



The U.S. Small Business Administration (SBA or Agency) proposes to amend its regulations for the Historically Underutilized Business Zone (HUBZone) Program to reduce the regulatory burdens imposed on HUBZone small business concerns and government agencies, implement new statutory provisions, and eliminate ambiguities in the regulations. SBA has reviewed all of its HUBZone regulations and is proposing a comprehensive revision to the HUBZone Program to clarify current HUBZone Program policies and procedures and to make changes that will benefit the small business community by making the HUBZone Program more efficient and effective. The proposed amendments are intended to make it easier for small business concerns to understand and comply with the program's requirements and to make the HUBZone program a more attractive avenue for procuring agencies.

SUPPLEMENTARY INFORMATION

1. SBA is proposing to implement section 1701(i) of the National Defense Authorization Act for Fiscal Year 2018 (NDAA 2018), Public Law 115–91, Dec. 12, 2017, which allows certain certified HUBZone small business concerns to maintain their HUBZone status until 2021, by amending the definition of "HUBZone small business concern."
2. The rule proposes to treat an individual as a HUBZone resident if that individual worked for the firm and resided in a HUBZone at the time the concern was certified or recertified as a HUBZone small business concern and he or she continues to work for that same firm, even if the area where the individual lives no longer qualifies as a HUBZone or the individual has moved to a non-HUBZone area.
3. The proposed rule would eliminate the burden on HUBZone small businesses to continually demonstrate that they meet all eligibility requirements at the time of each offer and award for any HUBZone contract opportunity.
 - a. To alleviate these problems, the proposed rule would require only annual recertification rather than immediate recertification at the time of every offer for a HUBZone contract award. A concern would represent that it is a certified HUBZone small business concern at the time of each offer, but its eligibility would relate back to the date of its certification or recertification, not to the date of the offer. **The concern would be required to come into compliance with the 35% HUBZone residency requirement again at the time of its annual recertification in order to continue to be eligible for additional HUBZone contracts after the one-year certification period.**

4. SBA requests comments on whether seasonal employees can or should be counted and still maintain the integrity of the eligibility requirements.
 - a. SBA received a few comments recommending that SBA count “seasonal” employees in a firm’s count of total employees for purposes of determining whether it meets the 35% HUBZone residency requirement even if those individuals are currently employed by the firm. SBA is concerned that counting any individuals who are not currently on a firm’s payroll (in the anticipation that they will again be employed by the firm at some point) would allow firms to circumvent the 35% residency requirement and subject the program to abuse.
******SBA requests comments on whether seasonal employees can or should be counted and still maintain the integrity of the eligibility requirements.**

II. SECTION-BY-SECTION ANALYSIS

1. DEFINITIONS

5. SBA proposes to delete the definitions of “Alaska Native Village” and “ANCSA” (i.e., Alaska Native Claims Settlement Act) and incorporate those terms in an amended definition of “Alaska Native Corporation (ANC)” to make the regulations more readable.
6. SBA proposes to amend the definition of “attempt to maintain” to clarify what happens if a HUBZone small business concern’s HUBZone residency percentage drops too low.
 - a. The Small Business Act provides that a HUBZone small business concern must “attempt to maintain” compliance with the 35% employee HUBZone residency requirement during the performance of a HUBZone contract.
 - b. SBA is proposing to amend this definition to add that falling below 20% HUBZone residency during the performance of a HUBZone contract will be deemed a failure to attempt to maintain compliance with the statutory 35% HUBZone residency requirement.
 - i. In such a case, SBA would propose that the concern be decertified from the HUBZone program. The concern would then have the opportunity to demonstrate that it in fact continues to have at least 20% HUBZone employees and that it continues to attempt to hire additional HUBZone residents in order to reach 35%.
******* SBA requests comments on how best to look at this 20% minimum requirement. SBA also believes that a lower percentage (i.e., allowing less than 20% HUBZone residents) would unreasonably diminish the impact of the program on the targeted areas and populations. However, SBA requests comments as to whether a different percentage is also reasonable and would accomplish the objectives of the HUBZone program while not unduly burdening firms performing HUBZone contracts.**
7. SBA proposes to eliminate the definition of “county unemployment rate” and incorporate it into the definition of “qualified nonmetropolitan county (QNMC).”
8. The proposed rule would amend the definition of “D/HUB” to make clear that this term refers to the Director of SBA’s Office of HUBZone.

9. SBA proposes to amend the definition of “decertify” to clarify that the decertification procedures described in part 126 are applicable to firms which voluntarily withdraw from the HUBZone program. If a certified HUBZone small business concern is unable to recertify its HUBZone eligibility at the time of its annual recertification, or if it acquires, is acquired by, or merges with another concern and no longer meets the HUBZone eligibility requirements, it should submit a request to SBA to voluntarily withdraw

10. SBA proposes to amend the definition of the term “employee.”
 - a. SBA believes that a clarification is necessary because the existing definition’s language— “a minimum of 40 hours per month”—is ambiguous. The proposed rule would explain that an individual is an employee if he or she works at least 40 hours during the four-week period immediately prior to the relevant date— either the date the concern submits its HUBZone application to SBA or the date of recertification
 - b. SBA is considering revising the requirement from 40 hours per month to 20 hours per week, due to concerns that the 40 hours per month requirement is not sufficient to stimulate employment in HUBZones.
***** SBA specifically requests comments on the number of hours SBA should require in order to count an individual as an employee of the firm for HUBZone eligibility purposes.**
***** SBA also requests comments on whether SBA should count only full-time employees or full-time equivalents.**
 - c. The proposed definition of “employee” continues to specify that employees include temporary and leased employees, individuals obtained through a union agreement, and those co-employed through a professional employer organization (PEO) agreement.
 - d. The proposed definition clarifies that all owners of a HUBZone applicant or HUBZone small business who work at least 40 hours per month will be considered employees, regardless of whether they receive compensation. SBA believes that any time an owner works at least 40 hours per month for the concern, he or she should be counted as an employee.
 - i. The proposed definition adds that if the sole owner of a firm works less than 40 hours during the four-week period immediately prior to the relevant date of review, but has not hired another individual to direct the actions of the concern’s employees, then that owner will be considered an employee as well.
 - e. The proposed definition clarifies that individuals who do not receive compensation and those who receive deferred compensation are generally not considered employees.
 - f. The proposed definition further clarifies that individuals who receive in-kind compensation commensurate with the work performed will be considered employees.
 - i. In a previous proposed rule amending the definition of “employee” to address in-kind compensation, SBA explained: “SBA intended the term compensation to be read broadly and to encompass more than wages. Thus, a person who receives food, housing, or other nonmonetary compensation in exchange for work performed would not be considered a volunteer under that proposed regulation. SBA believes that allowing volunteers to be counted as employees would not fulfill the purpose of the HUBZone Act—job creation and economic growth in underutilized communities.” 67 FR 3826 (Jan. 28, 2002).

*****SBA requests comments on whether it is reasonable to continue treating in-kind compensation this way, and on how to measure whether in-kind compensation is commensurate with work performed.**

- g. The proposed definition also clarifies that independent contractors who receive compensation through Internal Revenue Service (IRS) Form 1099 generally are not considered employees.
- h. Additionally, the proposed definition states that employees of affiliates may be counted as employees of a HUBZone applicant or certified HUBZone small business concern, if the totality of circumstances demonstrates that there is no clear line of fracture between the concerns. This has always been SBA's policy and this amendment is intended to eliminate ambiguities in the regulation. This means that SBA will consider the employees of an affiliate firm as employees of the HUBZone small business if there is no clear line of fracture between the business concerns in question, the employees are in fact shared, or there is evidence of intentional subterfuge.

******SBA specifically requests comments on these proposed changes to the definition of "employee."**

******SBA also requests comments on how SBA should treat individuals who are employed through an agreement with a third-party business that specializes in providing HUBZone resident employees to prospective HUBZone small business concerns for the specific purpose of achieving and maintaining HUBZone eligibility.**

- 11. SBA proposes to revise the definition of "HUBZone small business concern" to remove ambiguities in the regulation.
 - a. The definition of this term is copied directly from the Small Business Act and addresses only the ownership and control requirements. SBA proposes to revise the definition to state that "HUBZone small business concern" or "certified HUBZone small business concern"
- 12. SBA proposes to replace the term "qualified HUBZone SBC" with the term "certified HUBZone small business concern" to make the regulations more clear, since firms must apply to SBA and be certified as HUBZone small business concerns before they are can qualify to receive the benefits of the HUBZone program.
 - a. This rule proposes to remove the phrase "qualified HUBZone SBC" or "qualified HUBZone small business concern" everywhere it appears in SBA's regulations and replace it with "certified HUBZone small business concern."
- 13. SBA proposes to implement section 1701(i) of the NDAA 2018 in the amended definition of "HUBZone small business concern."
 - a. Firms that were certified HUBZone small business concerns as of the date of enactment (December 12, 2017), and that had principal offices located in redesignated areas set to expire prior to January 1, 2020, shall remain certified HUBZone small business concerns until SBA updates the HUBZone maps after the 2020 decennial census, so long as all other HUBZone eligibility requirements described in § 126.200 are met.

- b. Implementation of this change means SBA will “freeze” the HUBZone maps with respect to qualified census tracts, qualified non-metropolitan counties, and redesignated areas. As a result, for all redesignated areas in existence on December 12, 2017, the expiration of their HUBZone treatment has been extended until December 31, 2021.
 - c. An employee of a certified HUBZone small business concern who resided in a redesignated area as of December 12, 2017, will continue to be treated as a HUBZone.
- 14. SBA proposes to eliminate the definition of “median household income” and incorporate it into the definition of “qualified non-metropolitan county”.
 - a. SBA also proposes to remove the definition of “non-metropolitan” and incorporate it into the definition of “qualified non-metropolitan county” to make the regulations more clear.
- 15. SBA proposes to remove the definition of “metropolitan statistical area” and incorporate it into the definitions of the terms “qualified census tract” and “qualified nonmetropolitan county” to make the regulations more readable.
- 16. SBA proposes to add a definition for “primary industry classification” that refers to SBA’s definition of such term in 13 CFR 121.107.
- 17. SBA proposes to amend the definition of “principal office” to eliminate ambiguities in the regulation.
 - a. SBA is proposing this clarification because some applicants have been under the mistaken impression that only HUBZone resident employees are counted for purposes of determining a firm’s principal office.
 - b. In addition, SBA proposes to add that in order for a location to be considered a concern’s principal office, the concern must demonstrate that it conducts business at this location.
 - c. SBA proposes to add examples to the definition of principal office, to illustrate how the agency treats situations in which employees work at multiple locations.
****** SBA specifically requests comments on these proposed changes.**
- 18. SBA proposes to amend the definition of “qualified base closure area” to remove ambiguities in the regulation and to be consistent with SBA’s interpretation of the statutory text.
 - a. In paragraph (1)(i) of the definition, SBA proposes to replace the language “The date the Administrator makes a final determination as to whether or not to implement the applicable designations in accordance with the results of the decennial census conducted after the area was initially designated as a base closure area” with “the date on which the results of the decennial census conducted after the area was initially designated as a base closure area are released.”
 - b. In paragraph (2), SBA proposes to replace the language “until such time as the Administrator makes a final determination as to whether or not to implement the applicable designations in accordance with the results of the 2020 decennial census are released” with “until the results of the 2020 decennial census are released.” SBA believes these changes are needed to make clear that SBA interprets “the date the Administrator makes a final determination as to whether or not to implement the applicable designations” to mean the date that the public data is released.

19. SBA proposes to amend the definition of “qualified census tract” to make the regulation more readable.
20. SBA proposes to eliminate the definition of “qualified HUBZone SBC”.
21. SBA proposes to amend the definition of “qualified non-metropolitan county” to include Difficult Development Areas (DDAs) and to reflect SBA’s current policy of utilizing the most recent data from the Local Area Unemployment Statistics report.
22. SBA proposes to amend the definition of “redesignated area” to delete an obsolete reference to the 2010 census. SBA proposes to define “redesignated area” as a census tract or nonmetropolitan county that remains qualified as a HUBZone for 3 years after the date on which the area ceased to be either a qualified census tract or a qualified non-metropolitan county.
23. The proposed rule would also amend the definition of “reside.” This term is used when analyzing whether an employee should be considered a HUBZone resident for purposes of determining a firm’s compliance with the 35% HUBZone residency requirement. SBA proposes to remove the reference to primary residence, to eliminate the requirement that an individual demonstrate the intent to live somewhere indefinitely, and to provide clarifying examples.
 - a. SBA proposes that “reside” means to live at a location full-time and for at least 180 days immediately prior to the date of application or date of recertification, as applicable.
 - b. The definition also makes clear that to determine an individual’s residence, SBA will first look to an individual’s address as identified on his or her driver’s license or voter’s registration card, which is SBA’s current and longstanding policy.
******SBA specifically requests comments on these proposed changes.**
24. SBA proposes that it will consider the residence located in the United States as that employee’s residence if the employee is working overseas for the period of a contract.
 - a. SBA notes that more small businesses are performing contracts overseas and are faced with the problem of how to treat those employees who reside in a HUBZone when in the United States or its territories, but are temporarily residing overseas to perform a contract.
****** SBA requests comments on this issue.**
25. SBA proposes to eliminate the definition of “small disadvantaged business (SDB)” because SBA no longer certifies firms as SDBs, and SDB set-asides and price evaluation preferences no longer exist.
26. SBA proposes to remove the definition of “statewide average unemployment rate” and incorporate it into the definition of “qualified nonmetropolitan county” to make the regulations more readable and to clarify that the statewide average unemployment rate is determined using the Local Area Unemployment Statistics report, which is produced by the Department of Labor’s Bureau of Labor Statistics.

2. ELIGIBILITY REQUIREMENTS

27. SBA proposes to clarify that all employees are counted when determining a concern's compliance with this requirement, regardless of where the employee performs his or her work. This has always been SBA's policy, but it appears that some applicants have misinterpreted SBA's rules.
- a. SBA has received several comments indicating that some in the community mistakenly believe that SBA would look only at those employees performing work in the principal office, and not any employees performing work at job site locations, in determining whether the firm meets the 35% HUBZone residency requirement. The proposed rule seeks to clarify SBA's intent.
28. SBA proposes to change its application of how SBA requires a firm to meet the 35% residency requirement when the calculation results in a fraction.
- a. This rule proposes rounding to the nearest whole number, rather than rounding up in every instance as was previously used for determination. SBA believes that this proposed change would have a minimal impact, but would clear up confusion that several small businesses seeking HUBZone status have encountered.
29. SBA is also proposing that an employee that resides in a HUBZone at the time of a HUBZone small business concern's certification or recertification shall continue to count as a HUBZone employee as long as the individual remains an employee of the firm, even if the employee moves to a location that is not in a qualified HUBZone area or the area where the employee's residence is located is redesignated and no longer qualifies as a HUBZone.
- a. Under this proposed change, a certified HUBZone small business concern would have to maintain records of the employee's original HUBZone address, as well as records of the individual's continued and uninterrupted employment by the HUBZone small business concern, for the duration of the firm's participation in the HUBZone program.
30. SBA proposes to clarify in proposed § 126.200(g) that the concern and its owners cannot have an active exclusion in the System for Award Management and be certified into the program.
- a. Debarred/suspended entities are ineligible for federal contracting assistance and would thus not receive any benefits from being certified as a HUBZone small business concern.
31. SBA proposes to clarify § 126.204, in that a HUBZone small business concern may have affiliates, but the affiliate's employees may be counted as employees of the HUBZone applicant/participant when determining the concern's compliance with the principal office and 35% percent HUBZone residency requirements. Proposed § 126.204 clarifies that where there is evidence that a HUBZone applicant/participant and its affiliate are intertwined and acting as one, SBA will count the employees of one as employees of the other.
- a. The HUBZone applicant or concern must demonstrate a clear line of fracture between it and any affiliate in order for SBA to not count the affiliate's employees.
32. SBA proposes to delete the following in § 126.205: "Participation in other SBA Programs is not a requirement for participation in the HUBZone Program." SBA believes that this language is unnecessary and may merely confuse prospective HUBZone small businesses.

33. In § 126.206, SBA proposes to replace the term “non-manufacturers” with “nonmanufacturers” to be consistent with SBA’s regulations at § 121.406(b).
34. SBA proposes to amend the title and text of § 126.207 to clarify that a HUBZone small business concern may have multiple offices, as long as the firm’s principal office is located in a HUBZone and to clarify that a different rule applies to concerns owned by Indian Tribal Governments.

3. CERTIFICATION

35. SBA proposes to amend § 126.300 by breaking up the section to make it clearer and more readable, to move the discussion of the adverse inference rule to § 126.306, and to clarify that SBA may conduct site visits, conduct independent research, and review additional information (such as tax and property records, public utility records, postal records, and other relevant information).
36. SBA proposes to revise § 126.303 to update the instructions for submitting electronic applications.
 - a. This proposed rule would also clarify that an applicant must submit a completed application and all documents and a representation that it meets the program’s requirements as of the date of the application and that the information provided and any subsequent information provided is complete, true and accurate.
 - b. SBA proposes to require that the representation be electronically signed by a person who is authorized to represent the concern. SBA believes that this should either an owner or officer of the applicant, and not an administrative employee acting on behalf of an officer.
37. SBA proposes to clarify that after an application has been submitted, the applicant must notify SBA of any changes that could affect its eligibility.
38. SBA proposes several changes to § 126.306.
 - a. SBA proposes to clarify that the agency must receive all required information, supporting documents, and a completed HUBZone representation before it will begin processing a concern’s application and that SBA will make a final decision within 90 calendar days after receipt of a complete package.
 - b. SBA proposes to clarify that the burden of proof to demonstrate eligibility is on the applicant concern and if the concern does not provide requested information within the allotted time.
 - c. The proposed rule would also delete the reference to the ability of requesters to obtain a copy of the list of certified HUBZone small business concerns.
 - i. An interested party may find all firms that are certified HUBZone small business concerns by searching the Dynamic Small Business Search (DSBS) system, and can verify a specific concern’s HUBZone certification
 - ii. SBA proposes to amend § 126.308 to clarify that certified HUBZone small business concerns cannot “opt out” of being publicly displayed in the DSBS system. All certified HUBZone small business concerns appear in DSBS as certified HUBZone

small business concerns, and those not so appearing will not be eligible for HUBZone contracts

39. SBA proposes to revise § 126.309 to add a new provision permitting a firm to submit a formal request for reconsideration when it receives a determination denying admission to the HUBZone program.
- a. The business would be able to submit a request for reconsideration within 15 calendar days after receiving SBA's decision.
 - b. Proposed § 126.309(a)(4) would explain that SBA would not add a concern to DSBS as a certified HUBZone small business concern during the reconsideration process.
 - c. The D/HUB would have 30 calendar days to issue a decision and could either approve the application, deny it on the same grounds as the original decision, or deny it on other grounds.
 - d. If the D/HUB declines the application solely on issues not raised in the initial decline, the applicant could ask for reconsideration as if it were an initial decline.
40. SBA proposes that if a concern that has been declined does not request reconsideration of the D/HUB's decision, the concern could reapply for certification 90 calendar days after the date of decline.

4. PROGRAM EXAMINATIONS

41. SBA proposes to revise § 126.401 to clarify what a program examination is.
42. SBA proposes to revise § 126.403 to clarify what SBA will review during a program examination.
43. SBA proposes to add a new § 126.404 to provide the procedures and possible outcomes of a program examination.
44. The proposed regulation provides that SBA will make its determination within 90 calendar days after receiving all requested information, when practicable.

5. MAINTAINING HUBZONE STATUS

45. SBA proposes to amend § 126.500 to require HUBZone small business concerns to recertify annually.
46. SBA proposes to amend § 126.501 to clarify that once certified, a HUBZone small business concern will remain eligible for HUBZone contract awards for one year from the date of certification.
47. HUBZone status protests would also relate back to the date of initial certification or most recent annual recertification (except for protests against HUBZone joint ventures).

48. The proposed rule would also clarify that a HUBZone small business concern could voluntarily withdraw from the program at any time.
 - a. The proposed rule would also clarify that any firm that voluntarily withdraws from the program could reapply to the program at any point after 90 calendar days from the date it was decertified.
49. SBA proposes to amend § 126.504 to reflect the various ways that a HUBZone small business concern could lose its designation in DSBS as a certified HUBZone small business concern if the concern has:
 - a. Been decertified as a result of a protest.
 - b. Been decertified as a result of the procedures set forth in the regulations.
 - c. Submitted a voluntary withdrawal agreement.

6. CONTRACTUAL ASSISTANCE

50. SBA proposes to revise § 126.601 to remove the discussion of the acquisition-related dollar thresholds because this does not relate to additional requirements a certified HUBZone small business concern must meet to submit an offer on a HUBZone contract.
51. SBA proposes to move the discussion of compliance with the limitations on subcontracting for multiple award contracts currently in paragraph § 126.601(g) to proposed § 126.700, which specifically addresses the limitations on subcontracting requirements for HUBZone contracts.
52. SBA proposes to move the discussion of recertification currently in paragraph § 126.601(h) to proposed new § 126.619.
53. SBA proposes to amend § 126.602 to be consistent with the proposed change requiring certified HUBZone small businesses to demonstrate their eligibility at the time of initial certification and annual certification only.

7. PROTESTS

54. SBA proposes to amend § 126.801 to clarify how a HUBZone status protest should be filed and referred to SBA.
55. SBA proposes to clarify that HUBZone status protests may be filed against HUBZone joint ventures.
 - a. Arguments that the HUBZone small business concern partner(s) to the joint venture did not meet the HUBZone eligibility requirements set forth in § 126.200 at the time of the concern's initial certification or most recent annual recertification
 - b. Arguments that the HUBZone joint venture did not meet the requirements set forth in § 126.616 at the time the joint venture submitted its offer for the HUBZone contract.
56. SBA proposes to amend § 126.803, addressing how SBA will process a HUBZone status protest.