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DEPARTMENT OF HOMELAND SECURITY

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[CIS No. 2680–21; Docket No: USCIS 2020–0019]

RIN 1615–AC61

Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H–1B Petitions; Delay of Effective Date

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

ACTION: Final rule; delay of effective date; request for comments.

SUMMARY: On January 8, 2021, DHS published a final rule, *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H–1B Petitions* (H–1B Selection Final Rule) amending regulations governing the process by which U.S. Citizenship and Immigration Services (USCIS) selects H–1B registrations for the filing of H–1B cap-subject petitions (or H–1B petitions for any year in which the registration requirement is suspended), by generally first selecting registrations based on the highest Occupational Employment Statistics (OES) prevailing wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code and area(s) of intended employment. The Department is delaying the rule's effective date until December 31, 2021, because USCIS will not have adequate time to complete system development, thoroughly test the modifications, train staff, and conduct public outreach needed to ensure an effective and orderly implementation of the H–1B Selection Final Rule by the time the initial registration period will be open for the upcoming fiscal year (FY) 2022 H–1B cap season. During the delay, while USCIS works through the issues associated with implementation, DHS leadership will also evaluate the January 8th rule and its associated policies, as is typical of agencies at the beginning of a new Administration.

DATES: As of February 8, 2021, the effective date of the final rule published January 8, 2021, at 86 FR 1676, is delayed to December 31, 2021. DHS is accepting public comments on this delay until March 10, 2021.

ADDRESSES: You may submit comments on the entirety of this final rule package, identified by DHS Docket No. USCIS–2020–0019, through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the website instructions for submitting comments. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on this final rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. Due to COVID–19, USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using *http://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at 240–721–3000 for alternate instructions.

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

SUPPLEMENTARY INFORMATION:

I. Public Participation

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

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS–2020–0019 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at *http://www.regulations.gov.*

Docket: For access to the docket and to read background documents or comments received, go to *http://www.regulations.gov,* referencing DHS Docket No. USCIS–2020–0019. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Background

On January 8, 2021, DHS published the H–1B Selection Final Rule, *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H–1B Petitions,* amending regulations governing the process by which USCIS selects H–1B registrations for the filing of H–1B cap-subject petitions (or H–1B petitions for any year in which the registration requirement is suspended). Under the rule, USCIS would generally select H–1B registrations based on proffered wages and corresponding prevailing wage levels. Specifically, USCIS would first select registrations with proffered wages that meet or exceed the highest OES prevailing wage level for the relevant SOC code and area(s) of intended employment.[1]

The H–1B Selection Final Rule is currently scheduled to go into effect on March 9, 2021. As discussed in greater detail below, after further consideration, USCIS has determined that the final rule's 60-day effective date does not afford USCIS sufficient time between the publication of the rule on January 8, 2021, and March 9, 2021, to complete the development and thoroughly test the modifications needed in the H–1B registration system to sufficiently minimize technical risks that result from a compressed testing schedule, as well as to amend policies and train staff to ensure the effective and orderly administration of the cap under the H–1B Selection Final Rule. By this action, DHS is delaying the H–1B Selection Final Rule until December 31, 2021, and is applying the regulations currently in place (random selection) to the initial registration period, and, most likely, any subsequent registration period for the FY 2022 registration process.

DHS expects that delaying the rule to December 31, 2021, will provide USCIS sufficient time to develop, thoroughly test, and implement the modifications to the registration system and selection process and give stakeholders sufficient time to adjust to new procedures arising from the new rule. The publication of the final rule on January 8, 2021, finalized a new selection process requiring, from a technical standpoint, that a new algorithm be developed, thoroughly tested, and implemented in the form of an electronic registration tool. The publication date of the final rule only affords six weeks of development time, and less than two weeks to complete internal end-to-end testing and external performance testing with DHS OneNet, the DHS network. The selection logic is a fundamental part of the registration tool, and the H–1B Selection Final Rule created more complexity in the logic calculation by adding several versions of lotteries that must be developed, thoroughly tested and implemented. This additional complexity essentially requires a complete rebuilding of the registration tool that was developed for the FY 2021 selection process.[2] In light of these technical challenges, DHS now believes that there is not adequate time to develop and thoroughly test the new H–1B registration system, conduct training and provide outreach on such changes to the regulated public prior to the start of the FY22 initial registration period.[3]

As indicated below, DHS wants to ensure the orderly and efficient administration of the H–1B numerical allocations and wants to avoid disruption to the regulated public by affording itself sufficient time to fully modify and thoroughly test the changes to the H–1B registration system, minimize technical risks that result from a compressed testing schedule, and provide the regulated public enough time to become familiar with those changes to facilitate full compliance with the new regulatory requirements.

While DHS considered other alternatives, including a shorter term delay (such as a delay of 60 days, or a delay to the start of the next fiscal year, October 1, 2021), DHS believes that a longer delay is needed to avoid the confusion and disparate treatment of registrants that would result if a new rule took effect during the initial registration period, or a subsequent registration and selection period, for the FY 2022 numerical allocations, particularly if USCIS needs to open a subsequent registration period later this year to ensure full utilization of the FY 2022 numerical allocations. DHS cannot predict, with full certainty, the demand for H–1B visas for FY 2022 given the current state of the U.S. economy, the continued COVID–19 public health emergency, and efforts to address it in the United States and abroad. Thus, DHS cannot predict whether it will be necessary to continue to accept registrations after the initial registration period for the FY 2022 numerical allocations closes, or whether USCIS will need to reopen the H–1B registration period later in the 2021 calendar year to generate the number of H–1B cap petitions projected as needed to reach the FY 2022 numerical allocations. Should USCIS need to open a subsequent registration period and the H–1B Selection Final Rule is in effect at that time, that would mean that H–1B registrations for the same fiscal year would be selected under two different standards, thus causing confusion and disparate treatment among H–1B registrants for FY 2022. Further, if USCIS needed to select additional registrations after the H–1B Selection Final Rule takes effect, but must continue to select from among those submitted before the H–1B Selection Final Rule takes effect (*e.g.* submitted during the initial registration period), the submitted registrations would not contain the necessary data to make a wage level selection as such data would only be collected after the H–1B Selection Final Rule, and associated revisions to data collection, take effect. The H–1B Selection Final Rule does not have a mechanism whereby USCIS could request additional information from registrants in order to apply a new regulatory scheme. Furthermore, applying a new regulation to registrations submitted under the current regulations would lead to disparate treatment of registrants who submitted registrations during the same initial registration period and would

[1] 86 FR 1676. The H–1B Selection Final Rule was approved by Chad F. Wolf in his capacity as Acting Secretary of Homeland Security. DHS is aware that multiple courts have indicated or held that Mr. Wolf did not have valid authority to act, and, therefore, did not have authority to sign rules in that capacity. DHS also is aware that, following issuance of the rule, Peter T. Gaynor and Mr. Wolf took steps to ratify the H–1B Selection Final Rule. *See* DHS Delegation No. 23028, Delegation to the Under Secretary for Strategy, Policy, and Plans to Act on Final Rules, Regulations, and Other Matters (Jan. 12, 2021); Chad F. Wolf, Ratification (Jan. 14, 2021). By issuing this rule, DHS states no position on Mr. Gaynor's or Mr. Wolf's actions or authority.

[2] Development of the new system has been ongoing since publication of the final rule, however current estimates indicate that development work will not be complete before February 19, 2021. Testing of the system may commence upon completion of system development, which only leaves one to two weeks (depending on when the initial registration period opens), in a best case scenario, to test the system, identify any bugs, conduct additional development to resolve identified bugs, complete additional testing to ensure proper functionality, conduct internal training, and provide outreach to the public.

[3] The *Registration Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Cap-Subject Aliens Final Rule,* 84 FR 888 (Jan. 31, 2019), made clear that implementation of the registration tool requires significant development, testing and stakeholder outreach that cannot reasonably happen in a few weeks. As a result, DHS delayed implementation of the initial registration process for a full year to develop, test, and conduct stakeholder outreach. The H–1B Selection Final Rule would also benefit from a similar delay to develop, thoroughly test, and conduct stakeholder training on the modified registration tool, including training on identifying the wage level that should be used for selection. While there was an aspirational hope that the H–1B Selection Final Rule could be implemented in time for the FY 22 selection process, that hope has proven misguided.

have the potential to disturb their reliance interests.

After determining that there is not adequate time for USCIS to complete the development and thoroughly test the modifications to the H–1B registration system, train staff, and conduct outreach on the H–1B Selection Final Rule, DHS also considered an alternative to delaying the H–1B Selection Final Rule, *i.e.* having USCIS suspend the registration process for FY 2022 under 8 CFR 214.2(h)(8)(iv) and apply the new rule to the petition-based selection process. However, USCIS determined that suspending the registration process would have deleterious impacts on the FY 2022 selection process, as applying the new selection methodology to a petition-based selection process would be exceedingly difficult and require even more time to operationalize, particularly given COVID–19 and the difficulty the agency would face in staffing up to pivot to in-person intake, sorting, and selection process. For example, last year USCIS experienced significant difficulty staffing the Service Centers with contract staff to intake petitions during the petition filing season, even considering that the registration-based selection process significantly reduced the number of petitions filed at one time. Initial hiring of sufficient contractor staff to support USCIS petition intake was incredibly difficult and, due to COVID–19, data entry was significantly delayed. It took several weeks to complete data entry and reject petitions that did not meet the regulatory requirements (*e.g.* those filed with incorrect fees), which eliminated the ability of some petitioners to refile their petitions within the assigned filing window because of this delay. Suspending the registration process entirely for FY 2022 would mean that, during the first week of April, USCIS would receive petitions from all employers seeking cap-subject H–1B workers (*i.e.,* not only those whose registrations are selected in advance) through a paper-based process (*e.g.* U.S. mail, commercial courier), and would require a significant ramping up in contractor staffing. Arranging timely contractor staffing typically requires several months of advanced planning (*e.g.* announcing positions, receiving applications, running background checks on applicants, onboarding, and training), and therefore cannot be achieved in a timely manner if USCIS were to retain the March 9, 2021 effective date.[4]

Furthermore, because the selection process would be dependent on wage level, the scope of work for contractor staff would require not only initial review of petitions for completeness and correct filing fees, but also to identify the wage levels that would be used to rank them for purposes of the selection process. Petitions that do not contain required wage information would have to be rejected. Because the scope of intake work would significantly expand, the time to complete intake would be lengthened.

Moreover, reverting to a paper-based selection process would re-introduce additional uncertainties into the H–1B selection process that the electronic registration process eliminated. For example, in order to conduct the paper-based selection process, USCIS would likely have to suspend premium processing of H–1B petitions which would further delay the processing of petitions.

The aforementioned problems are significantly aggravated by the COVID–19 pandemic. In particular, to ensure sufficient physical distancing of staff on premises, USCIS has already made plans to evenly distribute the H–1B petition adjudication workload for FY 2022 between four Service Centers: California Service Center, Nebraska Service Center, Texas Service Center, and Vermont Service Center. If USCIS were to suspend the electronic registration process in order to implement the H–1B Selection Rule to conduct the FY 2022 selection process, USCIS would require a significant amount of time to staff up and train staff at the Nebraska and Texas Service Centers because those Service Centers had never previously conducted petition-based intake and selection. Additionally, because USCIS has already made plans to evenly distribute the H–1B petition adjudication workload for FY 2022 between four Service Centers, current budget and planning for the California Service Center and Vermont Service Center does not provide enough resources required for those two centers to handle the entire workload and to quickly pivot to a petition-based filing system.

Finally, the petition-based process would require time for the public to pivot and prepare H–1B petitions, including obtain certified Labor Condition Applications (LCAs) from the U.S. Department of Labor (DOL) for submission during the first week of April. This change could impact DOL operations because a far larger number of LCAs than anticipated with the registration-based system would be filed in a compressed time period, and DOL would need to ensure they are processed in accordance with the statutory and regulatory processing timeframe of 7 working days. 20 CFR 655.730(b). This is additional cost for the public to prepare and submit petitions when they do not have notice as to whether they are or will be selected. For these several reasons, USCIS determined that reverting to a paper-based selection process in order to implement the H–1B Selection Final Rule during FY 2022 was not a viable alternative.

Therefore, to ensure USCIS will not be incapable of administering the H–1B cap selection process and both avoid concerns associated with reverting to a paper-based selection process, as well as applying two separate regulatory schemes to the H–1B selection process, DHS believes that delaying the effective date of the H–1B Selection Final Rule until December 31, 2021, will provide sufficient time to complete the selection process for the FY 2022 numerical allocations, thus avoiding unnecessary confusion and possible inequitable results as well as more time for USCIS to modify and test its systems, train staff, and conduct public outreach. During the period of the delayed effective date, while DHS works through the issues associated with implementation, DHS leadership will also evaluate the January 8th rule and its associated policies, as is typical of agencies at the beginning of a new Administration.

Given the longer delay, USCIS expects that it will select from among all of the registrations properly submitted toward the FY 2022 H–1B numerical allocations based on the current (random selection) regulations that will be in effect when USCIS first begins accepting registrations or petitions toward the FY 2022 numerical allocations.

DHS also believes that December 31, 2021, while most likely to extend beyond when USCIS has determined that it has received enough petitions projected as needed to reach the FY 2022 numerical allocations, also balances the competing need to ensure that the regulated public has sufficient advance notice and certainty as to the rules that will be in effect for the FY 2023 H–1B numerical allocations.

[4] As indicated above, until very recently, USCIS had hoped that it would be able to modify and thoroughly test the H–1B registration system in time to implement the H–1B Selection Final Rule on March 9, 2021. In reliance on that hope, and given COVID–19 related challenges, as well as ongoing budget constraints, USCIS has not initiated steps to staff up for a possible suspension of the FY 2022 registration process, which would be the first in many steps required to utilize this alternative for implementing the H–1B Selection Final Rule. Therefore, this is not a viable option for USCIS.

III. Statutory and Regulatory Requirements

A. Administrative Procedure Act

This rule is being issued without prior notice and opportunity to comment and with an immediate effective date pursuant to 5 U.S.C. 553(b)(B) and (d). The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' [5] Similarly, the APA requires agencies to provide at least a 30-day delayed effective date for substantive rules,[6] except where the agency provides good cause to forgo this requirement. DHS has good cause to delay the H–1B Selection Final Rule's effective date without advance notice and comment because immediate implementation would be impracticable. Implementing the H–1B Selection Final Rule on March 9, 2021, would require USCIS to make and test major H–1B registration system modifications, revise internal procedures, train staff, and offer training to the regulated public, before the March 2021 start of FY 2022 H–1B cap filing season. While USCIS initially assessed that it would have sufficient time to undertake these changes and advised the regulated public accordingly in the H–1B Selection Final Rule,[7] upon further review, USCIS has determined that it will not have sufficient time to ensure an orderly and effective implementation of the changes to the H–1B registration system in time for the FY 2022 H–1B cap season, including time to make and thoroughly test system modifications, train staff, and conduct outreach. In addition and as discussed in detail above, DHS determined that USCIS suspending the registration process and instead applying the H–1B Selection Final Rule through a paper-based petition selection process is not a viable alternative because it would have deleterious effects on both the regulated public and the agency.

In addition, DHS recognizes that commenters responding to the H–1B Selection Notice of Proposed Rulemaking requested that DHS delay implementation of the H–1B Selection Final Rule because of insufficient time for them to adapt to a new regulatory regime. Commenters indicated that immediate implementation would impose an unreasonable burden on prospective petitioners and beneficiaries because changes so close to the beginning of that cap season would adversely impact U.S. employers and would create uncertainty and confusion. Multiple commenters said companies already have made hiring decisions based on the existing registration system, so delaying implementation until the FY 2023 cap filing season (set to begin in March 2022) would give the regulated community time to adjust. Some commenters disagreed, stating that there was sufficient time for DHS, employers, and others to adjust to the changes.[8]

Upon further consideration of these comments, in addition to concerns that USCIS lacks adequate time to make and thoroughly test system modifications, revise internal procedures, train staff, and offer training to the regulated public, and concerns that reverting to a paper-based selection process also would have adverse effects on the regulated public and the agency, DHS believes that providing the regulated public with only 60 days (with a current effective date of March 9, 2021) to adapt to new regulatory requirements and modifications of the H–1B registration system before the FY 2022 H–1B cap registration season would cause confusion and very likely would significantly disrupt the orderly administration of the H–1B cap. This is particularly so since, as described above, USCIS believes it can neither stand-up, thoroughly test, and therefore deploy the H–1B registration system changes and thus would not be able to conduct outreach on such changes to the regulated public in advance of implementation based on the current March 9, 2021 effective date, nor can it successfully revert to a paper-based petition selection process on this timeline. In addition, DHS believes that the possibility of having two different regulatory schemes apply to the same fiscal year would create significant confusion for the regulated public that would not have been reasonably foreseeable; the same is true for reverting to a paper-based petition selection process. Similarly, reverting to a paper-based petition process in order to implement the H–1B Selection Final Rule, with so little lead time to develop a process for sorting and selecting from among potentially two hundred thousand petitions, hiring temporary contract staff during the national health emergency to handle intake of the petitions, and train staff on how to conduct a new wage-based selection process in this context, as well as no lead time to offer outreach to the regulated public, would similarly disrupt the expectations of the regulated public, and adversely affect the ability of at least some petitioners to participate in the selection process for FY 2022. Therefore, DHS is delaying the effective date of the H–1B Selection Final Rule to December 31, 2021.

Current regulations at 8 CFR 214.2(h)(8)(iii)(A)(*3*) require that the registration period start at least 14 calendar days before the earliest date on which H–1B cap-subject petitions may be filed for a particular fiscal year (*i.e.,* April 1, 2021, or shortly thereafter for FY 2022). Therefore, USCIS must open the registration period some time in early- to mid-March. Delaying the effective date of the H–1B Selection Final Rule beyond March 9, 2021, necessarily requires that USCIS apply the random selection regulations currently in place to the FY 2022 initial registration period. As discussed above, DHS aims to ensure an orderly and effective administration of the FY 2022 H–1B numerical allocations. Because of this delay rule, the initial FY 2022 registration period will be administered under the current regulations. DHS believes that it is best for the public that the same legal standard is also applied to all of the FY 2022 H–1B numerical allocations. If the H–1B Selection Final Rule were to take effect during the initial registration period, or any subsequent registration period during FY 2022, USCIS believes it would not be operationally able to administer the H–1B numerical allocations under two different regulatory standards.

Therefore, DHS is delaying the effective date of the H–1B Selection Final Rule to December 31, 2021, to better ensure that the H–1B Selection Final Rule will not take effect while USCIS is still administering the FY 2022 numerical allocation selection process. This delay and the application of the current regulations to the initial registration period for the FY 2022 numerical allocations will provide DHS with more time to modify and test the changes to the H–1B registration system that will be needed to implement wage-level-based selection, and to provide the regulated public with time to adapt to new procedures arising from the new legal requirements and system modifications.

DHS is aware that some prospective petitioners and beneficiaries already may have changed their behavior in reliance on the H–1B Selection Final Rule. However, given the short amount of time that has passed since this rule was published on January 8, 2021, DHS

[5] 5 U.S.C. 553(b)(B).

[6] 5 U.S.C. 553(d).

[7] 86 FR at 1710.

[8] 86 FR at 1710.

believes that any reliance is minimal and that such reliance interests do not outweigh the need for DHS to ensure that USCIS has sufficient time to implement the new regulations, and that the regulated public has enough time to adjust to the new registration selection process.

Because it would be impracticable to provide for notice and comment and a delayed effective date in advance of the March 9, 2021, effective date, DHS is proceeding with this final rule. Accordingly, the effective date of the H–1B Selection Final Rule, FR Doc. 2021–00183, published on January 8, 2021, at 86 FR 1676, is delayed to December 31, 2021.

B. Executive Order 12866, Regulatory Planning and Review, Executive Order 13563 (Improving Regulation and Regulatory Review)

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

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. ''Small entities'' are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. A regulatory flexibility analysis is not required when a rule is exempt from notice and comment rulemaking. This final rule is exempt from notice and comment rulemaking, as stated in the Administrative Procedure Act, section of the preamble.

D. Unfunded Mandates Reform Act

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

Because the H–1B Selection Final Rule that is being delayed by this final rule may result in the expenditure of more than $100 million by the private sector annually, OIRA has determined that this rule may as well. However, neither the H–1B Selection Final Rule nor this rulemaking is a ''Federal mandate'' as defined for UMRA purposes. 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, petitioning for classification of the beneficiary as an H–1B nonimmigrant. 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.

E. Congressional Review Act

The Office of Information and Regulatory Affairs determined that the H–1B Selection final rule was 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, OIRA has determined that this rule should have a ''major'' rule designation because its practical impact is that it is delaying the implementation of a major rule to FY 2023. The CRA requires that major rules have a 60-day delayed effective date. 5 U.S.C. 801(a)(3). However, pursuant to 5 U.S.C. 808(2), DHS is forgoing the 60-day delayed effective date for the reasons articulated in the Administrative Procedure Act section above. This final rule will take effect immediately upon publication. 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 (NEPA)

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 1500–1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') that 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).[9] 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.[10]

As discussed in more detail throughout this final rule, DHS is issuing this final rule to delay the effective date and postpone the implementation of the H–1B Selection Final Rule. That rule is amending regulations governing the selection of registrations or petitions, as applicable, toward the annual H–1B numerical allocations based on the wage level that equals or exceeds the proffered wage based on occupational classification and area of intended employment.

Generally, DHS believes NEPA does not apply to a rule intended to change a discrete aspect of a visa program because any attempt to analyze its potential impacts would be largely, if not completely, speculative. The same applies to a rule delaying the effective date of such a rule that does not change the rule's substance, but only postpones its effective date, and consequently pushes out the date on which it will be implemented. This final rule does not alter the statutory limitations on the numbers of nonimmigrants who may be issued initial H–1B visas or granted initial H–1B nonimmigrant status, or those who consequently will be admitted into the United States as H–1B nonimmigrants, or those who will be allowed to change their status to H–1B, or will extend their stay in H–1B status. DHS does not believe, and cannot reasonably estimate whether, the delay in a rule that establishes a wage-level-based ranking approach to select H–1B registrations (or petitions in any year in which the registration requirement were suspended) that DHS is implementing will affect how many petitions will be filed for workers to be employed in specialty occupations or whether the regulatory amendments herein will result in an overall change in the number of H–1B petitions that ultimately will be approved, and the number of H–1B workers who will be employed in the United States in any FY. DHS has no reason to believe that delaying these amendments to H–1B regulations will change the environmental effect, if any, of the existing regulations. Therefore, DHS has determined that, even if NEPA applied to this action, this final 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 final rule only delays another final rule and will maintain the current human environment. This final 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.

[9] *See* 40 CFR 1507.3(b)(2)(ii), 1508.4.

[10] Instruction Manual section V.B(2)(a)–(c).

IV. Paperwork Reduction Act

DHS is delaying the implementation of all changes to the H–1B Registration Tool (OMB Control number 1615–0144) and Form I–129, Petition for a Nonimmigrant Worker (Form I–129) (OMB Control number 1615–0009), associated with the H–1B Selection Final Rule until December 31, 2021.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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DEPARTMENT OF ENERGY

10 CFR Part 430

[Case Number 2020–020; EERE–2020–BT–WAV–0035]

Energy Conservation Program: Notification of Petition for Waiver of Ningbo FOTILE Kitchen Ware Co. Ltd. From the Department of Energy Dishwashers Test Procedure and Notification of Grant of Interim Waiver

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notification of petition for waiver and grant of an interim waiver; request for comments.

SUMMARY: This notification announces receipt of and publishes a petition for waiver and interim waiver from Ningbo FOTILE Kitchen Ware Co. Ltd. (''FOTILE''), which seeks a waiver for specified dishwasher basic models from the U.S. Department of Energy (''DOE'') test procedure used for determining the energy and water consumption of dishwashers. DOE also gives notification of an Interim Waiver Order that requires FOTILE to test and rate the specified dishwasher basic models in accordance with the alternate test procedure set forth in the Interim Waiver Order. DOE solicits comments, data, and information concerning FOTILE's petition and its suggested alternate test procedure so as to inform DOE's final decision on FOTILE's waiver request.

DATES: The Interim Waiver Order is effective on February 8, 2021. Written comments and information are requested and will be accepted on or before March 10, 2021.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov.* Alternatively, interested persons may submit comments, identified by case number ''2020–020'', and Docket number ''EERE–2020–BT–WAV–0035,'' by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: FotileDishwasher2020WAV0035@ee.doe.gov.* Include Case No. 2020–020 in the subject line of the message.
- *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, Mailstop EE–5B, Petition for Waiver Case No. 2020–020, 1000 Independence Avenue SW, Washington, DC 20585–0121. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.
- *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: The docket, which includes **Federal Register** notices, comments,