunes of Startups'' (Jan. 2020), *https://www.nber.org/digest/jan20/winning-h-1b-visa-lottery-boosts-fortunes-startups* (''The opportunity to hire specialized foreign workers gives startups a leg up over their competitors who do not obtain visas for desired employees. High-skilled foreign labor boosts a firm's chance of obtaining venture capital funding, of successfully going public or being acquired, and of making innovative breakthroughs.''). Pierre Azoulay, et al., ''Immigration and Entrepreneurship in the United States'' (National Bureau of Economic Research, Working Paper 27778 (Sept. 2020) *https://*

benefit H–1B petitions filed by start-up entities and other beneficiary-owned businesses, or filed on behalf of entrepreneurs who have a controlling interest in the petitioning entity. DHS is unable to estimate how many petitioners will benefit from this change.

DHS is also providing new guardrails for beneficiary-owned entities, including limiting the validity period for beneficiary-owned entities' initial petition and first extension (including an amended petition with a request for an extension of stay) of such a petition to 18 months. *See* amended 8 CFR 214.2(h)(9)(iii)(E). Any subsequent extension will not be limited and may be approved for up to 3 years, assuming the petition satisfies all other H–1B requirements. DHS is limiting the first two validity periods to 18 months as a safeguard against possible fraudulent petitions. While DHS sees a significant advantage in promoting the H–1B program to entrepreneurs and allowing these beneficiaries to perform a significant amount of non-specialty occupation duties, unscrupulous petitioners might abuse such provisions without sufficient guardrails. DHS believes that there may be a cost to petitioners associated with this change however cannot estimate how many petitioners may be affected by limiting the validity period. DHS is also finalizing the provision that a beneficiary-owner may perform duties that are directly related to owning and directing the petitioner's business as long as the beneficiary will perform specialty occupation duties a majority of the time, consistent with the terms of the H–1B petition. DHS believes that there may be a cost to petitioners associated with this change however cannot estimate how many petitioners may be affected.

xviii. Site Visits

USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a petitioner and beneficiary are eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. These inspections, verifications, and other compliance reviews may be conducted telephonically or electronically, as well as through physical on-site inspections (site visits). DHS is adding regulations specific to the H–1B program to codify its existing authority and clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections. Using its general authority, USCIS may conduct audits, on-site inspections, reviews, or investigations to ensure that a petitioner and beneficiary are entitled to the benefits sought and that all laws have been complied with before and after approval of such benefits.[202] The authority to conduct on-site inspection is critical to the integrity of the H–1B program to detect and deter fraud and noncompliance.

In July 2009, USCIS started the Administrative Site Visit and Verification Program [203] as an additional method to verify information in certain visa petitions under scrutiny. Under this program, FDNS officers are 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 or beneficiary, and conducting site visits. Once the FDNS officers complete the site visit, they write a Compliance Review Report for any indicators of fraud or noncompliance to assist USCIS in final adjudicative decisions.

The site visits conducted under USCIS's existent, general authority, and thus part of the baseline against which this rule's impact should be measured, have uncovered a significant amount of noncompliance in the H–1B program.[204] Further, when disaggregated by worksite location, the noncompliance rate was found to be higher for workers placed at an off-site or third-party location compared to workers placed at a petitioner's on-site location.[205] As a result, USCIS began conducting more targeted site visits related to the H–1B program, focusing on the cases of H–1B dependent employers (*i.e.,* 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 believes that site visits are important to maintain the integrity of the H–1B program to detect and deter fraud and noncompliance in the H–1B program, which in turn ensures the appropriate use of the H–1B program and the protection of the interests of U.S. workers. These site visits will continue in the absence of this rule and DHS notes that current Form I–129 instructions notify petitioners of USCIS' legal authority to verify information before or after a case decision, including by means of unannounced physical site inspection. Hence, 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 existing inspections. DHS does not foresee the rule leading to more on-site inspections.

This rule will provide a clear disincentive for petitioners that do not cooperate with compliance reviews and inspections while giving USCIS greater authority to access and confirm information about employers and workers as well as identify fraud.

The regulations will 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 petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H–1B program. *See* amended 8 CFR 214.2(h)(4)(i)(B)(*2*). The regulation will also clarify that an

www.nber.org/system/files/working_papers/w27778/w27778.pdf (''immigrants act more as 'job creators' than 'job takers' and . . . non-U.S. born founders play outsized roles in U.S. high-growth entrepreneurship'').

[202] *See* INA section 103 and 8 CFR 2.1. As stated in subsection V.A.5.ii(d) of this analysis, regulation would 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.

[203] *See* USCIS, ''Administrative Site Visit and Verification Program,'' *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, 2019). *See* USCIS, ''Administrative Site Visit and Verification Program,'' *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, 2019). *See* USCIS, ''Administrative Site Visit and Verification Program,'' *https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program 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, 2019).

[204] USCIS, Office of Policy and Strategy, PRD, Summary of H–1B Site Visits Data.

[205] *Id.*

inspection may take place at the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable. The provisions will make clear that an H–1B petitioner or any employer must allow access to all sites where the labor will be performed for the purpose of determining compliance with applicable H–1B requirements. The regulation will state the consequences if USCIS is unable to verify facts related to an H–1B petition, including due to the failure or refusal of the petitioner or a third-party worksite to cooperate with a site visit. These failures or refusals may be grounds for denial or revocation of any H–1B petition related to locations that are a subject of inspection, including any third-party worksites. *See* amended 8 CFR 214.2(h)(4)(i)(B)(*2*).

In order to estimate the population impacted by site visits, DHS uses site inspection data used to verify facts pertaining to the H–1B petition adjudication process. The site inspections were conducted at H–1B petitioners' on-site locations and third-party worksites during FY 2019 through FY 2023. For instance, from FY 2019 through FY 2023, USCIS conducted a total of 32,366 H–1B compliance reviews and found 6,206 of them, equal to 19 percent, to be noncompliant or indicative of fraud.[206] These compliance reviews (from FY 2019 through FY 2023) consisted of reviews conducted under both the Administrative Site Visit and Verification Program and the Targeted Site Visit and Verification Program, which began in 2017. The targeted site visit program allows USCIS to focus resources where fraud and abuse of the H–1B program may be more likely to occur.[207]

Table 19 shows the number of H–1B worksite inspections conducted each year and the number of visits that resulted in compliance and noncompliance. USCIS found a low of 1,061 fraudulent/noncompliant cases in FY 2022, and a high of 1,473 fraudulent/noncompliant cases in FY 2021. DHS estimates that, on average, USCIS conducted 6,473 H–1B worksite inspections annually from FY 2019 through FY 2023 and of those DHS finds a noncompliance rate of 19 percent. Assuming USCIS continues worksite inspections at the 5-year annual average rate, the population impacted by this provision will be 1,241 or 19 percent of H–1B petitioners visited who are found noncompliant or indicative of fraud. The outcomes of site visits under the rule are indeterminate as currently noncooperative petitioners might be found to be fully compliant, might continue to not cooperate with site visits despite penalties, or might be forced to reveal fraudulent practices to USCIS. The expected increase in cooperation from current levels will be the most important impact of the provision, which DHS discusses below. DHS notes that the increased cooperation might come disproportionately from site visits of third-party worksites that did not sign Form I–129 attesting to permit unannounced physical site inspections of residences and places of employment by USCIS.

Table 19. H-1B Compliance and Fraud/Noncompliance Percentages Closed by FDNS Overall, FY 2019 through FY 2023

Fiscal Year	Compliant	Fraud/Noncompliant	Total	Percent of Fraud/Noncompliance
2019	7,897	1,435	9,332	15%
2020	4,065	1,083	5,148	21%
2021	5,429	1,473	6,902	21%
2022	4,663	1,061	5,724	19%
2023	4,106	1,154	5,260	22%
5-year Total	**26,160**	**6,206**	**32,366**	**19%**
5-year Annual Average	**5,232**	**1,241**	**6,473**	**19%**
Source: USCIS, Fraud Detection and National Security (FDNS) June 2, 2024				

[206] DHS, USCIS, PRD (2023). PRD399. USCIS conducted these site visits through its Administrative and Targeted Site Visit Programs.

[207] *See* USCIS, ''Putting American Workers First: USCIS Announces Further Measures to Detect H–1B Visa Fraud and Abuse'' (April 3, 2017), *https://www.uscis.gov/archive/putting-american-workers-first-uscis-announces-further-measures-to-detect-h-1b-visa-fraud-and-abuse.*

Table 20 shows the average duration of time to complete each inspection was 1.09 hours. Therefore, DHS assumes that USCIS will continue to conduct the same number of annual worksite inspections (6,929), on average, and that the average duration of time for a USCIS immigration officer to conduct each worksite inspection will be an average of 1.09 hours. The data in Tables 19 and 20 differ slightly based on the different search criteria, pull dates and systems accessed. DHS also assumes that the average duration of time of 1.09 hours to conduct an inspection covers the entire inspection process, 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.

Table 20. Total Number of Worksite Inspections Conducted for H-1B Petitioners and Average Inspection Time, FY 2019 to FY 2023.

Fiscal Year	Number of Worksite Inspections	Average Duration for Worksite Inspection (Hours)
2019	10,463	1.23
2020	5,843	1.12
2021	6,805	0.86
2022	5,659	1.05
2023	5,874	1.17
5-year Total	**34,644**	**5.43**
5-year Average	**6,929**	**1.09**

Source: USCIS, Fraud Detection and National Security (FDNS). June 2, 2024

DHS assumes that a supervisor or manager, in addition to the beneficiary, will be present on behalf of a petitioner while a USCIS immigration officer conducts the worksite inspection. The officer will interview the beneficiary to verify the date employment started, work location, hours, salary, and duties performed to corroborate with the information provided in an approved petition. The supervisor or manager will 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 will also be able to provide the proper records available 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.[208] However, if any other worker or on-site manager is interviewed, the same compensation rates will apply.

DHS uses hourly compensation rates to estimate the opportunity cost of time a beneficiary and supervisor or manager will incur during worksite inspections. Based on data obtained from a USCIS report in 2024, DHS estimates that an H–1B worker earned an average of $130,000 per year in FY 2023.[209] DHS therefore estimates the salary of an H–1B worker is approximately $130,000 annually, or $62.50 hourly wage.[210] The annual salary does not include noncash 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 $90.63 for an H–1B nonimmigrant worker.[211] In order to estimate the opportunity cost of time they will incur during a worksite inspection, DHS uses an average hourly compensation rate of $96.03 per hour for a supervisor or manager, where the average hourly wage is $66.23 per hour worked and average benefits are $29.80.[212] While the average duration of time to conduct an inspection is estimated at 1.09 hours in this analysis, DHS is not able to estimate the average duration of time for a USCIS immigration officer to conduct an interview with a beneficiary or supervisor or manager. In the absence of this information, DHS assumes that it will on average take 0.545 hours to interview a beneficiary and 0.545 hours to interview a supervisor or manager.[213]

[208] DHS does not estimate any other USCIS costs associated with the worksite inspections (*i.e.,* travel and deskwork relating to other research, review and document write up) 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.

[209] 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 2023. 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. USCIS, ''Characteristics of H–1B Specialty Occupation Workers, Fiscal Year 2023 Annual Report to Congress, October 1, 2022–September 30, 2023,'' at 50, Table 9a (Mar. 6, 2024). See *https://www.uscis.gov/sites/default/files/document/reports/OLA_Signed_H-1B_Characteristics_Congressional_Report_FY2023.pdf* (last visited Aug. 21, 2024).

[210] The hourly wage is estimated by dividing the annual salary by the total number of hours worked in a year (2,080, which is 40 hours of full-time workweek for 52 weeks). $62.50 hourly wage = $130,000 annual pay ÷ 2,080 annual work hours. According to DOL that certifies the LCA 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 assuming full-time work is 40 hours per week. DOL, Wage and hour Division: ''Fact Sheet # 68—What Constitutes a Full-Time Employee Under H–1B Visa Program?'' (July 2009), *https://www.dol.gov/whd/regs/compliance/whdfs68.htm* (last visited July 30, 2019).

[211] Hourly compensation of $90.63 = $62.50 average hourly wage rate for H–1B worker × 1.45 benefits-to-wage multiplier. *See* section V.A.5. for estimation of the benefits-to-wage multiplier.

[212] Hourly compensation of $96.03 = $66.23 average hourly wage rate for Management Occupations (national) × 1.45 benefits-to-wage multiplier. *See* BLS, ''Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2023, 11–0000 Management Occupations (Major Group),'' *https://www.bls.gov/oes/2023/may/oes110000.htm* (last visited Aug. 20, 2024).

[213] DHS assumes that beneficiary takes 50 percent of average inspection duration and supervisor, or manager takes 50 percent. Average duration of interview hours for beneficiaries (0.545) = Average inspection duration (1.09) × 50% = 0.545. Average duration of interview hours for Supervisors or

Continued

In Table 21, 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 (6,929) by the average duration the interview will take for a beneficiary or supervisor or manager and their respective compensation rates. DHS obtains the total annual cost of the H–1B worksite inspections to be $704,886 for this rule.

Table 22. Form I-129 Petitioners' Annual Cost of Worksite Inspection for H-1B Petitions

Cost Item	Number of Worksite Inspections (Annual Average)	Average Duration of Interview (Hours)	Compensation Rate	Total Cost
	A	B	C	D=A×B×C
Beneficiaries' opportunity cost of time during worksite inspections	6,929	0.545	$90.63	$342,247
Supervisors or managers' opportunity cost of time during worksite inspections	6,929	0.545	$96.03	$362,639
Total	**-**	**1.09**	**-**	**$704,886**
Source: USCIS analysis				

This change may affect employers who do not cooperate with site visits who will face denial or revocation of their petition(s), which could result in costs to those businesses. Petitioners may face financial losses because they may lose access to labor for extended periods, which could result in too few workers, loss of revenue, and some could go out of business. DHS expects program participants to comply with program requirements, however, and notes that those that do not could experience significant impacts due to this rule.

xix. Third-Party Placement (Codifying Policy Based on Defensor v. Meissner (5th Cir. 2000))

Amended 8 CFR 214.2(h)(4)(i)(B)(*3*) clarifies that, in certain circumstances USCIS will look at the third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation.

As required by both INA section 214(i)(1) and 8 CFR 214.2(h)(4)(i)(A)(*1*), an H–1B petition for a specialty occupation worker must demonstrate that the worker will perform services in a specialty occupation, which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty (or its equivalent) as a minimum requirement for entry into the occupation in the United States. This provision will ensure that petitioners are not circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party. Specifically, under amended 8 CFR 214.2(h)(4)(i)(B)(*3*), if the beneficiary will be staffed to a third party, meaning they will be contracted to fill a position in a third party's organization and becomes part of that third party's organizational hierarchy by filling a position in that hierarchy (and not merely providing services to the third party), the actual work to be performed by the beneficiary must be in a specialty occupation. Therefore, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline some petitioners for third parties may have taken time to demonstrate that the worker will perform services in a specialty occupation for that third party. Because this has been in place for a long time, DHS cannot estimate how much time it will have taken for petitioners to provide that information.

4. Alternatives Considered

In the NPRM, DHS sought public comment on how to ensure that the limited number of H–1B cap-subject visas, and new H–1B status grants available each fiscal year are used for non-speculative job opportunities. DHS has reviewed public comments, including suggested alternatives, on the various provisions in the NPRM and responded above.

5. Total Quantified Net Costs of the Final Regulatory Changes

In this section, DHS presents the total annual cost savings of this final rule annualized over a 10-year period of analysis. Table 22 details the annual cost savings of this rule. DHS estimates the total cost savings is $1,038,721.

managers (0.545) = Average inspection duration (1.09) × 50% = 0.545.

Table 22. Summary of Cost Savings	
Description	**Cost Savings**
Amended Petitions	$385,559
Eliminating the Itinerary Requirement for H Programs	$653,162
Total Cost Savings	**$1,038,721**
Source: USCIS Analysis	

DHS summarizes the annual costs of this rule. Table 23 details the annual costs of this rule. DHS estimates the total cost is $704,886.

Table 23. Summary of Costs	
Description	**Costs**
Cost of Worksite Inspection for H-1B Workers	$704,886
Total Costs	**$704,886**
Source: USCIS Analysis	

Net costs savings to the public of $333,835 are the total costs minus cost savings.[214] Table 24 illustrates that over a 10-year period of analysis from FY 2024 through FY 2033 annualized cost savings will be $333,835 using a 2-percent discount rates.

Table 24. Discounted Net Cost Savings Over a 10-Year Period of Analysis	
Fiscal Year	**Total Estimated Cost Savings**
	$333,835 (Undiscounted)
	Discounted at 2 percent
2024	$327,289
2025	$320,872
2026	$314,580
2027	$308,412
2028	$302,365
2029	$296,436
2030	$290,623
2031	$284,925
2032	$279,338
2033	$273,861
10-year Total	**$2,998,701**
Annualized Cost Savings	**$333,835**

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 and 602, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.[215]

An ''individual'' is not considered a small entity and costs to an individual are not considered a small entity impact for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities.[216] Consequently, indirect impacts from a

[214] Calculations: $1,038,721 Total Costs Savings – $704,886 Total Costs = $333,835 Net Cost Savings.

[215] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

[216] *See* Small Business Administration, ''A Guide For Government Agencies, How to Comply with the Regulatory Flexibility Act,'' at 22, *https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf* (last visited Aug. 23, 2024).

rule on a small entity are not considered as costs for RFA purposes. USCIS acknowledges that the rule could have indirect impacts on small entities including, but not limited to, costs associated with the time required to comply with the site visits provision. These indirect impacts are not included within the RFA because of uncertainty related to how many small entities would be affected and the degree to which affected entities would be impacted. The Regulatory Impact Analysis included above contains in-depth analysis of those possible impacts and how they may impact small entities.

USCIS's RFA analysis for this final rule focuses on the population of Form I–129 petitions for H–1B workers.

C. Final Regulatory Flexibility Act (FRFA)

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

The purpose of this rulemaking is to modernize and improve the regulations relating to the H–1B program by: (1) streamlining the requirements of the H–1B program and improving program efficiency; (2) providing greater benefits and flexibility for petitioners and beneficiaries; and (3) improving integrity measures.

7. A Statement of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Statement of the Assessment of the Agency of Such Issues, and a Statement of any Changes Made in the Proposed Rule as a Result of Such Comments

DHS invited comments in the NPRM but did not receive any comments specific to the IRFA. USCIS responded to general comments concerning the rule in section III (Public Comments on the Proposed Rule).

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

DHS invited comments in the NPRM but did not receive any comments filed by the Chief Counsel for Advocacy of the Small Business Administration.

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

For this analysis, due to the impracticality of full population analysis, DHS conducted a sample analysis of historical Form I–129 H–1B petitions to estimate the number of small entities impacted by this rule. DHS utilized a subscription-based electronic 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. To determine whether an entity is small for purposes of RFA, DHS first classified the entity by its NAICS code and then used Small Business Administration (SBA) guidelines to classify the revenue or employee count threshold for each entity. Some entities were classified as small based on their annual revenue, and some by their numbers of employees.

Using FY 2022 internal data on actual filings of Form I–129 H–1B petitions, DHS identified 44,593 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 confidence interval estimation for the impacted population of entities using the standard statistical formula at a 5-percent margin of error. DHS then 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 notes that the random sample was drawn from the population of Form I–129 H–1B petitioners for purposes of estimating impacts of each provision in the NPRM, including those finalized here, on the population of Form I–129 H–1B petitioners at-large.

DHS randomly selected a sample of 3,396 entities from the population of 44,593 entities that filed Form I–129 for H–1B petitions in FY 2022. Of the 3,396 entities, 1,724 entities returned a successful match of a filing entity in the ReferenceUSA, Manta, Cortera, and Guidestar databases; 1,672 entities did not return a match. Using these databases' revenue or employee count and their assigned NAICS code, DHS determined 1,209 of the 1,724 matches to be small entities, 515 to be non-small entities. DHS assumes filing entities without database matches or missing revenue/employee count data are likely to be small entities. As a result, in order to prevent underestimating the number of small entities this final rule will affect, DHS considers all the non-matched and missing entities as small entities for the purpose of this analysis. Therefore, DHS classifies 2,881 of 3,396 entities as small entities, including combined non-matches (1,672), and small entity matches (1,209). Thus, DHS estimates that 84.8 percent (2,881 of 3,396) 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 H–1B petitioners. Thus, DHS estimates the number of small entities to be 84.8 percent of the population of 44,593 entities that filed Form I–129 under the H–1B classification, as summarized in Table 25 below. The annual numeric estimate of the small entities impacted by this final rule is 37,815 entities.[217]

Table 25. Number of Small Entities for Form I-129 for H-1B, FY 2022

Population	Number of Small Entities	Proportion of Population (Percent)
44,593	37,815	84.8%

[217] The annual numeric estimate of the small entities (37,815) = Population (44,593) * Percentage of small entities (84.8%).

Following the distributional assumptions above, DHS uses the set of 1,209 small entities with matched revenue data to estimate the economic impact of the final rule on each small entity. Typically, DHS will estimate the economic impact, in percentage, for each small entity is the sum of the impacts of the final changes divided by the entity's sales revenue.[218] DHS constructed the distribution of economic impact of the final rule based on the 1,209 small entity matches in the sample. Because this final rule resulted in an overall cost savings for petitioners there also would be no adverse impact on the estimated small entity population. Based on FY 2022 revenue, of the 1,209 small entities, 0 percent (0 small entities) would experience a cost increase that is greater than 1 percent of revenues.

10. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

This rule codifies USCIS' existing authority to conduct site visits and clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections, and supervisors of H–1B beneficiaries will bear an opportunity cost of time as described above.

11. A Description of the Steps the Agency has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and why Each of the Other Significant Alternatives to the Rule Considered by the Agency was Rejected

While the site visit provision imposes some burden to prospective employers, USCIS found no other alternatives that achieved stated objectives with less burden to small entities.

[218] The economic impact, in percentage, for each small entity i = ((Cost of one petition for entity i × Number of petitions for entity i)/Entity i's sales revenue) × 100. The cost of one petition for entity i (−$0.79) is estimated by dividing the total cost of this rule by the estimated population. −$333,835/421,421 = −$0.79. The entity's sales revenue is taken from ReferenceUSA, Manta, Cortera, and Guidestar databases.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

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 rule, or final rule for which the agency published a proposed rule, that includes any Federal mandate 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.[219]

The inflation adjusted value of $100 million in 1995 is approximately $200 million in 2023 based on the Consumer Price Index for All Urban Consumers (CPI–U).[220] This final rule does not contain a Federal mandate as the term is defined under UMRA.[221] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

E. Congressional Review Act

OIRA has determined that this final rule is not a major rule, as defined in 5 U.S.C. 804, for purposes of congressional review of agency rulemaking pursuant to the Congressional Review Act, Pub. L. 104–121, title II, sec. 251 (Mar. 29, 1996), 110 Stat. 868 (codified at 5 U.S.C. 801–808). This rule will not result in an annual effect on the economy of $100 million or more.

DHS will send this 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, it is 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 was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This final rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this final rule meets the applicable standards provided in section 3 of E.O. 12988.

H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have ''tribal implications'' because it will 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 (NEPA)

As discussed in the National Environmental Policy Act (NEPA) [222] section of the NPRM,[223] and partially addressed in the H–1B Registration Improvement final rule,[224] DHS proposed a broader set of reforms in the H–1B program, as well as discrete reforms impacting other nonimmigrant programs. DHS received one public comment on the NEPA discussion in the NPRM. DHS is addressing that comment here to the extent it pertains to the provisions of this final rule. DHS previously addressed this public comment in the rule that finalized the registration process aspects of the NPRM.[225]

Comment: One commenter asserted that DHS's reliance on categorical

[219] *See* 2 U.S.C. 1532(a).

[220] *See* BLS, ''Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month,'' *https:/www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202312.pdf* (last visited Jan. 17, 2024). Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2023); (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 2023–Average monthly CPI–U for 1995) ÷ (Average monthly CPI–U for 1995)]×100 = [(304.702–152.383) ÷152.383] = (152.319/152.383) = 0.99958001×100 = 99.96 percent = 100 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars×2.00 = $200 million in 2023 dollars.

[221] The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1), 658(6).

[222] *See* Public Law 91–190, 42 U.S.C. 4321–4347.

[223] 88 FR 72870, 72955 (Oct. 23, 2023).

[224] ''Improving the H–1B Registration Selection Process and Program Integrity,'' 89 FR 7456, 7489 (Feb. 2, 2024) (final rule).

[225] 89 FR 7456, 7489 (Feb. 2, 2024).

exclusion (''CATEX'') A3 is arbitrary and capricious and indicated that DHS must prepare an environmental impact statement or at least an environmental assessment before finalizing the NPRM.[226] The commenter asserted that the action proposed in the NPRM is an action that, by its nature, increases the population because its goal is to increase the number of foreign nationals who enter the country. The commenter argued that the action proposed in the NPRM has the potential to have a cumulative effect when combined with other actions that increase levels of immigration, and that it should be considered rather than categorically excluded. The commenter further stated that DHS's use of categorical exclusion A3 is ''entirely irrational'' because DHS could not assess the environmental impact of the rule and thus concluded that the rule is of the type that would not have any. The commenter further stated that the NPRM does not fit into any of the categories under CATEX A3, and that DHS was not considering rules that increase immigration to the United States when it formulated this rule.

Response: DHS disagrees with both the factual and the legal assertions made by this commenter. The commenter cited no data, analysis, evidence, or statements made by DHS in the NPRM to support the commenter's assertion. Specifically with respect to the provisions being finalized through this final rule, the intended and expected impact of those provisions is not anticipated to significantly increase the number of foreign nationals in the United States. Rather, as discussed throughout this preamble, DHS is amending existing regulations to primarily modernize the H–1B program but is also including certain provisions that impact other nonimmigrant programs—H–2, H–3, F–1, L–1, O, P, Q–1, R–1, E–3, and TN. In addition, the final rule will provide certain benefits and flexibilities, as well as improve program integrity. These amendments to existing regulations clearly fit within CATEX A3 because they are administrative in nature, do not have the potential to significantly affect the environment. are not a part of any larger Federal actions, and DHS is unaware of the existence of any extraordinary circumstances that create the potential for environmental effects. These amendments are administrative in nature, reflect current USCIS policy, and will not result in a change to the environmental impact of the regulation. The same is true with clarifications regarding the filing of amended petitions, deference policy, and rules regarding evidence of maintenance of status.

NEPA Final Rule Analysis

DHS and its components analyzed the proposed actions to determine whether NEPA applies to them and, if so, what level of analysis is required. DHS Directive 023–01, Rev. 01 (Directive) and Instruction Manual 023–01–001–01, Rev. 01 (Instruction Manual) [227] establish the procedures DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA. *See* 40 CFR parts 1500 through 1508. The CEQ regulations allow Federal agencies to establish in their NEPA implementing procedures categories of actions (''categorical exclusions'') that experience has shown normally do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require preparation of an Environmental Assessment or Environmental Impact Statement. *See* 40 CFR 1501.4(a). Instruction Manual, Appendix A, Table 1 lists the DHS categorical exclusions.

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.[228]

As discussed throughout this preamble, this final rule amends existing regulations governing the H–1B program primarily to modernize and streamline those regulations, provide certain benefits and flexibilities to the regulated public, and improve program integrity. It therefore fits within CATEX A3 because the amendments are administrative and procedural in nature, are not a part of a larger Federal action and do not have the potential to significantly affect the environment. Finally, DHS is unaware of the existence of any extraordinary circumstances that would result in any environmental effects.

J. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, all agencies must submit to the OMB, for review and approval, any reporting requirements inherent in a rule, unless they are exempt.

In compliance with the PRA, DHS published an NPRM on October 23, 2023 (88 FR 72870), in which comments on the revisions to the information collections associated with this rulemaking were requested. Any comments received on information collections activities were related to the beneficiary-centric changes and documentation required for establishing unique beneficiary identification. DHS responded to those comments in section III. of this final rule. The information collection instruments that will be revised with this final rule are described below.

Overview of Information Collections:

H–1B Registration Tool (OMB Control No. 1615–0144)

(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 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 uses the data collected on this form to determine which employers will be informed that they may submit a USCIS Form I–129, Petition for Nonimmigrant Worker, for H–1B classification.

(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 (Businesses) is 20,950 and the estimated hour burden per response is 0.6 hours. The estimated total number of respondents for the information collection H–1B Registration Tool (Attorneys) is 19,339 and the estimated hour burden per response is 0.6 hours.

[226] The commenter stated: ''Categorical exclusion A3, in full, is as follows: A3 Promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, advisory circulars, and other guidance documents of the following nature: (a) Those of a strictly administrative or procedural nature; (b) Those that implement, without substantive change, statutory or regulatory requirements; (c) Those that implement, without substantive change, procedures, manuals, and other guidance documents; (d) Those that interpret or amend an existing regulation without changing its environmental effect; (e) Technical guidance on safety and security matters; or (f) Guidance for the preparation of security plans.''

[227] *See* DHS, ''Implementing the National Environmental Policy Act,'' DHS Directive 023–01, Rev 01 (Oct. 31, 2014), and DHS Instruction Manual Rev. 01 (Nov. 6, 2014), *https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex.*

[228] *See* Instruction Manual, section V.B.2 (a–c).

(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 213,354 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.

Form I–129 (OMB Control No. 1615–0009)

(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 Form I–129 and accompanying supplements to determine whether the petitioner and beneficiary(ies) is (are) eligible for the nonimmigrant classification. A U.S. employer, or agent in some instances, may file a petition for nonimmigrant worker to employ foreign nationals under the following nonimmigrant classifications: H–1B, H–2A, H–2B, H–3, L–1, O–1, O–2, P–1, P–2, P–3, P–1S, P–2S, P–3S, Q–1, or R–1 nonimmigrant worker. The collection of this information is also required from a U.S. employer on a petition for an extension of stay or change of status for E–1, E–2, E–3, Free Trade H–1B1 Chile/Singapore nonimmigrants and TN (USMCA workers) who are in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* [229] The estimated total number of respondents for the information collection I–129 (paper-filings) is 572,606 and the estimated hour burden per response is 2.55 hours; the estimated total number of respondents for the information collection I–129 (electronic-filings) is 45,000 and the estimated hour burden per response is 2.333 hours the estimated total number of respondents for the information collection E–1/E–2 Classification Supplement to Form I–129 is 12,050 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement (paper-filings) to Form I–129 is 10,945 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement (electronic-filings) to Form I–129 is 2,000 and the estimated hour burden per response is 0.5833 hours; the estimated total number of respondents for the information collection H Classification Supplement (paper-filings) to Form I–129 is 426,983 and the estimated hour burden per response is 2.07 hours; the estimated total number of respondents for the information collection H Classification Supplement (electronic-filings) to Form I–129 is 45,000 and the estimated hour burden per response is 2 hours; the estimated total number of respondents for the information collection H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement (paper-filings) is 353,936 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement (electronic-filings) is 45,000 and the estimated hour burden per response is .9167 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I–129 is 40,353 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 28,434 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Q–1 Classification Supplement to Form I–129 is 54 and the estimated hour burden per response is 0.34 hours; and the estimated total number of respondents for the information collection R–1 Classification Supplement to Form I–129 is 6,782 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 is 3,795,670 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 $294,892,090.

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, 1357, 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, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Amend § 214.1 by:
■ a. Revising paragraphs (c)(1) and (4);
■ b. Redesignating paragraph (c)(5) as paragraph (c)(7);
■ c. Adding a new paragraph (c)(5) and paragraph (c)(6); and
■ d. Revising newly redesignated paragraph (c)(7).

The revisions and additions read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(1) *Extension or amendment of stay for certain employment-based nonimmigrant workers.* An applicant or petitioner seeking the services of an E–1, E–2, E–3, H–1B, H–1B1, H–2A, H–2B, H–3, L–1, O–1, O–2, P–1, P–2, P–3, P–1S, P–2S, P–3S, Q–1, R–1, or TN nonimmigrant beyond the period previously granted, or seeking to amend the terms and conditions of the nonimmigrant's stay without a request for additional time, must file for an extension of stay or amendment of stay, on Form I–129, with the fee prescribed in 8 CFR 106.2, with the initial evidence specified in § 214.2, and in accordance

[229] After the publication of the NPRM, DHS published the USCIS Fee Schedule Final Rule (''Fee Rule'') (89 FR 6194) on January 31, 2024, and that rule went into effect on April 1, 2024. Subsequently, DHS updated the information collection, and the baseline estimated total number of respondents, and the amount of time estimated for an average respondent to respond, to reflect the changes to the information collection approved in connection with the Fee Rule. As a result, the estimated total public burden in hours and cost associated with the information collection has changed since the publication of the NPRM. USCIS Form I–129 (paper-filings) estimated time burden average per response is 2.487 hours (current) + .067 hours (increase from the NPRM) = 2.55 hours. On April 1, 2024, DHS also began accepting online filing for H–1B cap petitions and since included the estimated total respondents and the estimated time burden average per response to account for electronic filing submissions since the publication of the NPRM.

with the form instructions. Dependents holding derivative status may be included in the petition if it is for only one worker and the form version specifically provides for their inclusion. In all other cases, dependents of the worker should file extensions of stay using Form I–539.

* * * * *

(4) *Timely filing and maintenance of status.* (i) An extension or amendment of stay may not be approved for an applicant or beneficiary who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that USCIS may excuse the late filing in its discretion where it is demonstrated at the time of filing that:

(A) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and USCIS finds the delay commensurate with the circumstances;

(B) The applicant or beneficiary has not otherwise violated their nonimmigrant status;

(C) The applicant or beneficiary remains a bona fide nonimmigrant; and

(D) The applicant or beneficiary is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

(ii) If USCIS excuses the late filing of an extension of stay or amendment of stay request, it will do so without requiring the filing of a separate application or petition and will grant the extension of stay from the date the previously authorized stay expired, or the amendment of stay from the date the petition was filed.

(5) *Deference to prior USCIS determinations of eligibility.* When adjudicating a request filed on Form I–129 involving the same parties and the same underlying facts, USCIS gives deference to its prior determination of the petitioner's, applicant's, or beneficiary's eligibility. However, USCIS need not give deference to a prior approval if: there was a material error involved with a prior approval; there has been a material change in circumstances or eligibility requirements; or there is new, material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility.

(6) *Evidence of maintenance of status.* When requesting an extension or amendment of stay on Form I–129, an applicant or petitioner must submit supporting evidence to establish that the applicant or beneficiary maintained the previously accorded nonimmigrant status before the extension or amendment request was filed. Evidence of such maintenance of status may include, but is not limited to: copies of paystubs, W–2 forms, quarterly wage reports, tax returns, contracts, and work orders.

(7) *Decision on extension or amendment of stay request.* Where an applicant or petitioner demonstrates eligibility for a requested extension or amendment of stay, USCIS may grant the extension or amendment in its discretion. The denial of an extension or amendment of stay request may not be appealed.

* * * * *

■ 3. Amend § 214.2 by:
■ a. Revising paragraph (f)(5)(vi)(A);
■ b. Removing and reserving paragraph (h)(2)(i)(B);
■ c. Revising paragraphs (h)(2)(i)(E) and (F) and (h)(4)(i)(B);
■ d. Revising the definitions of ''Specialty occupation'' and ''United States employer'' in paragraph (h)(4)(ii);
■ e. Revising the heading for paragraph (h)(4)(iii) and paragraph (h)(4)(iii)(A);
■ f. Adding paragraph (h)(4)(iii)(F);
■ g. Revising paragraph (h)(4)(iv) introductory text;
■ h. Adding paragraph (h)(4)(iv)(C);
■ i. Revising paragraphs (h)(8)(iii)(F)(*2*)(*iv*), (h)(8)(iii)(F)(*4*), and (h)(9)(i);
■ j. Adding paragraphs (h)(9)(ii)(D) and (h)(9)(iii)(E);
■ k. Revising paragraph (h)(11)(ii);
■ l. Removing the period at the end of paragraph (h)(11)(iii)(A)(*6*) and adding ''; or'' in its place;
■ m. Adding paragraph (h)(11)(iii)(A)(*7*);
■ n. Revising paragraphs (h)(14), (h)(19)(iii)(B)(*4*), (h)(19)(iii)(C), and (h)(19)(iv);
■ o. Adding paragraph (h)(33); and
■ p. Revising paragraphs (l)(14)(i), (o)(11), and (p)(13).

The revisions and additions read as follows:

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

* * * * *

(f) * * *

(5) * * *

(vi) * * *

(A) The duration of status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), of an F–1 student who is the beneficiary of an H–1B petition subject to section 214(g)(1)(A) of the Act (8 U.S.C. 1184(g)(1)(A)) requesting a change of status will be automatically extended until April 1 of the fiscal year for which such H–1B status is being requested or until the validity start date of the approved petition, whichever is earlier, where such petition:

(*1*) Has been timely filed;

(*2*) Requests an H–1B employment start date in the fiscal year for which such H–1B status is being requested consistent with paragraph (h)(2)(i)(I) of this section; and

(*3*) Is nonfrivolous.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(E) *Amended or new petition*—(*1*) *General provisions.* The petitioner must file an amended or new petition, with the appropriate fee and in accordance with the form instructions, to reflect any material changes in the terms and conditions of employment or training or the beneficiary's eligibility as specified in the original approved petition. An amended or new H–1B, H–2A, or H–2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H–1B petition, this requirement includes a current or new certified labor condition application.

(*2*) *Additional H–1B provisions.* The amended or new petition must be properly filed before the material change(s) takes place. The beneficiary is not authorized to work under the materially changed terms and conditions of employment until the new or amended H–1B petition is approved and takes effect, unless the beneficiary is eligible for H–1B portability pursuant to paragraph (h)(2)(i)(H) of this section. Any change in the place of employment to a geographical area that requires a corresponding labor condition application to be certified to USCIS is considered a material change and requires an amended or new petition to be filed with USCIS before the H–1B worker may begin work at the new place of employment. Provided there are no material changes in the terms and conditions of the H–1B worker's employment, a petitioner does not need to file an amended or new petition when:

(*i*) Moving a beneficiary to a new job location within the same area of intended employment as listed on the labor condition application certified to USCIS in support of the current H–1B petition approval authorizing the H–1B nonimmigrant's employment.

(*ii*) Placing a beneficiary at a short-term placements(s) or assignment(s) at any worksite(s) outside of the area of intended employment for a total of 30 days or less in a 1-year period, or for a total of 60 days or less in a 1-year period where the H–1B beneficiary continues to maintain an office or work station at their permanent worksite, the

beneficiary spends a substantial amount of time at the permanent worksite in a 1-year period, and the beneficiary's residence is located in the area of the permanent worksite and not in the area of the short-term worksite(s); or

(*iii*) An H–1B beneficiary is going to a non-worksite location to participate in employee development, will be spending little time at any one location, or when the job is peripatetic in nature, in that the normal duties of the beneficiary's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location. Peripatetic jobs include situations where the job is primarily at one location, but the beneficiary occasionally travels for short periods to other locations on a casual, short-term basis, which can be recurring but not excessive (*i.e.,* not exceeding 5 consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations).

(F) *Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary; the representative of both the employer and the beneficiary; or a person or entity authorized by the employer to act for, or in place of, the employer as its agent. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required.

(*1*) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition.

(*2*) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

* * * * *

(4) * * *

(i) * * *

(B) *General requirements for petitions involving a specialty occupation*—(*1*) *Labor condition application requirements.* (*i*) Before filing a petition for H–1B classification in a specialty occupation, the petitioner must obtain a certified labor condition application from the Department of Labor in the occupational specialty in which the alien(s) will be employed.

(*ii*) Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by the agency that the occupation in question is a specialty occupation. USCIS will determine whether the labor condition application involves a specialty occupation as defined in section 214(i)(1) of the Act and properly corresponds with the petition. USCIS will also determine whether all other eligibility requirements have been met, such as whether the alien for whom H–1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

(*iii*) If all of the beneficiaries covered by an H–1B labor condition application have not been identified at the time a petition is filed, petitions for newly identified beneficiaries may be filed at any time during the validity of the labor condition application using copies of the same certified labor condition application. Each petition must refer by file number to all previously approved petitions for that labor condition application.

(*iv*) When petitions have been approved for the total number of workers specified in the labor condition application, substitution of aliens against previously approved openings cannot be made. A new labor condition application will be required.

(*v*) If the Secretary of Labor notifies USCIS that the petitioning employer has failed to meet a condition of paragraph (B) of section 212(n)(1) of the Act, has substantially failed to meet a condition of paragraphs (C) or (D) of section 212(n)(1) of the Act, has willfully failed to meet a condition of paragraph (A) of section 212(n)(1) of the Act, or has misrepresented any material fact in the application, USCIS will not approve petitions filed with respect to that employer under section 204 or 214(c) of the Act for a period of at least 1 year from the date of receipt of such notice.

(*vi*) If the employer's labor condition application is suspended or invalidated by the Department of Labor, USCIS will not suspend or revoke the employer's approved petitions for aliens already employed in specialty occupations if the employer has certified to the Department of Labor that it will comply with the terms of the labor condition application for the duration of the authorized stay of aliens it employs.

(*2*) *Inspections, evaluations, verifications, and compliance reviews.* (*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 verifications and inspections may include, but are not limited to: electronic validation of a petitioner's or third party's basic business information; visits to the petitioner's or third party's facilities; interviews with the petitioner's or third party's officials; reviews of the petitioner's or third party's records related to compliance with immigration laws and regulations; and interviews with any other individuals possessing pertinent information, as determined by USCIS, which may be conducted in the absence of the employer or the employer's representatives; and reviews 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. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the interviewee and USCIS away from the employer's property. An inspection may be conducted at locations including the petitioner's headquarters, satellite locations, or the location where the beneficiary works, has worked, or will work, including third party worksites, as applicable. USCIS may commence verification or inspection under this paragraph (h)(4)(i)(B)(*2*) for any petition and at any time after an H–1B petition is filed, including any time before or after the final adjudication of the petition. The commencement of such verification and inspection before the final adjudication of the petition does not preclude the ability of USCIS to complete final adjudication of the petition before the verification and inspection are completed.

(*ii*) 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 facts, including due to the failure or refusal of the petitioner or a third party to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H–1B petition for H–

1B workers performing services at the location or locations that are a subject of inspection or compliance review, including any third party worksites.

(*3*) *Third party requirements.* If the beneficiary will be staffed to a third party, meaning they will be contracted to fill a position in a third party's organization and becomes part of that third party's organizational hierarchy by filling a position in that hierarchy (and not merely providing services to the third party), the actual work to be performed by the beneficiary must be in a specialty occupation. When staffed to a third party, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation.

* * * * *

(ii) * * *

Specialty occupation means 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 directly related specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. A position is not a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position. A position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position. *Directly related* means there is a logical connection between the required degree, or its equivalent, and the duties of the position.

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

(*1*) Has a bona fide job offer for the beneficiary to work within the United States, which may include telework, remote work, or other off-site work within the United States;

(*2*) Has a legal presence in the United States and is amenable to service of process in the United States; and

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

(*4*) If the H–1B beneficiary possesses a controlling interest in the petitioner, meaning the beneficiary owns more than 50 percent of the petitioner or has majority voting rights in the petitioner, such a beneficiary may perform duties that are directly related to owning and directing the petitioner's business as long as the beneficiary will perform specialty occupation duties a majority of the time, consistent with the terms of the H–1B petition.

(iii) *General H–1B requirements*—(A) *Criteria for specialty occupation position.* A 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 at paragraphs (h)(4)(iii)(A)(*1*) through (*4*) of this section:

(*1*) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular occupation;

(*2*) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is normally required to perform job duties in parallel positions among similar organizations in the employer's industry in the United States;

(*3*) The employer, or third party if the beneficiary will be staffed to that third party, normally requires a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, to perform the job duties of the position; or

(*4*) The specific duties of the proffered position are so specialized, complex, or unique that the knowledge required to perform them is normally associated with the attainment of a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent.

(*5*) For purposes of the criteria at paragraphs (h)(4)(iii)(A)(*1*) through (*4*) of this section, normally means conforming to a type, standard, or regular pattern, and is characterized by that which is considered usual, typical, common, or routine. Normally does not mean always.

* * * * *

(F) *Bona fide position in a specialty occupation.* At the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.

* * * * *

(iv) *General documentary requirements for H–1B classification in a specialty occupation.* Except as specified in paragraph (h)(4)(iv)(C) of this section, an H–1B petition involving a specialty occupation must be accompanied by:

* * * * *

(C) In accordance with 8 CFR 103.2(b) and paragraph (h)(9) of this section, USCIS may request evidence such as contracts, work orders, or other similar evidence between all parties in a contractual relationship showing the bona fide nature of the beneficiary's position and the minimum educational requirements to perform the duties.

* * * * *

(8) * * *

(iii) * * *

(F) * * *

(*2*) * * *

(*iv*) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. A nonprofit entity may engage in more than one fundamental activity.

* * * * *

(*4*) An H–1B beneficiary who is not directly employed by a qualifying institution, organization, or entity identified in section 214(g)(5)(A) or (B) of the Act will qualify for an exemption under such section if the H–1B beneficiary will spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research. Work performed ''at'' the qualifying institution may include work performed in the United States through telework, remote work, or other off-site work. When considering whether a position is cap-exempt, USCIS will focus on the job duties to be performed, rather than where the duties are physically performed.

* * * * *

(9) * * *

(i) *Approval.* (A) USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication. USCIS will notify the petitioner of the approval of the petition on a Notice of Action. The approval notice will include the beneficiary's (or beneficiaries') name(s) and classification and the petition's

period of validity. A petition for more than one beneficiary and/or multiple services may be approved in whole or in part. The approval notice will cover only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act.

(B) Where an H–1B petition is approved for less time than requested on the petition, the approval notice will provide or be accompanied by a brief explanation for the validity period granted.

(ii) * * *

(D)(*1*) If an H–1B petition is adjudicated and deemed approvable after the initially requested validity period end-date or end-date for which eligibility is established, the officer may issue a request for evidence (RFE) asking the petitioner whether they want to update the requested dates of employment. Factors that inform whether USCIS issues an RFE could include, but would not be limited to: additional petitions filed or approved on the beneficiary's behalf, or the beneficiary's eligibility for additional time in H–1B status. If the new requested period exceeds the validity period of the labor condition application already submitted with the H–1B petition, the petitioner must submit a certified labor condition application with a new validity period that properly corresponds to the new requested validity period on the petition and an updated prevailing or proffered wage, if applicable, except that the petitioner may not reduce the proffered wage from that originally indicated in their petition. This labor condition application may be certified after the date the H–1B petition was filed with USCIS. The request for new dates of employment and submission of a labor condition application corresponding with the new dates of employment, absent other changes, will not be considered a material change. An increase to the proffered wage will not be considered a material change, as long as there are no other material changes to the position.

(*2*) If USCIS does not issue an RFE concerning the requested dates of employment, if the petitioner does not respond, or the RFE response does not support new dates of employment, the petition will be approved, if otherwise approvable, for the originally requested period or until the end-date eligibility has been established, as appropriate. However, the petition will not be forwarded to the Department of State nor will any accompanying request for a change of status, an extension of stay, or amendment of stay, be granted.

(iii) * * *

(E) *H–1B petition for certain beneficiary-owned entities.* The initial approval of a petition filed by a United States employer in which the H–1B beneficiary possesses a controlling interest in the petitioning organization or entity, meaning the beneficiary owns more than 50 percent of the petitioner or has majority voting rights in the petitioner, will be limited to a validity period of up to 18 months. The first extension (including an amended petition with a request for an extension of stay) of such a petition will also be limited to a validity period of up to 18 months.

* * * * *

(11) * * *

(ii) *Immediate and automatic revocation.* The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based. The approval of an H–1B petition is also immediately and automatically revoked upon notification from the H–1B petitioner that the beneficiary is no longer employed.

(iii) * * *

(A) * * *

(*7*) The petitioner failed to timely file an amended petition notifying USCIS of a material change or otherwise failed to comply with the material change reporting requirements in paragraph (h)(2)(i)(E) of this section.

* * * * *

(14) *Extension of visa petition validity.* The petitioner must file a request for a petition extension on the Form I–129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. A request for a petition extension generally may be filed only if the validity of the original petition has not expired.

* * * * *

(19) * * *

(iii) * * *

(B) * * *

(*4*) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. A nonprofit entity may engage in more than one fundamental activity;

(C) *A nonprofit research organization or government research organization.* When a fundamental activity of a nonprofit organization is engaging in basic research and/or applied research, that organization is a nonprofit research organization. When a fundamental activity of a governmental organization is the performance or promotion of basic research and/or applied research, that organization is a government research organization. A governmental research organization may be a Federal, State, or local entity. A nonprofit research organization or governmental research organization may perform or promote more than one fundamental activity. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. Both basic research and applied research may include research and investigation in the sciences, social sciences, or humanities and may include designing, analyzing, and directing the research of others if on an ongoing basis and throughout the research cycle;

* * * * *

(iv) *Nonprofit or tax exempt organizations.* For purposes of paragraphs (h)(19)(iii)(B) and (C) of this section, a nonprofit organization or entity must be determined by the Internal Revenue Service to be a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6).

* * * * *

(33) *Severability.* The Department intends that should any of the revisions effective on January 17, 2025, to provisions in paragraphs (f)(5), (h)(2), (4) through (6), (8), (9), (11), (14), and (19), (l)(14), (o)(11), and (p)(13) of this section or to the provisions in 8 CFR 214.1(c)(1) and (4) through (7) be held to be invalid or unenforceable by their terms or as applied to any person or circumstance they should nevertheless be construed so as to continue to give the maximum effect to the provision(s) permitted by law, unless any such provision is held to be wholly invalid

and unenforceable, in which event the provision(s) should be severed from the remainder of the provisions and the holding should not affect the other provisions or the application of those other provisions to persons not similarly situated or to dissimilar circumstances.

* * * * *

(l) * * *

(14) * * *

(i) *Individual petition.* The petitioner must file a petition extension on Form I–129 to extend an individual petition under section 101(a)(15)(L) of the Act. A petition extension generally may be filed only if the validity of the original petition has not expired.

* * * * *

(o) * * *

(11) *Extension of visa petition validity.* The petitioner must file a request to extend the validity of the original petition under section 101(a)(15)(O) of the Act on the form prescribed by USCIS, in order to continue or complete the same activities or events specified in the original petition. A petition extension generally may be filed only if the validity of the original petition has not expired.

* * * * *

(p) * * *

(13) *Extension of visa petition validity.* The petitioner must file a request to extend the validity of the original petition under section 101(a)(15)(P) of the Act on the form prescribed by USCIS in order to continue or complete the same activity or event specified in the original petition. A petition extension generally may be filed only if the validity of the original petition has not expired.

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Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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