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

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

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

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

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

Despite the fact that DHS estimated that 80.1 percent of those that filed Form I-129 were small entities, DHS believes that no small entities would be significantly impacted by the final rule. Petitioners who regularly place their workers at third-party worksites often submit uncorroborated statements describing the role the H-1B beneficiary will perform at the third-party worksite. Such statements by the petitioner, without additional corroborating evidence, are generally insufficient to establish by a preponderance of the evidence that the H-1B petitioner will have an employer-employee relationship with the beneficiary for any or all of the period

requested in petition, especially considering that the beneficiary may be placed at multiple worksites. Therefore, where a beneficiary will be placed at one or more third-party worksites, DHS will require the petitioner to submit evidence such as contracts, work orders, or other similar evidence to establish that the beneficiary will perform services in a specialty occupation at the third-party worksite(s), and that the petitioner will have an employer-employee relationship with the beneficiary.

DHS notes that corroborating evidence will have to be detailed enough to provide a sufficiently comprehensive view of the work available, and the terms and conditions under which the work will be performed at the third-party worksite. Since these petitioners will generally need to provide more documentation than petitioners who do not seek to employ H-1B workers at third-party worksite locations, DHS estimates the time burden for petitioners will be approximately 1 hour to gather and submit these documents as required under this interim final rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

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

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

While this final rule may result in the expenditure of more than $100 million by the private sector annually, the rulemaking is not a "Federal mandate" as defined for UMRA purposes.[27] The cost of preparation of H-1B petitions (including required evidence) and the payment of H-1B nonimmigrant petition fees by petitioners or other private sector entities is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.[28] This final rule does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. Therefore, no actions were deemed necessary under the provisions of the UMRA.

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

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

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

[27] *See* 2 U.S.C. 658(6).

[28] *See* 2 U.S.C. 658(7)(A)(ii).

E. Congressional Review Act

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

F. Executive Order 13132 (Federalism)

This final rule would not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

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

H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have "tribal implications" because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

I. National Environmental Policy Act

DHS analyzes actions to determine whether the National Environmental Policy Act, Public Law 91–190, 42 U.S.C. 4321 through 4347 (NEPA), applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01, *Implementation of the National Environmental Policy Act* (Instruction Manual) establish the policies and procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions ("categorical exclusions") which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii), 1508.4. Categorical exclusions established by DHS are set forth in Appendix A of the Instruction Manual. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c).

This final rule amends regulations governing the H-1B temporary nonimmigrant specialty occupation program to improve the integrity of the program, and more closely conform the regulatory framework to that of the Act. Specifically, DHS is revising the definition of "United States employer" and "employer-employee relationship" to clarify how USCIS will determine whether there is an employer-employee relationship between the petitioner and the beneficiary.

The primary purpose of these changes is to better ensure that each H-1B nonimmigrant worker will be working for a qualified petitioner." While this final rule revises regulatory eligibility requirements and may result in denials of some H-1B petitions, this rule does not change the number of H-1B workers that may be employed by U.S. employers; the final rule leaves unchanged the statutory numerical limitations and cap exemptions. It also does not change rules for where H-1B nonimmigrants may be employed.

Generally, DHS believes NEPA does not apply to a rule intended to strengthen an immigration program because any attempt to analyze its potential impacts would be largely speculative, if not completely so. DHS cannot reasonably estimate how many petitions will be filed for workers to be employed in specialty occupations following the change made by this rule or whether the regulatory amendment herein will result in an overall change in the number of H-1B petitions that are ultimately approved, and the number of H-1B workers who are employed in the United States in any fiscal year. DHS has no reason to believe that the amendment to H-1B regulations would change the environmental effect, if any, of the existing regulations. Therefore, DHS has determined that even if NEPA were to apply to this action, this rule clearly fits within categorical exclusion A3(d) in the Instruction Manual, which provides an exclusion for "promulgation of rules . . . that amend an existing regulation without changing its environmental effect." This rule maintains the current human environment by making improvements to the H-1B program in a way that will better ensure that each H-1B nonimmigrant worker will be working for a qualified petitioner. This rule is not a part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

J. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. This rule does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

K. Signature

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

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

PART 214 -- NONIMMIGRANT CLASSES

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

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115-218.

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

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

* * * * *

(h) * * *

(4) * * *

(ii) * * *

Employer-employee relationship means the conventional master-servant relationship consistent with the common law. The petitioner must establish that its offer of employment as stated in the petition is based on a valid employer-employee relationship that exists or will exist. In considering whether the petitioner has established that a valid "employer-employee relationship" exists or will exist, USCIS will assess and weigh all relevant aspects of the relationship with no one factor being determinative.

(*1*) In cases where the H-1B beneficiary does not possess an ownership interest in the petitioning organization or entity, the factors that USCIS may consider to determine if a valid employment relationship will exist or continue to exist include, but are not limited to:

(*i*) Whether the petitioner supervises the beneficiary and, if so, where such supervision takes place;

(*ii*) Where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision;

(*iii*) Whether the petitioner has the right to control the work of the beneficiary on a day-to-day basis and to assign projects;

(*iv*) Whether the petitioner provides the tools or instrumentalities needed for the beneficiary to perform the duties of employment;

(*v*) Whether the petitioner hires, pays, and has the ability to fire the beneficiary;

(*vi*) Whether the petitioner evaluates the work-product of the beneficiary;

(*vii*) Whether the petitioner claims the beneficiary as an employee for tax purposes;

(*viii*) Whether the petitioner provides the beneficiary any type of employee benefits;

(*ix*) Whether the beneficiary uses proprietary information of the petitioner in order to perform the duties of employment;

(*x*) Whether the beneficiary produces an end-product that is directly linked to the petitioner's line of business; and

(*xi*) Whether the petitioner has the ability to control the manner and means in which the work product of the beneficiary is accomplished.

(*2*) In cases where the H-1B beneficiary possesses an ownership interest in the petitioning organization or entity, additional factors that USCIS may consider to determine if a valid employment relationship will exist or continue to exist include, but are not limited to:

(*i*) Whether the petitioning entity can hire or fire the beneficiary or set the rules and parameters of the beneficiary's work;

(*ii*) Whether and, if so, to what extent the petitioner supervises the beneficiary's work;

(*iii*) Whether the beneficiary reports to someone higher in the petitioning entity;

(*iv*) Whether and, if so, to what extent the beneficiary is able to influence the petitioning entity;

(*v*) Whether the parties intended that the beneficiary be an employee, as expressed in written agreements or contracts; and

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

* * * * *

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

(*1*) Engages a person to work within the United States;

(*2*) Has an employer-employee relationship with respect to employees under this part; and

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

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