



Decision Memorandum

TO: Sharon Block
Official Performing the Delegated Duties of Administrator, OIRA
Office of Information and Regulatory Affairs
Office of Management and Budget

THROUGH: Eric Hysen
Chief Information Officer
Department of Homeland Security

FROM: Samantha Deshommnes
Chief, Regulatory Coordination Division
USCIS Office of Policy and Strategy

SUBJECT: Request for Office of Management and Budget Emergency Clearance of Information Collection Requests Related to the Withdrawal of the Final Rule Titled *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions* (RIN 1615-AC61)

Purpose: USCIS is requesting emergency approval of two information collections under 5 CFR 1320.13: Form I-129, Petition for Nonimmigrant Worker (1615-0009) and H-1B Registration Tool (1615-0144).

Background: On January 8, 2021, after going through notice and comment rulemaking, the Department of Homeland Security (DHS) issued a final rule titled *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions* (“H-1B Selection Final Rule”).¹ The rule was scheduled to go into effect on March 9, 2021. On February 8, 2021, DHS issued a final rule delaying the effective date of the H-1B Selection Final Rule to December 31, 2021.² That rule also delayed changes to the information collections associated

¹ *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, 86 FR 1676 (Jan. 8, 2021).

² *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions; Delay of Effective Date*, 86 FR 8543 (Feb. 8, 2021).

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with that rule. On March 19, 2021, Plaintiffs in ongoing litigation moved to file an amended complaint in the U.S. District Court for the Northern District of California adding the H-1B Selection Final Rule to the list of challenged agency actions,³ which the court granted leave to file on April 15, 2021.⁴ Following several months of litigation, on September 15, 2021, the court vacated the H-1B Selection Final Rule and remanded the matter to DHS.⁵ Following the vacatur DHS and DOJ deliberated regarding the possibility of appeal but ultimately decided against an appeal.⁶

DHS is moving to fully comply with the court's decision vacating the H-1B Selection Final Rule. Therefore, since regulatory changes promulgated through the H-1B Selection Final Rule are scheduled to be codified in the Code of Federal Regulations (CFR) at 8 CFR 214.2 on the rule's new effective date, December 31, 2021, DHS is issuing a rule to withdraw the vacated H-1B Selection Final Rule. The withdrawal rule will have an immediate effective date. To prevent the information collection changes associated with the H-1B Selection Final Rule from going into effect on December 31, 2021, DHS is seeking emergency processing to reverse the changes made by that rule in order to fully comply with the court's vacatur of the that rule.

Discussion: Pursuant to 44 U.S.C. 3507(j)(1)(B) and 5 CFR 1320.13, DHS is requesting that the Administrator approve modifications to the instruments under the impacted information collections. USCIS certifies that the requirements of 5 CFR 1320.13(a)(1) are met and that:

- The subject collections of information are needed immediately and are essential to the mission of the agency; and
- The agency cannot reasonably comply with the normal collection procedures because the use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause a court ordered deadline to be missed.

If DHS were to follow the normal information collection clearance procedures, DHS would be unable to fully comply with the court's vacatur and would generate significant confusion among the regulated public regarding which regulatory and information collection requirements associated with DHS regulations governing the administration of the H-1B numerical allocations are in place for the upcoming FY 2023 cap season.

³ See *Chamber of Commerce of the United States of America et al. v. United States Department of Homeland Security, et al.*, No. 4:20-cv-07331 (N.D. Cal. March 19, 2021) (Amended Complaint).

⁴ See *Chamber of Commerce of the United States of America et al. v. United States Department of Homeland Security, et al.*, No. 4:20-cv-07331 (N.D. Cal. Apr. 15, 2021) (Order Permitting Supplementation of Complaint and Extending Deadline to Submit Joint Case Management Conference Statement).

⁵ See *Chamber of Commerce of the United States of America et al. v. United States Department of Homeland Security, et al.*, No. 4:20-cv-07331 (N.D. Cal. Sep. 15, 2021) (Order Granting Pl.'s Motion for Summary Judgment and Denying Def.'s Cross-Motion for Summary Judgment; Judgment).

⁶ On November 12, 2021 a notice of appeal was filed in the case. On November 30, 2021, the government filed a motion to voluntarily dismiss the appeal, and the appeal was dismissed on December 2, 2021. The district court's judgment is final.

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USCIS greatly appreciates the timely consideration of this request.