Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF STATE

22 CFR Part 41

[Public Notice 11221]

RIN 1400–AE95

Visas: Temporary Visitors for Business or Pleasure

AGENCY: Department of State.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of State (''Department'') proposes to amend its regulation governing nonimmigrant visas for temporary visitors for business, the B–1 nonimmigrant visa classification, by removing two sentences defining the term ''business'' that are outdated due to changes in the INA since 1952, from when the two sentences originate. With removal of these sentences, the Department would no longer authorize issuance of B–1 visas for certain aliens classifiable as H–1B or H–3 nonimmigrants, commonly referred to as the ''B–1 in lieu of H'' policy, unless the alien independently qualifies for a B–1 visa for a reason other than the B–1 in lieu of H policy.

DATES: Written comments must be received on or before December 21, 2020.

ADDRESSES: You may submit comments, identified by RIN 1400–AE95, by either of the following methods:

- *Internet (preferred):* At *www.regulations.gov,* you can search for the document using [Docket Number DOS–2020–0041] or using the proposed rule RIN 1400–AE95.
- *Email:* Megan Herndon, Senior Regulatory Coordinator, Office of Visa Services, Bureau of Consular Affairs, U.S. Department of State, *VisaRegs@state.gov.*

FOR FURTHER INFORMATION CONTACT: Megan Herndon, Senior Regulatory Coordinator, Office of Visa Services, Bureau of Consular Affairs, Department of State, 600 19th St. NW, Washington, DC 20006, (202) 485–7586.

Public Participation

All interested parties are invited to participate in this rulemaking by submitting written views and comments on all aspects of this proposed rule. Comments must be submitted in English or an English translation must be provided. Comments that will provide the most assistance to the Department of State in implementing this change will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include information that supports the recommended change.

Instructions: If you submit a comment, you must include the agency name and RIN 1400–AE95 for this rulemaking in the title or body of the comment. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, because all submissions will be public, you may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission. The Department of State may withhold from public viewing information provided in comments that it determines may infringe privacy rights of an individual or is offensive. For additional information, please read the Privacy Act notice available in the footer at *http://www.regulations.gov.*

SUPPLEMENTARY INFORMATION:

I. What changes to 22 CFR 41.31 does the Department propose?

The Department proposes to eliminate two sentences from its regulation governing nonimmigrant visitors for business, 22 CFR 41.31(b)(1). The current regulation, in the paragraph defining ''business,'' includes the statement, ''An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of 22 CFR 41.53,'' which is the regulation governing H nonimmigrant temporary workers or trainees. The Department proposes to remove this language, as explained below, because, as the regulation states explicitly, ''business,'' as used in section 101(a)(15)(B) of the Immigration and Nationality Act (''INA''), 8 U.S.C. 1101(a)(15)(B) ''does not include local employment or labor for hire,'' so the referenced statement is confusing and potentially misleading. For the same reasons, the Department also proposes to eliminate from the current regulation the statement, ''An alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature requiring such merit and ability, but having no contract or other pre-arranged employment, may be classified as a nonimmigrant temporary visitor for business.''

II. Why is the Department proposing this rule?

A. Statutory Framework

The Department's proposal conforms the regulation with changes in the Immigration Act of 1990 (''IMMACT 90''),[1] the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (''MATINA''),[2] and the American Competitiveness and Workforce Improvement Act of 1998 (''ACWIA'').[3] The two sentences the Department proposes to eliminate from 22 CFR 41.31 date back to 1952, prior to enactment of these laws. *See* 22 CFR 41.40 (1952) (added by 17 FR 11574, Dec. 19, 1952). They no longer reflect the statutory framework governing nonimmigrants.

The primary statute governing the requirements for B visa classification is the Immigration and Nationality Act (''INA'') of 1952, as amended.[4] The Department's proposal takes into account the amendments to the INA effected by IMMACT 90, MATINA, and the ACWIA.

The statutory language authorizing the issuance of visas to temporary visitors for business (B–1 nonimmigrants) or pleasure (B–2 nonimmigrants) has remained unchanged since the 1952 Act. The B visa classification applies to temporary visitors for business or for pleasure and excludes individuals coming for the

[1] Public Law 101–649, 104 Stat. 4978 (1990).

[2] Public Law 102–232, 105 Stat. 1733 (1991).

[3] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Public Law 105–277, div. C. tit. IV, 112 Stat. 2681–642 (1998).

[4] Reference to the ''1952 INA'' or ''1952 Act'' refers to the original Immigration and Nationality Act of 1952, Public Law 82–414, 66 Stat. 163 (June 27, 1952).

purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation. *See* INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B).

Under the 1952 Act, the H nonimmigrant classification pertained to individuals of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability; coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in the United States; or (iii) who is coming temporarily to the United States as an industrial trainee. *See* INA section 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H) (1952).

IMMACT 90, as amended by the MATINA, created new nonimmigrant classifications, including two nonimmigrant classifications for certain aliens with extraordinary ability in the sciences, arts, business, or athletics and certain artists and entertainers, the O and P classifications.[5] Many such aliens were previously classified as H–1 nonimmigrants, corresponding to INA section 101(a)(15)(H)(i), 8 U.S.C. 1101(a)(15)(H)(i) (1952). Since INA section 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H) was not originally designed to address these classes of activities, Congress determined that they should be separated from that classification and treated independently.[6] Most professional athletes and entertainers coming to the United States to work in their professions fall within the scope of these O and P classes under current law. All aliens applying for an O or P nonimmigrant visa as a principal alien require a petition approved by DHS prior to applying for a visa.

In addition to creating the O and P nonimmigrant classifications, IMMACT 90 and the MATINA amended the INA with regard to the H–1 classification for certain temporary workers by, in relevant part: (1) Restricting H–1B classification to nonimmigrants coming temporarily to perform services in a specialty occupation (as defined in INA section 214(i)(1), 8 U.S.C. 1184(i)(1)), or as a fashion model of distinguished merit and ability;[7] (2) adding the requirement of a labor condition application filed with respect to the nonimmigrant by the intending employer under INA section 212(n)(1), 8 U.S.C. 1182(n)(1), with the Secretary of Labor;[8] and (3) limiting the number of aliens who may be issued H–1B visas or otherwise provided H–1B nonimmigrant status during any fiscal year.[9]

The ACWIA, enacted in 1998, further amended the INA with respect to H–1 classification by, in relevant part: (1) Temporarily increasing numerical limits of H–1 visas;[10] (2) imposing new restrictions and requirements on H–1-dependent employers;[11] (3) instituting a new regime of penalties for petitioners whose attestations include misrepresentations;[12] (4) establishing a process to review complaints regarding failures to offer job opportunities to U.S. workers;[13] and (5) imposing a $500 fee for certain H–1B petitioners.[14]

Congress imposed an additional $2,000 fee in 2010 for certain H–1B petitioners through Public Law 111–230, section 402(b), 124 Stat. 2487 (2010). This fee authorization expired on September 30, 2015, and Congress subsequently reauthorized and increased it to $4,000 with the Consolidated Appropriations Act, 2016, Public Law 114–113, section 411, 129 Stat. 3006. This fee remains in effect until Sept. 30, 2025.

B. Policy

The proposed rule would increase clarity and transparency by removing confusing and outdated language about the scope of activity in the United States that is permissible on a B–1 visa. An example of the confusion—here to a qui tam relator—caused by this outdated language arose recently in *United States ex rel. Krawitt* v. *Infosys Technologies Limited, Incorporated,* 372 F.Supp. 3d 1078, 1086 (N.D. Cal 2019), in which the District Court found a fraud complaint misinterpreted the first sentence the Department proposes to remove related to labor pursuant to a contract or other prearrangement.[15] The court's interpretation properly highlighted that this sentence is in fact meaningless, although it is unclear whether the Court understood why this was the case. Reporting from posts abroad indicates confusion among aliens, attorneys, consular officers, and DHS officials at Ports of Entry about the application of these outdated sentences, specifically as they apply to the B–1 in lieu of H policy, described below in section (II)(D)(ii). Thus, the Department proposes removing the confusing and outdated sentences from the regulation.

Removing these two sentences, and thus removing any question about whether the referenced employment or labor might be permissible B–1 activity, not only conforms the regulation to the applicable statutory framework, but also furthers the goals of Executive Order (''E.O.'') 13788, *Buy American and Hire American. See* 82 FR 18837 (April 21, 2017). That E.O. articulates the executive branch policy to ''rigorously enforce and administer'' the laws governing entry of nonimmigrant workers into the United States ''[i]n order to create higher wages and employment rates for workers in the United States, and to protect their economic interests.'' *Id.* sec. 2(b). It directs federal agencies, including the Department, to protect U.S. workers by proposing new rules and issuing new guidance to prevent fraud and abuse in nonimmigrant visa programs. *Id.* sec. 5. The Department believes that eliminating any perceived gray area of acceptable local employment or labor for skilled foreign workers for the purpose of B–1 nonimmigrant visa issuance will better protect U.S. workers' economic interests and strengthen the integrity of the B–1 nonimmigrant visa classification

With greater clarity regarding the Department's policy and interpretation of the law concerning the availability of

[5] Nonimmigrant visas in the O classification are for certain aliens with extraordinary ability in sciences, arts, education, business or athletics, or a demonstrated record of achievement in the motion picture or television industry, as well as certain support staff and dependents. *See* IMMACT 90 section 207(a), INA section 101(a)(15)(O), 8 U.S.C. 1101(a)(15)(O) and 22 CFR 41.55. *See also* 8 CFR 214.2(o). Nonimmigrant visas in the P classification are for certain types of artists and entertainers, as well as certain support staff and dependents. *See* INA section 101(a)(15)(P), 8 U.S.C. 1101(a)(15)(P) and 22 CFR 41.56. *See also* 8 CFR 214.2(p).

[6] *See* 136 Cong. Rec. H13203–01 (1990).

[7] IMMACT 90, Sec. 205(c)(1).

[8] IMMACT 90, Sec. 205(c)(1), (3). Prior to IMMACT 90, there was no prevailing wage requirement or other U.S. labor force protections concerning H–1B workers. Note that the H–1B category resulted from the split of the H–1 category into the H–1A (now defunct) and H–1B categories through amendments to the INA by the Immigration Nursing Relief Act of 1989, Public Law 101–238, 103 Stat. 2099 (1989).

[9] IMMACT 90, Sec. 205(a).

[10] ACWIA, Sec. 411.

[11] ACWIA, Sec. 412.

[12] ACWIA, Sec. 413a.

[13] ACWIA, Sec. 413b.

[14] ACWIA, Sec. 414.

[15] Krawitt, the qui tam relator, argued that one of the sentences in 22 CFR 41.31 the Department proposes to remove (''An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of § 41.53'') prohibited two Infosys employees from providing training to Apple employees in the United States in B–1 status pursuant to a contract between the two companies. The court responded that ''Numerous authoritative sources contradict Krawitt's reading of the regulation,'' but did not offer an alternative reading of the confusing sentence, apparently giving the sentence no meaning at all.

a B–1 nonimmigrant visa for an alien seeking to engage in local employment or labor, employers will be on notice that they must pay prevailing wages for such labor performed in the United States, either by hiring a U.S. worker or by following the procedures established by Congress for the importation of a skilled worker in an appropriate visa category. The Department believes this will lead to an increase in wages for U.S. workers, because U.S. entities that previously may have paid less than the prevailing wage for services in a specialty occupation performed by foreign nationals who traveled to the United States on a B–1 nonimmigrant visa issued on the basis of the outdated regulatory language or under the B–1 in lieu of H policy (discussed in (II)(B)(2), below) will be compelled to align their business practices with the current statutory scheme and the policy expressed in this proposal.

C. Proposed Elimination of Statement That an Alien Seeking To Enter for Employment or Labor Pursuant to a Contract or Other Prearrangement Is Required To Qualify Under the Provisions of 22 CFR 41.53

Performance of skilled or unskilled labor is statutorily impermissible in the B nonimmigrant visa classification. INA section 101(a)(15)(B), 8 U.S.C 1101(a)(15)(B). The term ''labor'' is not defined in the INA or implementing regulations,[16] for the purpose of the B nonimmigrant classification. The statement in the Department's regulation that an alien seeking to enter for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of 22 CFR 41.53 (relating to H visas), fails to account for the other visa categories that permit the performance of labor in the United States (including, but not limited to the D, E, I, L, O, P, Q, and R classifications). Additionally, the requirement is under-inclusive, because INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B), prohibits skilled or unskilled labor in the B nonimmigrant visa classification categorically, whether or not pursuant to a contract or other prearrangement. Because skilled and unskilled labor on a B visa are already generally prohibited by statute, the Department believes the referenced statement is confusing and misleading and therefore proposes to remove the sentence from the regulation.

D. Proposed Elimination of Statement Regarding Alien of Distinguished Merit and Ability

1. Proposal as it Relates to Aliens of Extraordinary Ability in the Sciences, Arts, Education, Business, or Athletics; and Athletes, Entertainers, and Artists Seeking Nonimmigrant Visas Relative to Their Professions

The Department proposes to eliminate the provision in 22 CFR 41.31 that currently provides that ''[a]n alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature requiring such merit and ability, but having no contract or other prearranged employment, may be classified as a nonimmigrant temporary visitor for business.'' This language has remained unchanged since 1952. *See* 22 CFR 41.40(b) (1952) added by 17 FR 11475 (Dec. 19, 1952)). Notwithstanding this regulatory language, the Department has long interpreted ''business'' activities permissible in the B–1 classification to exclude the activities of members of the entertainment profession seeking to perform services within the scope of their profession. For example, an acclaimed singer and accompanying musicians seeking to enter the United States to perform a concert in a stadium in the United States would be required to obtain O or P visas, after filing a petition with U.S. Citizenship and Immigration Services (USCIS), and would not be eligible for a B–1 visa for this purpose, as the existing regulation suggests.

The Department's interpretation of ''business,'' with respect to entertainers, dates back to the 1960s or 1970s, well before enactment of IMMACT 90, but the oldest published guidance currently available to the Department is from August 30, 1987, stating ''[o]rdinarily, a member of an entertainment occupation who seeks to enter the United States temporarily to perform services, whether or not the services will involve public appearance and regardless of the amount or source of compensation, will be accorded the appropriate H–1 classification.'' [17] Because this guidance was promulgated prior to the enactment of IMMACT 90, H–1 was the appropriate classification for aliens performing such services. Under IMMACT 90's targeted standards and procedures for professional entertainers, such performers would fall in the O and P categories. Notably, the 1987 guidance, which steers members of the entertainment profession away from B visas, is consistent with current FAM guidance; [18] the proposal serves to bring the regulation in line with the Department's long-standing policy. Therefore, with respect to entertainers of distinguished merit and ability who seek to perform in the United States, the Department does not expect that removing this language from the B nonimmigrant visa regulation will have any impact on visa issuance, because the statement does not align with current practice.[19]

While there is limited case law directly interpreting ''business'' as related to athletes, entertainers, and artists seeking to perform services within the scope of their professions,[20]

[16] The INA, including INA section 212(a)(5)(A)(i), 8 U.S.C. 1182(a)(15)(A)(i) (labor certification requirement for certain immigrants), and implementing regulations, such DOL regulations as 20 CFR 655.5 (defining agricultural labor) use the term labor without defining it.

[17] 9 FAM 41.31, Notes, N7.1 (TL:VISA–2, August 30, 1987). In the intervening decades, this guidance has become more nuanced to reflect certain situations where services in an entertainment profession are consistent with B–1 visa classification, as described in the following paragraphs and associated footnotes.

[18] 9 FAM 402.2–5(G) states that, with limited exception not affected by this proposal, ''B visa status is not appropriate for a member of the entertainment profession (professional entertainer) who seeks to enter the United States temporarily to perform services. Instead, performers should be accorded another appropriate visa classification, which in most cases will be P, regardless of the amount or source of compensation, whether the services will involve public appearance(s), or whether the performance is for charity or a U.S. based ethnic society.'' This proposal would not affect existing Department guidance on the situations in which professional entertainers and artists may be classified B–1, such as participants in cultural programs performing before a nonpaying audience and being paid by the sending government. See 9 FAM 402.2–5(G)(1)–(5).

[19] This proposal would not affect Department guidance to consular officers with regard to amateur athletes and entertainers. Under 9 FAM 402.2–4(A)(7), a person who is an amateur in an entertainment or athletic activity is, by definition, not a member of any of the profession associated with that activity. An amateur is someone who normally performs without remuneration (other than an allotment for expenses). A performer who is normally compensated for performing cannot qualify for a B–2 visa based the provisions of 9 FAM 402.2–4(A)(7) even if the performer does not make a living at performing, or agrees to perform in the United States without compensation. Thus, an amateur (or group of amateurs) who will not be paid for performances and will perform in a social and/or charitable context or as a competitor in a talent show, contest, athletic event, or other similar activity is eligible for B–2 classification, even if the incidental expenses associated with the visit are reimbursed.

This proposal would not change this understanding.

In proposing to remove this provision from the regulation, the Department recognizes that aliens of ''distinguished merit and ability'' in areas other than athletics, entertainment, and art may also be impacted. To the extent the proposal to eliminate this section overlaps with the proposal to eliminate the B–1 in lieu of H policy, see the discussion immediately below.

[20] The Board of Immigration Appeals held that a professional dancer was not eligible to enter the United States to fulfill a 6 month dancing contract as a temporary visitor for business in *In the Matter*

the Department's interpretation is consistent with case law interpreting ''business'' more generally. The Board of Immigration Appeals has repeatedly held that ''business,'' as used in INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B), does not include ordinary labor for hire or local employment of a continuing nature, the extension of professional practice to the United States, or the regular performance of services in the United States not performed as an incident to any international commercial activity. *See, e.g., Matter of Neill,* 15 I. & N. Dec. 331, 334 (BIA 1975) (extending professional engineering practice to the United States was not permissible for the B nonimmigrant classification); *Matter of G—,* 6 I. & N. Dec. 255, 258 (BIA 1954) (holding that employment of a continuing nature as a receiving clerk and truck loader in the United States was not permissible B–1 activity even when the alien maintained a residence in Canada which he had no intent of abandoning and was paid entirely by the Canadian company); compare *Matter of Duckett,* 19 I. & N. Dec. 493, 498 (BIA 1987) (holding professional services regularly performed in the United States permissible B–1 activity because the function was a necessary incident to international trade).

The Department's existing guidance to consular officers provides some scenarios in which professional athletes, artists, and entertainers may qualify for B–1 visas for the purpose of performing services within the scope of their professions. These examples extend the reasoning of administrative decisions interpreting the scope of permissible B–1 activity to situations consular officers may encounter and do not rely on the regulatory language the Department proposes to remove; thus, these purposes of travel would not be affected by this proposal. For example, 9 FAM 402.2–5(C)(4) paragraph b explains that athletes or team members who seek to enter the United States as members of a foreign-based team in order to compete with another sports team are eligible for B–1 visas, provided that the foreign athlete and the foreign sports team have their principal place of business or activity in a foreign country and the income of the foreign-based team and the salary of its players are principally accrued in a foreign country. The referenced FAM guidance is consistent with *Matter of Hira,* 11 I&N 824 (BIA 1965; A.G. 1966), which identifies relevant factors for B–1 classification as, among others, the principal foreign place of business and the principal location of accrual of profits abroad.[21] A separate FAM provision, which is also not affected by this proposal, specifies that a professional entertainer may be classified B–1 if the entertainer (1) is coming to the United States to participate only in a cultural program sponsored by the sending country; (2) will be performing before a nonpaying audience; and (3) all expenses, including per diem, will be paid by the member's government. 9 FAM 402.2(G)(1). These criteria also align with the Attorney General's interpretation in *Matter of Hira.*

The Department's proposal seeks to bring the regulations into conformity with Department practice with respect to athletes, entertainers, and artists by removing the one sentence of regulatory language that has been superseded by Congress through the passage of IMMACT 90. Therefore, the Department does not expect that removing this language from the regulation will impact visa issuance with respect to athletes, entertainers, and artists of distinguished merit and ability who seek to compete or perform in the United States.

2. Proposal as It Relates to B–1 in Lieu of H Nonimmigrant Visas

Following elimination of the two outdated and misleading sentences from the regulation, there will be less confusion about whether the Department might permit B visa issuance for aliens seeking to engage in local employment, including labor appropriately classified as H–1B or H–3 activities. Employers, foreign workers, immigration attorneys, or others may have erroneously believed that such activity has been permissible for B–1 nonimmigrant visa issuance, in some cases, under a visa policy referred to as the B–1 in lieu of H policy. Agency guidance to consular officers on this policy, currently in 9 FAM 402.2–5(F),[22] will be withdrawn if the rule is finalized. Like the confusing and outdated regulatory language described above, the Department also seeks to terminate the B–1 in lieu of H policy, for reasons of law and policy. Eliminating the regulatory language described above and eliminating the FAM guidance supporting the B–1 in lieu of H policy will make clear that foreign workers seeking to engage in local employment or labor for hire must follow the procedural requirements enacted by Congress to protect U.S. workers. Temporary visits for business activities that are consistent with *Matter of Hira* will still be permissible purposes for B–1 visa issuance under this proposal. Aliens seeking to engage in such business activities will qualify for B–1 visa classification if their purpose of travel is consistent with the B–1 visa classification, irrespective of whether the applicant might qualify for an H visa. The Department believes this clarification will strengthen the integrity of the B–1 program and better align its regulation and guidance for consular officers with the statutory framework, administrative case law, and visa policy.

Under INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B), aliens coming to the United States to perform skilled or unskilled labor are not eligible for B–1 nonimmigrant classification. The Senate Report accompanying the Immigration and Nationality Act of 1952 (S. Rept. No. 1515), p. 525, cited *Karnuth* v. *United States,* 279 U.S. 231 (1929), to indicate that ''visitor for business'' does not include a visitor coming to perform labor for hire, especially given the congressional intent of the 1924 Act ''to protect American labor against the influx of foreign labor.'' *Id.* at 243–44. In addition to carrying over that principle from the Immigration Act of 1924, Congress in the 1952 Act added a new nonimmigrant visa classification, the H classification, designed for temporary foreign workers to meet the needs of employers in the United States. *See* INA section 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H). As noted above, in 1952, the H nonimmigrant classification was divided between ''aliens of distinguished merit and ability'' coming temporarily to the United States to ''perform temporary services of an exceptional nature requiring such merit and ability'' (H–1); other skilled or unskilled aliens to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in the United States (H–2); and trainees (H–3). All three H nonimmigrant sub-categories required a petition approved by the former Immigration and Naturalization Service (INS) to establish eligibility for the

of M—, 2 I. & N. Dec. 240 (BIA 1945), but the reasoning leading to that conclusion is opaque.

[21] 9 FAM 402.2–5(A) paragraph b explains the facts of *Matter of Hira* and its relevance to consular officers' determination of appropriate B–1 activity. It explains that in some situations, it can be difficult to distinguish between appropriate B–1 business activities, and activities that constitute skilled or unskilled labor in the United States that are not appropriate on B status. *Hira* involved a tailor measuring customers in the United States for suits to be manufactured and shipped from outside the United States. The decision stated that this was an appropriate B–1 activity, because the principal place of business and the actual place of accrual of profits, if any, was in the foreign country.

[22] See 9 FAM 402.2, available at *https://fam.state.gov/FAM/09FAM/09FAM040202.html* (last accessed October 14, 2020).

classification, and a labor market test was required for the H–2 nonimmigrant classification. The B–1 in lieu of H policy arose in the context of this framework in the 1960s.

The B–1 in lieu of H policy was adopted jointly by the INS and the Department's Visa Office in the 1960s. *See The Proposed Restriction of the ''B–1 in Lieu of H–1'' Concept,* Bernsen, 70 No. 35 Interpreter Releases 1189, Sept. 13, 1993. The purpose was to reduce unnecessary paperwork and facilitate international travel by eliminating the requirement for filing H–1 and H–3 petitions for cases within the purview of the concept, so that the alien could apply for a visa without any intervening INS action, in a one-step procedure.[23] *Id.*

a. B–1 in Lieu of H–1B

In proposing elimination of B–1 in lieu of H, which is related to the two sentences proposed for elimination, the Department finds that visa policy has lagged behind changes to the INA since the policy was first adopted. The Department's past failure to align its regulations with the statutory framework has created confusion about the limits of permissible activity on a B visa. Section 205 of IMMACT 90 amended the H–1B nonimmigrant classification in a number of respects. Among other amendments, it (1) imposed a numerical limitation on this classification for the first time; (2) modified the standard generally applicable to aliens seeking admission under the classification from ''distinguished merit and ability'' to ''specialty occupation'' as defined in INA section 214(i)(1); and (3) instituted a labor condition application requirement. *See* INA section 214(g)(1)(A) and section 212(n), 8 U.S.C. 1184(g)(1)(A) and 1182(n). The amendments made by section 205 expressed Congress' intent to limit availability of the H–1B visa classification in certain respects. MATINA further amended the H–1B category to include certain fashion models, placed conditions on eligibility for doctors, and narrowed the attestation requirements for labor condition applications.

While IMMACT 90 did not alter the language of INA section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B), the changes to the H–1B classification and the legislative history indicate that Congress intended the B–1 classification to be applied narrowly after enactment. The Senate report describes the reasoning as follows: ''For example, the committee has taken note of, and relied upon, the reasoning of *Bricklayers and Allied Craftsmen* v. *Meese,* 616 F. Supp. 1387 (N.D. Cal. 1985), with regard to the proper scope of the B temporary visa category . . . the committee's action in expanding immigration rests on this understanding of the narrow scope of the B temporary visa category, and consequently, the narrow scope of any implementing operations, instructions, or regulations.'' [24]

After the passage of IMMACT 90, the Department and the INS began to question the appropriateness of continuing the B–1 in lieu of H policy. *See* 91 STATE 312100, reproduced in 68 No. 37 Interpreter Releases 1263, Sept. 30, 1991. The Department proposed to eliminate the B–1 in lieu of H policy in an NPRM published in the summer of 1993. 58 FR 40024–30 (July 26, 1993). INS also published an NPRM proposing the elimination of the B–1 in lieu of H policy in the autumn of 1993. 58 FR 58982–88 (Nov. 5, 1993). Neither agency finalized its rule, although interagency discussions continued. *See* 12 STATE 101466, reproduced at 89 No. 42 Interpreter Releases 2013 (Oct. 29, 2012) (''The B–1 in lieu of H–1B and H–3 guidance in 9 FAM 41.31 N11 is under review in an interagency process, but remains in effect until further notice.'')

While the Department endeavored to interpret its B–1 in lieu of H policy in a manner consistent with the statutory framework, including by limiting the policy to apply only to those cases that most clearly met the definition of ''business'' set forth in *Matter of Hira* and subsequent Board of Immigration Appeals cases, the resulting changes to the policy's parameters were not well publicized and the relevant regulations were never updated. Additionally, with the development of new technology since the introduction of the B–1 in lieu of H policy in the 1960s, including increased standardization of electronic salary deposits through direct deposit, the policy has become more subject to exploitation. For example, a company can more easily ''pay salaries'' from abroad that circumvent the local wage and hour laws where actual labor is performed when contracting local labor for hire in the United States, which would have been impermissible during the early days of the B–1 in lieu of H policy due to restrictions on place of salary payment. As a result of the confusing regulatory language, changes in immigration laws over the years, and technological advancements, the Department believes some stakeholders may have come to believe the B–1 in lieu of H policy permits issuance of B–1 visas for broad categories of skilled labor, notwithstanding the greater specificity in labor and employment-related visa classifications under the INA, as amended by IMMACT 90. In light of E.O. 13788, as well as the numerical restrictions in the H–1B category, requirements of the labor condition application, and revised definition of the H–1B category contained in IMMACT 90, the Department is compelled to eliminate the B–1 in lieu of H policy and end the confusion that has surrounded it.

Efforts to limit the application of the B–1 in lieu of H policy have had unintended consequences, and the continuation of the policy would not align with Administration policy. The requirements of the B–1 in lieu of H policy outlined in 9 FAM 402.2–5(F), derived from the reasoning in *Matter of Hira,* focus on the physical location of the employer's office and the source of the worker's remuneration for services performed in the United States both being abroad. The Board of Immigration Appeals identified these factors, among others, as dispositive of whether the work in question was impermissible local employment or permissible business that is a necessary incident to international trade or commerce. The focus on these factors alone might lead to an incorrect conclusion that skilled labor is permissible in the B–1 classification, if these factors are met. To the contrary, the Department does not believe that a strategically structured contract between a U.S.

[23] In a version of the FAM available from March 31, 1980, 9 FAM 41.25, note 4.2(c) provided that ''[a]n alien already employed abroad coming to undertake training who would be classifiable H–3 but who will continue to receive a salary from the foreign employer and will receive no salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to his temporary stay'' is classifiable B–1. The H–3 petition process had been criticized for being too slow. *See* Nonimmigrant Business Visas and Adjustment of Status; Hearing before the Subcommittee on Immigration and Refugee Policy, Senate Judiciary Committee; Serial No. J–97–86, December 11, 1981; Preference System; Hearing before the Subcommittee on Immigration and Refugee Policy, Senate Judiciary Committee; Serial No. J–97–83, November 23, 1981. By March 31, 1980, Department guidance referenced B in lieu of H–3.

[24] Immigration Act of 1989; S. Rept. 101–55 on S. 358, June 19, 1989 *Congressional Reports: Doc. No. 15- June 19. 1989,* page 20. In the *Bricklayers* case, the Court struck down an INS operating instruction allowing admission as a business visitor of an alien coming to install, service, or repair commercial or industrial equipment sold by a foreign vendor to a U.S. purchaser, holding that the instruction was contrary to the plain language of the INA. The Ninth Circuit granted a joint motion to limit the injunction only to aliens coming to perform building or construction work of the kind performed by members of the plaintiff union, after which the parties agreed to dismiss the case. The validity of the U.S. government's interpretation of INA section 101(a)(15)(B) as extending to other types of skilled labor was never addressed.

business and a foreign employer can provide an acceptable basis for foreign workers to seek B–1 visas to perform skilled labor in the United States. Such an interpretation would undermine the interests of U.S. workers, the intent of Congress, and the goals of E.O. 13788. For these reasons and the reasons stated above, the Department seeks to end this longstanding policy, remove the regulatory sentences supporting it, and eliminate guidance to consular officers reflecting the policy.

One example that may illuminate the implications of retaining the B–1 in lieu of H policy could be a U.S. architecture firm seeking protection from rising labor costs in the United States. The firm might believe it could lay off its U.S. architects and contract for the same professional architectural services to be provided by a foreign architecture firm. If the foreign firm sought H–1B visas for its architects, it would be required to pay the prevailing wage for architects in the area of intended employment in the United States, presumably the same wage the U.S. architects had been paid, and meet the other requirements enacted by Congress to protect U.S. workers. But under the B–1 in lieu of H policy, the foreign architects could ostensibly seek B–1 visas and travel to the United States to fill a temporary need for architecture services, so long as they retained a residence in the foreign country and continued to receive a salary, perhaps significantly lower than what is customary for U.S. architects, dispersed abroad by the foreign firm (or under the auspices of a foreign parent or subsidiary). Under the Department's guidance as expressed in 9 FAM 402.2–5(F), visas could be issued for multiple architects planning temporary work in the United States, in certain situations; however, a foreign employer may succeed in undermining U.S. immigration law and policy by rotating architects between the United States and the foreign country to effectively fill the position of one U.S. architect at a significantly lower cost. If the architects who intended to perform skilled labor were ''of distinguished merit and ability . . . seeking to perform [temporary architectural services] of an exceptional nature requiring such merit and ability,'' one might argue the current regulatory language suggests this type of labor is a permissible basis for B–1 nonimmigrant visa issuance. As this potential outcome is harmful to U.S. workers and contrary to administration policy as expressed in E.O. 13788, and as expressed in longstanding FAM guidance to consular officers, the Department seeks to eliminate guidance that could be misunderstood to imply that such an arrangement might be permissible.

If finalized, this proposal will eliminate any misconception that the B–1 in lieu of H policy provides an alternative avenue for aliens to enter the United States to perform skilled labor that allows, and potentially even encourages, aliens and their employers to circumvent the restrictions and requirements relating to the H nonimmigrant classification established by Congress to protect U.S. workers.[25] The proposed changes and the resulting transparency would reduce the impact of foreign labor on the U.S. workforce of aliens performing activities in a specialty occupation without the procedural protections attendant to the H–1B classification. Specifically, these procedural protections include the numerical cap on the H–1B category in INA section 214(g)(1), 8 U.S.C. 1184(g)(1), which limits the number of foreign workers permitted to compete with U.S. workers. There are no such limits on the number of workers who may qualify for a B–1 visa under the B–1 in lieu of H–1B policy. Similarly, the labor condition application requirement added to INA section 212(n), 8 U.S.C. 1182(n), by IMMACT 90 requires employers to make attestations regarding the wages and working conditions of H–1B nonimmigrants and to provide notification to U.S. workers to mitigate the potential adverse effects of importing foreign labor through the H–1B program. In contrast, the application process for a B–1 visa does not include similar procedural requirements to protect U.S. workers. Further, while Congress required H–1B employers to pay significant fees to fund assistance to the U.S. workforce as well as prevention and detection of fraud related to skilled labor, employers are not required to pay comparable fees to employ skilled workers under the B–1 in lieu of H policy. *See* INA sections 214(c)(9), (12), and 286(s), (v), 8 U.S.C. 1184(c)(9), (12), and 1356(s), (v). To the extent the current regulatory language suggests that U.S. employers may seek foreign workers in the B–1 classification to perform local employment or labor, absent the procedural protections for U.S. workers Congress enacted, this practice affords lesser protections than Congress intended for U.S. workers filling and seeking similar position. The Department proposes eliminating the B–1 in lieu of H policy for these reasons, for greater consistency with U.S. law and congressional intent, and in furtherance of the policy expressed in E.O. 13788, all of which aim to protect U.S. workers' economic interests.

To the extent any U.S. entities may claim its business model relied on the B–1 in lieu of H policy to pay foreign skilled workers at rates below prevailing wages, the Department would note that consular officers are the sole arbiters of visa eligibility and no one may justifiably assume that a visa will be issued to a particular alien or for a particular purpose, prior to adjudication. Any such businesses could face costs, potentially significant costs, in conforming their hiring practices to the statutory scheme without the benefit of the B–1 in lieu of H policy. To mitigate harm that might follow immediate implementation, B–1 visas that are valid when this proposal is enacted will not be revoked on the basis of this policy change, and employers will be able to continue to benefit from the services of skilled workers appropriately issued B–1 visas under the guidance at 9 FAM 402.2–5(F) in place at the time of visa issuance, subject to the independent reviews by DHS at ports of entry. The Department hereby notifies U.S. businesses that following the effective date of a final rule, they no longer will be able to reference the B in lieu of H policy to defend obtaining services in a specialty occupation from workers being paid at a rate below prevailing wage. The Department has determined that policy must be eliminated to better protect U.S. workers' economic interests and strengthen the integrity of the B–1 visa program, in addition to conforming to current statutory requirements.

Setting aside legal considerations, the Department believes that the proposal is justified as a matter of policy, notwithstanding any possible reliance by U.S. entities and other costs to businesses of aligning the hiring of skilled foreign workers to the requirements of the INA, or alternatively of hiring U.S. workers, because of the

[25] The legal proceedings against Indian information technology company Infosys Limited provides one public example outside the context of the B–1 in lieu of H policy of the strong financial incentives for aliens and their employers to misuse the B–1 visa to circumvent the requirements of the H nonimmigrant classification. On December 17, 2019, the California Attorney General announced an $800,000 settlement against Infosys Limited to resolve allegations that approximately 500 Infosys employees worked in California on Infosys-sponsored B–1 visas rather than H–1B visas. According to the Attorney General's statement, the misclassification resulted in Infosys avoiding California payroll taxes and paying workers lower wages. See *https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-800000-settlement-against-infosys* (Last accessed December 26, 2019). The New York Attorney General announced a $1 million settlement with Infosys Corporation in June 2017 based on similar claims. See *https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-settlement-infosys-failing-follow-us-visa-requirements* (Last accessed December 26, 2019).

benefits that this proposed rule provides U.S. workers, which could be substantial. In calculating these benefits, the Department assumes that the wages paid to workers in the United States in B–1 status would generally be the minimum legally permissible, or the minimum wage in the work location. Similarly, due to lack of more specific data, the Department assumes the salary paid either to H–1B workers or to U.S. workers in specialty occupations generally would be the prevailing wage calculated by the Department of Labor.[26] The gap between this wage and the local minimum wage could be significant; for example, an employer in Silicon Valley could legally pay a computer network architect in B–1 status the minimum wage of $15 per hour, whereas the same employer would be required to pay a computer network architect in H–1B status the prevailing wage of at least $40.88 per hour. Presumably, the same employer would need to offer wages at least as high as the prevailing wage in order to secure the services of a qualified U.S. worker. The gap is even larger in Austin, Texas where the minimum wage is $7.50 per hour and the prevailing wage for a computer network architect is at least $37.15 per hour.[27] In enacting IMMACT 90 and requiring employers to pay the prevailing wage for skilled foreign workers, Congress determined that the gains of this policy to U.S. workers, who would see greater employment opportunities and higher wages without the downward pressure from underpaid foreign workers, outweighed the associated costs to U.S. employers. The Department proposes to remove the outdated regulatory language supporting the B–1 in lieu of H policy that erodes the protections for U.S. workers Congress sought to enact.

b. B–1 in Lieu of H–3

Likewise, and also taking into account E.O. 13788, the Department proposes to eliminate the B–1 in lieu of H–3 policy.[28] In addition to limiting the H–1B program, IMMACT 90 limited the H–3 program to exclude training programs ''intended primarily to provide productive employment.'' The H–3 petition process for trainees requires an immigration officer to evaluate whether a training program complies with this limitation and with applicable regulations, which limit the total time of a training program to two years and contains explicit protections for U.S. workers. Among other requirements, petitioners must explain why the training is required, demonstrate that the training is not available in the beneficiary's country, indicate how the training will benefit the beneficiary in pursuing a career abroad, identify the source of any remuneration the trainee will receive, and describe any benefit the petitioner will obtain by providing the training. *See* 8 CFR 214.2(h)(7).

As explained in the final rule establishing H–3 regulatory requirements, 55 FR 2602, 2618 (Jan. 26, 1990), ''[t]oo often, petitioners who cannot obtain H–1 or H–2B classification for workers will submit petitions for such workers under the H–3 classification with the intention of employing them under the guise of a training program.'' The aforementioned final rule was written before the enactment of IMMACT 90, which further restricted the H–3 classification to training programs that are ''not designed primarily to provide productive employment.'' IMMACT 90 section 205(d). While the regulatory requirements and statutory limitations discussed above prevented some of this abuse in the H–3 category, some employers misused the B–1 in lieu H policy to bypass the important protections built into the H–3 classification and described above. The Department's proposal ending the use of B–1 visas for these training programs in the future, even for trainings of a short duration, will assist in preventing abuse of the U.S. immigration system and protecting U.S. workers' economic interests.

For these reasons, the Department proposes to eliminate the referenced specific language from 22 CFR 41.31(b)(1), the outdated regulatory language that supported the B–1 in lieu of H–3 policy, and the related guidance at 9 FAM 402.2–5(F).

[26] For H–1B workers, the prevailing wage calculated by DOL is the minimum legally permissible wage. INA section 212(n)(1)(A)(i)(II). The Department of Labor's website explains that the prevailing wage rate is the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. See *https://flag.dol.gov/programs/prevailingwages,* last accessed January 22, 2020. This is the best available measure of the salary costs to employers of hiring a U.S. worker.

[27] *https://www.minimum-wage.org/,* last accessed November 4, 2019; *https://flcdatacenter.com,* last accessed November 4, 2019. Note that the prevailing wage cited is for workers in a specialty occupation with the lowest level of experience; employers are required to pay experienced H–1B workers a higher prevailing wage.

[28] The B–1 in lieu of H policy, as it relates to H–3s, has historically applied to only H–3 trainees, therefore the discussion of H–3 is specific to this type of H–3 nonimmigrant.

III. Regulatory Findings and Impact Statements

A. Administrative Procedure Act

The Department is providing 60 days for public comment on this proposed rule's elimination of two sentences in the regulation and the B in lieu of H policy.

B. Regulatory Flexibility Act/Executive Order 13272 (Small Business)

This proposed rule only regulates the category of individuals who qualify for B nonimmigrant visas. Businesses have no petition component for B visas and are outside the zone of interest of this rulemaking because the RFA deals with direct economic impacts on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (''UMRA'') is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final 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.

This proposed rule does not exceed the $100 million expenditure in any one year when adjusted for inflation ($163 million in 2018 dollars), and this rulemaking does not contain such mandates. The requirements of Title II of the Act, therefore, do not apply, and the Department has not prepared a statement under the Act.

D. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Department has reviewed this proposal to ensure consistency with those requirements. The Department has not identified any available regulatory alternative to this proposal that would meet the Department's policy of rigorously interpreting the relevant

provisions of the INA, including provisions governing entry into the United States of workers from abroad.

This proposed rule would not directly regulate U.S. entities but may have indirect fiscal effects on those entities that use the services of foreign workers in specialty occupations in the United States in B–1 classification. Aliens issued visas based on the B–1 in lieu of H policy must be paid by a foreign source and are thus generally employed by a foreign company.[29] However, the purpose of the travel is often to provide services in a specialty occupation for one or more U.S.-based clients. Generally, those U.S. entities might incur some additional costs if they instead seek U.S. workers to provide those services or, alternatively, seek H–1B or other classification for those foreign workers.

The Department estimates that this proposal will affect no more than 6,000 to 8,000 aliens per year, specifically aliens intending to provide services in a specialty occupation in the United States. Since February 22, 2017, the FAM has required consular officers to use a specific annotation on the face of any visa issued on the basis of the B–1 in lieu of H–1 or B–1 in lieu of H–3 policy. See 9 FAM 402.2–5(F). The Department searched annotations for Fiscal Years 2015 through 2019 using the currently required annotations and variations of B–1 in lieu of H and found the following numbers of annotated visas reflecting B–1 in lieu of H–1 or H–3: FY 2015: 6,323; FY 2016: 5,739; FY 2017: 6,287; FY 2018: 6,681; FY 2019: 7,940. Because the annotation has been required since February 2017, data collected on or after that date is more reliable than data for earlier periods. It is likely that data for earlier periods understated the number of visas issued on the basis of these policies, so we estimate annual visa issuance under the B–1 in lieu of H policy in some years could have been as high as 8,000. For purposes of providing baseline information about potential costs associated with this proposal, the Department therefore uses the upper estimate of 8,000. This is likely an overestimate because some aliens who received a B–1 visa under the B–1 in lieu of H policy would still qualify for B–1 visas. However, the assessment of their qualification for the B–1 visa classification would not take into consideration whether they would qualify for an H visa, but rather whether the B–1 visa classification is appropriate for other reasons, like adherence to the *Hira* standards.

The Department estimates that up to 28 percent of the approximately 8,000 annual B–1 visa issuances under the B–1 in lieu of H policy were to aliens who applied for a visa to perform services in a specialty occupation for a small entity in the United States. This estimate is based on the Department's analysis of a sample of 375 of the visa applications that resulted in visa issuance under the B–1 in lieu of H policy.[30] To determine whether the alien intended to perform services for a small U.S. entity, the Department analyzed the ''U.S. Point of Contact'' field on submitted DS–160 applications, the most relevant available information. The Department does not collect data on the legal name of the entity in the United States using the services to be provided by an alien applying for a B–1 visa.[31] This analysis showed that a maximum of 106 aliens, or 28.27% of the sample, listed a U.S. Point of Contact that was a small entity, as defined by the Small Business Administration. This includes 50 applications listing a U.S. Point of Contact about which the Department was unable to find sufficient information to determine whether the enterprise is small; in order to capture the maximum possible impact on small entities, the Department considered all 50 entities with insufficient information to be small entities.

The Department assumed that the up to 8,000 aliens benefitting from the B–1 in lieu of H policy provided services to a maximum of 8,000 distinct U.S. entities, though the exact number of distinct entities potentially indirectly affected by this proposal is unknown due to limited data availability, and because some aliens previously issued a B–1 visa under the B–1 in lieu of H policy may continue to qualify for the B–1 visa classification after termination of the policy. Based on the analysis described above, the Department estimates that a maximum of 2,262 (28.27% of 8,000) distinct small entities could be indirectly affected by this proposal.

U.S. entities seeking services in a specialty occupation will no longer be able to acquire those services from aliens in the United States in B–1 classification pursuant to the B–1 in lieu of H policy. Some, but not all, of those services could be performed by individuals in B–1 status, even after termination of the B–1 in lieu of H policy. Otherwise, U.S. entities could hire U.S. workers. Or, if relevant labor-related conditions were met, such entities could seek qualified foreign workers in H–1B status to perform the needed services.

In light of the uncertainty and lengthy wait time to secure H–1B status for a foreign worker, the Department assesses that an H–1B is not likely to be a viable option for many U.S. entities seeking an alien to perform services in a specialty occupation that were previously performed by an alien in B–1 status. Rather, the Department assesses that U.S. entities indirectly affected by this proposal will likely hire U.S. workers to perform required services in a specialty occupation previously provided by aliens in B–1 classification. For those H–1B petitions that are selected, approval is not guaranteed. For example, approval would require that the U.S. entity have the employer-employee relationship with the alien that is required for H–1B status.[32] Even those entities whose petitions are selected in the lottery and approved face a timeline much longer than the timeline for securing a B–1 visa under the B–1 in lieu of H policy. To begin, the employer must wait until the start of the next fiscal year for the employee to start work and, if the early April deadline for entering the lottery has already passed, the employee's start date will be delayed at least until the start of the following fiscal year. If a particular petition is not selected in the lottery, the employer must wait at least another year for the employee to start work.

Due to the labor-related requirements, uncertainty of selection under the numerical cap on the H–1B classification, the long timeline for H–1B adjudication, and the significant

[29] The Department's guidance on the B–1 in lieu of H policy at 9 FAM 402.2–5(F) prohibits B–1 visa issuance if the applicant will receive any salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to the alien's temporary stay. For purposes of this Section, it is essential that the remuneration or source of income for services performed in the United States continue to be provided by the business entity located abroad.

[30] From the 14,621 total visa applications approved under the B–1 in lieu of H policy in fiscal years 2018 and 2019 combined, the Department randomly selected 375. That sample size was selected after the Department computed that a sample size of 374 would provide a 95% confidence level with 5% error.

[31] As noted above, under the Department's guidance at 9 FAM 402.2–5(F), aliens issued visas based on the B–1 in lieu of H policy must be paid by a foreign source and are thus generally employed by a foreign company. Thus, while the DS–160 application contains a field for ''Present Employer or School Name,'' this field is not useful for determining the U.S. entity that will use the alien's services in the United States, which could be, for example, a parent, subsidiary, client, supplier, or business partner of the foreign employer.

[32] 8 CFR 214.2(h)(4)(ii). In contrast, under the Department's guidance at under the Department's guidance at 9 FAM 402.2–5(F), aliens issued visas based on the B–1 in lieu of H policy must be paid by a foreign source and are thus generally employed by a foreign company.

paperwork and costs required to petition for the H–1B classification, the Department anticipates that the H–1B classification will not be a viable alternative for many U.S. entities that are currently able to obtain the services of skilled workers under the B–1 in lieu of H policy. Notwithstanding, the Department seeks to provide for informational purposes baseline data about the potential costs, to aliens and/or U.S. entities using the services of such aliens, of seeking H–1B visas.

The Department recognizes that the costs associated with the H–1B visa are higher than those associated with a B–1 visa. *See* Chart 1 below for a comparison of common costs. The Department notes the various costs associated with the H–1B and B–1 visas may be paid by different parties and thus are not directly comparable; for example, the costs associated with the nonimmigrant visa application listed in the first two rows of the chart may be paid by the alien, a foreign employer (in the case of a B visa application), or a U.S. employer (in the case of an H–1B visa application).

CHART 1

Cost type	Cost required for H–1B	Cost required for B (or "No" if not required for B)
Nonimmigrant visa application processing fee (non-refundable)	$190	$160.
Estimated cost of time required to complete nonimmigrant visa application [33].	$51.11	$51.11.
Filing an I–129, Petition for Nonimmigrant Worker	$460 *	No.
The American Competitive and Workforce Improvement Act fee (authorized under Sec. 414(c), Division C, of Pub. L. 105–277 for certain H–1B petitioners).	$1500 (for certain petitioners with more than 25 employees). $750 (for certain petitioners with 25 or fewer employees) *.	No.
Fraud Prevention and Detection Fee (authorized under Sec. 426(a), Division J, of Pub. L. 108–447 for employers seeking initial H–1B nonimmigrant status for a foreign worker).	$500 *	No.
Fee under Public Law 114–113 (temporarily authorized until September 30, 2025 under Sec. 411(b) of Pub. L. 114–113 for H–1B petitioners that employ 50 or more employees in the United States if more than 50 percent of these employees are in H–1B, L–1A or L–1B nonimmigrant status).	$4,000 *	No.
Estimated cost associated with completing Form I–129 [34]	$239.80 *	No.
Estimated cost of time required to complete H–1B petition	$220.89 *	No.
Visa reciprocity fees charged by the Department of State (authorized under INA § 281, 8 U.S.C. 1351).	Depending on nationality of applicant.	Depending on nationality of applicant.
Minimum Total Costs	$2,411.80–$9,311.80	$211.11.

An asterisk (*) indicates that the cost is generally paid by a U.S. entity (the H–1B petitioner), which is not regulated by this proposal, but which the Department includes for informational purposes.

The Department estimates the average time needed to complete and submit a DS–160, Online Application for Nonimmigrant Visa, is the same for B and H nonimmigrant visa applicants, and therefore there is no additional time burden to visa applicants under this proposal.[35] The Department estimates that the average additional time U.S. petitioners expend on the H–1 visa process, as compared to what foreign employers spend on the B–1 visa process, is 6.384 hours. This is based on an estimate that completing the I–129, Petition for Nonimmigrant Worker and associated supplements related to the H classification (according to the DHS supporting statement for the form) would take approximately 5.384 hours and one hour for the Department of Labor's Labor Certification Application, Form 9035/9035E.[36] Based on the weighted average hourly rate used by DHS of $34.84, the average cost of the time required to complete an H–1B petition is $220.89. No petition is required for B visas. Additionally, according to the Small Business Administration, over 90 percent of H–1B applicants utilize attorneys at fees of $5000–$10,000. (See email on file with Visa Office.)

As discussed above, Congress created certain requirements in the H–1B program to protect the economic interests of U.S. workers by ensuring that wages and working conditions of H–1B workers are at least as desirable as those for comparable U.S. workers. By eliminating the ''B–1 in lieu of H'' policy and requiring employers to use the H–1B process to obtain skilled foreign workers,[37] this regulation will impose upon those employers the costs of adhering to those protections, or alternatively of hiring U.S. workers. The cost associated with hiring a U.S. worker include paying the employee the

[33] *See* OMB Control Number 1405–0182, available at *https://www.reginfo.gov/public/do/PRAMain.*

[34] In its Supporting Statement for I–129, Petition for Nonimmigrant Worker, OMB Control No. 1615–0009, USCIS included the following paragraph about the costs of completing Form I–129: ''USCIS estimates that costs for form preparation, legal services, translations, required consultations, document search and generation, and postage to mail the completed package will vary widely. USCIS estimates that petitioners will pay an average of $239.80 per response.''

[35] *See* OMB Control Number 1405–0182, available at *https://www.reginfo.gov/public/do/PRAMain.*

[36] *See* OMB Control Number 1615–0009 (Petition for Nonimmigrant Worker); OMB Control Number 1205–0332 (Labor Certification Application), available at *https://www.reginfo.gov/public/do/PRAMain.*

[37] The Department recognizes that some U.S. entities seeking services from aliens in the United States in B–1 status under the B–1 in lieu of H policy may alternatively seek visa classifications other than B or H, depending on the circumstances of the proposed employment in the United States. Most employment-based nonimmigrant visa classifications have narrow eligibility requirements likely inapplicable to most aliens performing services in B–1 visa classification. For example, it is possible some aliens who qualify for B visas under the B–1 in lieu of H policy may qualify for L nonimmigrant visas. An alien applying for a L nonimmigrant visa would need to establish, among other eligibility requirements, that he or she has, within three years preceding the time of his or her application for admission into the United States, been employed abroad continuously for one year by a firm, corporation, or other legal entity or parent, branch, affiliate, or subsidiary thereof, and seeks to enter the United States temporarily in order to render services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge. *See* INA section 101(a)(15)(L), 8 U.S.C. 1101(a)(15)(L); 22 CFR 21.54. L nonimmigrant visas also require petitions, and fees and costs that exceed the costs associated with B nonimmigrant visas.

prevailing wage and providing other common benefits such as health insurance, worker's compensation, and unemployment insurance. The difference between the costs incurred by employers paying the minimum wage to nonimmigrant workers in B–1 classification and the costs incurred under this proposal vary significantly depending on the proposed work location. Returning to the two examples detailed in section (II)(D)(2)(a) above, and applying the wage rate benefit multiplier of 1.46 to account for benefits provided, the increased cost of securing the services of U.S. worker as a computer network architect would be approximately $37.78 per hour in Silicon Valley and approximately $42.39 per hour in Austin, Texas. If all U.S. entities affected by this proposal seek a U.S. worker to provide services as an entry level computer network architect in Silicon Valley, the total additional annual cost of this proposal to U.S. employers would be approximately $604,480,000.[38] If all U.S. entities seek such a worker in Austin, the total additional annual cost of this proposal to U.S. employers would rise to $678,240,000.[39]

If all U.S. entities affected by this proposal do not seek another worker but rather suffer lost productivity comparable to the wages that would have been paid to a worker in B–1 status making the federal minimum wage of $7.25 per hour, the total additional annual cost of this proposal would be $116,000,000.[40] This analysis assumes that every worker admitted in B–1 status pursuant to a visa issued under the B–1 in lieu of H policy was admitted for one year, the maximum period permitted under 8 CFR 214.2(b)(1), and worked a normal U.S. work schedule of 40 hours per week for 50 weeks during that time. Anecdotal evidence indicates that the total hours worked by aliens admitted in this category is likely much less, but the Department does not have reliable data on typical admission periods or work weeks for aliens admitted in this category and includes the maximum possible cost for full transparency in keeping with the purpose of E.O. 12866. The Department invites comment on this analysis and the underlying assumptions.

[38] This is calculated from $37.78 per hour in Silicon Valley, California (includes 1.46 wage multiplier) × 2,000 hours per year × 8,000 workers.

[39] This is calculated from $42.39 per hour in Austin, Texas (includes 1.46 wage multiplier) × 2,000 hours per year × 8,000 workers.

[40] This is calculated from $7.25 per hour (federal minimum wage) × 2,000 hours per year × 8,000 workers.

The Department recognizes that employers may have to offer higher wages, greater benefits, or improved working conditions in order to find U.S. workers to complete the work previously done by aliens benefitting from the B–1 in lieu of H policy. Finally, some employers may forgo services in a specialty occupation that were previously provided by aliens in B–1 status, and may suffer lost productivity and profits as a result. However, the Department believes the benefits of this proposal outweigh those costs. To the extent U.S. entities may face increased costs, including those related to H–1B or other visa classification requirements, hiring U.S. workers, or forgone labor, the associated costs protect the economic interests of workers in the United States.[41]

The Department has also considered this proposed rule in light of Executive Order 13563 and affirms that this regulation is consistent with the guidance therein.

E. Executive Orders 12372 and 13132 (Federalism)

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. This proposed rule does not alter the standards and procedures for the Department's consideration of requests for waiver recommendations for waiver requests made by a State Department of Public Health, or its equivalent. Nor will the rule have federalism implications warranting the application of Executive Orders 12372 and 13132.

F. Executive Order 12988 (Civil Justice Reform)

The Department has reviewed the regulation in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

[41] This proposal advances the policy of the executive branch to ''buy American and hire American.'' *See* Section 2 of E.O. 13788, 82 FR 18837 (Buy American and Hire American). Section 3 of E.O. 13788 states the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad in order to create higher wages and employment rates for workers in the United States, and to protect their economic interests. *Id.* One potential benefit of this rule could be the creation of higher wages and employment rates for workers in the United States because employers that previously engaged the services of aliens admitted under the B–1 classification who are not subject to the wage and working conditions requirements and other protections under the H–1B classification may seek employees in the H–1B classification who are subject to those requirements, or may hire U.S. workers. *Id.* As described above, Congress required the current costs of seeking workers in the H–1B classification with the enactment of IMMACT 90, MATINA, and ACWIA.

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

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

H. Paperwork Reduction Act

This proposed rule does not impose any new information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. chapter 35. The Department does not anticipate that there would be an increase in paperwork if this proposal is finalized. The Department acknowledges that, as discussed above in Section II(d)(2), one of the reasons behind the creation of the B–1 in lieu of H policy in the 1960's was to reduce unnecessary paperwork. However, because of the changes to the statute since the 1960s, an alien can no longer qualify for an H–1 visa on the basis of ''distinguished merit and ability,'' and the Department no longer considers the paperwork required for an alien to perform temporary labor in the United States under the current statutory scheme unnecessary in any circumstances. Given the numerical cap on H–1B visas, the Department does not anticipate an increase in respondents using existing approved information collections. It is possible that this regulation would shift application burden to the H–1B lottery and application process, but the Department notes that it is too speculative at this point to pursue amendments to any information collections under the Paperwork Reduction Act. Similarly, to the extent employers are likely to hire U.S. workers to replace some B–1 in lieu of H workers, the Department does not anticipate that would require any new information collections.

List of Subjects in 22 CFR Part 41

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Foreign relations, Students, Visas.

Text of the Proposed Rule

Accordingly, for the reasons stated in the preamble, the Department proposes to amend 22 CFR part 41 as follows:

PART 41—VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

■ 1. The authority citation for part 41 continues to read as follows:

Authority: 8 U.S.C. 1101; 1102; 1104; 1182; 1184; 1185 note (section 7209 of Pub. L. 108–458, as amended by section 546 of Pub. L. 109–295); 1323; 1361; 2651a.

■ 2. Revise § 41.31(b)(1) to read as follows:

§ 41.31 Temporary visitors for business or pleasure.

* * * * *

(b) * * *

(1) The term ''business,'' as used in INA 101(a)(15)(B), refers to conventions, conferences, consultations and other legitimate activities of a commercial or professional nature. It does not include local employment or labor for hire. For the purposes of this section building or construction work, whether on-site or in plant, shall be deemed to constitute purely local employment or labor for hire; provided that the supervision or training of others engaged in building or construction work (but not the actual performance of any such building or construction work) shall not be deemed to constitute purely local employment or labor for hire if the alien is otherwise qualified as a B–1 nonimmigrant.

* * * * *

Carl C. Risch,

Assistant Secretary, Consular Affairs, Department of State.

[FR Doc. 2020–21975 Filed 10–20–20; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 27

[WT Docket No. 19–348; FCC 20–138; FRS 17121]

Facilitating Shared Use in the 3100–3550 MHz Band

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes rules to govern commercial wireless operations in the 3.45–3.55 GHz band. It proposes to add a new primary allocation for fixed and mobile (except aeronautical mobile) services and to adopt technical, licensing, and competitive bidding rules governing licenses in this band. The Commission proposes and seeks comment on coexistence and coordination between new commercial wireless licensees and incumbent federal radiolocation and radionavigation operations, which will continue to operate on a limited basis, but which will remain co-primary with commercial operations. The Commission also proposes and seeks comment on relocation and sunset procedures for incumbent non-federal, secondary operations, which are being cleared from the band.

DATES: Interested parties may file comments on or before November 20, 2020; and reply comments on or before December 7, 2020.

ADDRESSES: You may submit comments, identified by WT Docket No. 19–348, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/* in docket number WT Docket No. 19–348. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy,* Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

FOR FURTHER INFORMATION CONTACT: Joyce Jones, Wireless Telecommunications Bureau, Mobility Division, (202) 418–1327 or *joyce.jones@fcc.gov,* or Ira Keltz, Office of Engineering and Technology, (202) 418–0616 or *ira.keltz@fcc.gov.* For information regarding the PRA information collection requirements, contact Cathy Williams, Office of Managing Director, at 202–418–2918 or *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the *Further Notice of Proposed Rulemaking* (FNPRM) in WT Docket No. 19–348, FCC 20–138, adopted September 30, 2020, and released October 2, 2020. The full text of the FNPRM is available for public inspection at the following internet address: *https://docs.fcc.gov/public/attachments/FCC-20-138A1.pdf.* Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice) or 202–418–0432 (TTY).

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before the dates indicated on the first page of this document.

Ex Parte Rules

This proceeding shall continue to be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules (47 CFR 1.1200). Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments