AMERICAN IMMIGRATION LAWYERS ASSOCIATION

American Immigration Council

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Office of Policy and Strategy
U.S. Citizenship and Immigration Service
5900 Capital Gateway Drive
Camp Springs, MD 20746

Submitted via http://www.regulations.gov

Re: Fee for Certain H-1B Petitions (Docket No. USCIS-2026-0298)

To Whom it May Concern:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit this comment in response to the proposed rule published in the Federal Register on August 25, 2026, by the Department of Homeland Security (DHS).

Established in 1946, AILA is a voluntary bar association of more than 18,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We believe that our members' collective expertise and experience make us particularly well-qualified to offer views on this matter.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws and protect the legal rights of noncitizens. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act (INA) and its implementing regulations.

On September 19, 2025, the White House issued a Presidential Proclamation (the "2025 Proclamation") that mandated government agencies to restrict decisions on H-1B petitions not accompanied by a $100,000 fee for individuals seeking entry into the United States.[1] The policy also permitted Secretarial discretion for exceptions to the payment requirement.[2] In the months following the proclamation, three sets of plaintiffs filed lawsuits challenging the legality of the charge. In June 2026, the U.S. District Court for the District of Massachusetts held that the $100,000 assessment amounted to an unlawful tax and that the power to levy taxes rests with Congress and not the White House or the Executive Branch.[3] The court further found that the policy exceeded statutory authority and violated the Administrative Procedure Act. Accordingly, the $100,000 assessment was deemed improper for exceeding statutory authority and for violating the APA. The government appealed the decision to the U.S. Court of Appeals for the First Circuit, but that court refused to stay the decision of the lower court while the appeal is pending.[4] The fee was set to expire on September 21, 2026; however, on September 18, 2026, the Administration extended the $100,000 fee through September 21, 2027.[5]

Against this backdrop, DHS published the proposed rulemaking with a nearly identical financial burden that is the subject of this comment—on a greater number of U.S. employers. If finalized as proposed, the rule would levy a fee of $103,265 for the first H-1B petition on behalf of someone who is subject to the annual H-1B visa cap (and whose H-1B registration thus must have been selected in the H-1B lottery). This amount bears a striking resemblance to the $100,000 assessment imposed under the 2025 Proclamation that was challenged, vacated and remains the subject of ongoing litigation. The timing and the structure of the proposed fee raises serious questions regarding whether DHS is attempting to accomplish through regulation what the Administration unsuccessfully sought to achieve through Presidential Proclamation.

AILA and the Council oppose the proposed rule which imposes restrictions that would significantly diminish the viability of the H-1B program under the guise of an ultra vires fee. For the reasons discussed below, AILA and the Council believe the proposed rule exceeds DHS's statutory authority, is contrary to the intent of Congress, and is arbitrary and capricious under the Administrative Procedure Act. Accordingly, DHS should withdraw the proposal and refrain from implementing the fee.

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[1] *See* Proclamation No. 10973, *Restriction on Entry of Certain Nonimmigrant Workers*, 90 Fed. Reg. 46027 (Sep. 19, 2025).
[2] *Id*.
[3] *See State of California, et al. v. Mullin, et al.*, No. 1:25-cv-13038 (D. Mass. June 8, 2026).
[4] *See State of California, et al. v. Mullin, et al.*, No. 26-1699 (1st Cir. July 24, 2026). Plaintiffs in the Northern District of California filed a parallel challenge, *Global Nurse Force v. Trump* (N.D. Cal.
[5] *See* https://www.whitehouse.gov/presidential-actions/2026/09/restriction-on-entry-of-certain-nonimmigrant-workers-faad/.

I. INA §§ 286(m) and (n) Do Not Authorize the Reimbursement of Other Agencies as Provided in the Proposed Rule

Section 286(m) of the INA authorizes DHS to establish fees for "providing adjudication and naturalization services" at a level sufficient to recover the "full costs of providing all such services," including "the costs of similar services provided without charge to asylum applicants or other immigrants" and the costs of "administration of the fees collected." Section 286(n), in turn, makes monies deposited in the Immigration Examinations Fee Account (IEFA) available to reimburse appropriations for expenses incurred "in providing immigration adjudication and naturalization services." The operative limitation in both provisions is the same: cost recovery must only account for costs attendant to the provision of "adjudication and naturalization services" or the expressly identified similar services.

DHS characterizes the proposed fee as a mechanism for recovering costs associated with "administering the lawful immigration system," including investigations, enforcement and vetting, immigration-court operations, labor enforcement, consular operations, and border inspection. DHS's formulation thereby substitutes the far broader concept of administering the lawful immigration system for the specific adjudication and naturalization services Congress authorized DHS to fund.

However, this characterization contradicts the statutory scheme that Congress created when establishing the Department of Homeland Security. The Homeland Security Act of 2002 clearly distinguished between adjudication services and enforcement activities. In replacing the former Immigration and Naturalization Service, Congress intentionally divided its benefit-adjudication and enforcement functions among separate DHS components. It assigned USCIS responsibility for immigration-services policies and the administration of immigration and naturalization adjudications[6] and prohibited DHS from recombining the citizenship-and-immigration-services and border-security bureaus or consolidating their functions.[7] Although these provisions do not prohibit intercomponent coordination, they confirm that Congress treated adjudication and enforcement as distinct functions.

DHS's interpretation would leave no clear limiting principles on governmental activities that could be financed through this statutory provision. Under the proposed rule's reasoning, DHS could seemingly require immigration benefit requestors to subsidize costs incurred whenever an agency activity can be characterized as supporting or facilitating the broader immigration system. For example, in the following instances, petitioners could bear the cost for services provided by the Social Security Administration when assigning and verifying

[6] 6 U.S.C. § 271.
[7] 6 U.S.C. § 291(b).

Social Security numbers for noncitizens; federal agencies using immigration-status verification systems to administer public benefits; or Health and Human Services serving refugees and other eligible noncitizens. While those activities may relate to immigration in some tangential sense, their threadbare nexus to immigration does not transform every such activity into an expense incurred in "providing immigration adjudication and naturalization services." In enacting these authorities, Congress did not authorize collection of fees for any activity whatsoever by any federal agency that has any relation to adjudications and naturalization services no matter how tenuous. Congress easily could have inserted language to that effect had they wished to do so. Instead, Congress chose narrower language, limiting fee recovery to the costs of "providing" adjudications and naturalization services. DHS must implement that limitation by interpreting section 286(m) to include cost-recovery only for adjudication and naturalization services—and not for any costs that may relate to such services in some lesser or more obscure way.

Notably, Congress has repeatedly enacted specific fee and funding mechanisms for many of the very immigration-related functions DHS now seeks to finance through the proposed H-1B fee. Section 286 itself separately prescribes funding for particular functions, including premium processing, H-1B ACWIA Fees, and fraud prevention, and expressly allocates fraud-prevention fees collected from H-1B and L petitioners among DHS, DOS, and DOL for specified purposes.[8] Congress has likewise established specific fee regimes for ICE's SEVP program, CBP's ESTA and EVUS programs, DOS consular services, DOL H-2A administration, and EOIR proceedings.[9] These provisions demonstrate that it is up to Congress to mandate new immigration-related fees and interagency distributions for specified purposes when it believes they are necessary.

DHS's own account of its historical implementation of section 286(m) confirms the novelty of the interpretation advanced here. The proposed rule acknowledges that, "[t]o date…DHS has generally exercised this authority by focusing fee recovery on costs incurred by USCIS….[and has] not included costs borne by other departments and agencies."[10] DHS further acknowledges that, when ICE, CBP, and DOJ previously invoked section 286(m) in their fee rulemakings, those agencies likewise calculated fees by "considering only their own costs."[11] Those prior rulemakings reflect a consistent historical practice under section 286(m): the agency providing the immigration adjudication or related service calculated fees based on the costs of the program or services for which the fee was imposed. For example, ICE's SEVP fee rule calculated fees charged to students, exchange visitors, and participating

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[8] *See, e.g.*, 8 U.S.C. § 1356(s), (u), (v).
[9] *See* 8 U.S.C. §§ 1187(h)(3)(B), 1188(a)(2), 1372(e), 1713, 1802, 1812, 1813.
[10] 91 Fed. Reg. 54,817, 54,826 (Aug. 25, 2026).
[11] *Id.* at 54,826 n.77.

schools to recover the costs of operating SEVP and SEVIS,[12] while EOIR's 2020 fee review calculated fees based on the costs EOIR incurred in processing and adjudicating the particular applications, appeals, and motions for which EOIR charged fees.[13]

DHS's expansive interpretation has already been discredited. In *Moya Barahona v. Napolitano*, the court upheld USCIS's inclusion of agency-wide operating, infrastructure, technology, staffing, and fraud-prevention costs in the IEFA fee structure. However, in distinguishing Supreme Court precedent rejecting efforts to shift the wholesale costs of governmental regulation onto regulated entities, the court emphasized that the agency was collecting application fees to fund "programs and operations connected with adjudicating specific applications or requests," such that the fees remained "specific charges for specific services to specific individuals or companies."[14] The proposed rule disclaims precisely that connection: DHS expressly acknowledges that it "is not setting this fee to be associated with or required for providing a specific service."[15] *Moya* at most supports broad recovery of direct and indirect costs incurred in providing adjudication and naturalization services; it does not establish that DHS may expand the services being funded beyond those Congress identified in § 286(m), much less assess one class of benefit requestors to finance otherwise unrelated governmental activities, including those of other agencies, merely because those activities form part of the broader immigration system.[16]

II. DHS' Calculations for Estimated Revenue Do Not Account for the Proposed Fee's Impact on the Quantity of H-1B Petitions Filed

DHS should not finalize its proposed $103,265 fee without supplementing the rulemaking record with (1) a reasoned explanation of its petition-volume assumptions, (2) a rational response to empirical evidence that contradicts the basis for the $103,265 fee, and (3) a clarification of how actual fee collections will be reconciled with recoverable costs.

DHS calculates its proposed revenue by multiplying the $103,265 fee by an assumed annual volume of 85,000 petitions to reach $8,777,525,000 ($8.8 billion).[17] This calculation merely

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[12] *See* 83 Fed. Reg. 33762, 33762–63 (July 17, 2018)

[13] *See* 85 Fed. Reg. 11866, 11869 (Feb. 28, 2020).

[14] 2011 WL 4840716, at *8 (S.D.N.Y. Oct. 11, 2011).

[15] 91 Fed. Reg. at 54,829 n.84.

[16] We recognize that *Moya* predates *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and the decision's statutory analysis expressly relied on the now-overruled *Chevron* framework. *Moya* found ambiguity in the term "full costs" and deferred to DHS's reasonable interpretation. *Moya*, 2011 WL 4840716, at *6–8. After *Loper Bright*, however, a reviewing court must exercise its independent judgment to determine the best meaning of § 286(m) and (n); statutory ambiguity does not itself impart a requirement that courts defer to agency interpretation. 603 U.S. at 412–13. Thus, while *Moya* remains instructive as to the breadth of costs that may properly be recovered in providing adjudication services, its deferential approach does not support deference to DHS's substantially broader interpretation here.

[17] 91 Fed. Reg. 54817.

establishes what DHS would collect if 85,000 fee-bearing petitions are filed; it does not establish that employers will continue to file 85,000 petitions after a fee increase exceeding $100,000 per petition. Under the APA, 5 U.S.C. § 706(2)(A), an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[18] DHS' explanation for the proposed fee demonstrates that DHS has not adequately examined the relevant data and articulated a rational course of action for the following reasons:

- **Statutory Caps Are Not Demand Forecasts:** The 85,000 figure represents the statutory numerical ceiling under INA §§ 214(g)(1)(A) and (g)(5)(C) (establishing the annual numerical limitation for 65,000 H-1B visas from the general cap plus 20,000 attributable to the advanced-degree exemption), not an economic forecast of employer demand following an unprecedented fee hike. Treating a legal maximum as an empirical baseline without analysis violates basic administrative requirements to rely on substantial evidence.[19]
- **Failure to Reconcile Empirical Evidence:** DHS's own Technical Appendix acknowledges a short-term drop exceeding 90% in consular H-1B receipts following the implementation of the 2025 Proclamation requiring a $100,000 payment for certain new H-1B petitions.[20] DHS fails to explain why this real-world demand drop was ignored in its assumption that 85,000 petitions will be filed if this rule were to go into effect as proposed. Such a precipitous drop in petitions would have significant impact on USCIS' own resources, as well as a detrimental impact on U.S. employers that must be considered. An agency acts arbitrarily when it fails to address significant counterevidence in the record.[21]
- **Unaddressed Competing Economic Models:** Public comments and independent analyses (e.g., the Institute for Progress (IFP) analysis[22]) submit five economic models projecting demand reductions between 63% and 91%, implying a possibility of cap undersubscription. DHS must address these criticisms rather than relying on an unadjusted single-point estimate.[23]
- **Ambiguity Between Cost Targets and Forecasts:** DHS fails to clarify whether $8.8 billion is a strict cost-recovery target, merely a projection of actual collections, or both. Failure to articulate the precise regulatory objective renders the rule opaque and unreviewable.[24]

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[18] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).
[19] *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).
[20] *See* Restriction on Entry of Certain Nonimmigrant Workers – The White House
[21] *See Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009); *see also Ohio v. EPA*, 603 U.S. 285, 292 (2024) (granting stay where agency failed to address comments challenging central factual premises).
[22] *See* Explaining the Proposed $103k H-1B Fee | IFP
[23] *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) (agency must meaningfully respond to significant comments and methodology criticisms).
[24] *See A.L. Pharma, Inc. v. Shalala*, 64 F.3d 707, 712 (D.C. Cir. 1995).

- **Failure to Account for Specific Funding Authorities:** DHS fails to address separate funding statutes enacted by Congress to support programs that ostensibly would be funded by the fee in this proposed rule. For example, the proposed rule provides that the fee would account for DOL processing of H-2A labor certifications, but Congress already authorized the Secretary of Labor (and, importantly, not DHS) to assess a fee for the reasonable costs of processing applications, and appropriated funding for certain DOL activities relating to the H-2A program.[25]
- **Improper Unit Costing & Cost Allocation:** Established precedent analyzing the permissible scope of cost recovery when setting user fees requires agencies to allocate costs to the smallest practical unit, isolate direct recipient benefits from public services, and disclose inclusion criteria.[26] The analysis is applicable here and DHS has not demonstrated that its $103,265 unit fee meets these standards.
- **Interagency Distribution & Funding Overlap Risks:** The proposed fee would fund activities across multiple agencies (USCIS, ICE, CBP, EOIR, DOS, and DOL). DHS provides no controls against double-dipping across separate appropriations or fee accounts (e.g., SEVP), nor does it explain how agencies will operate if actual collections fall short.[27] Moreover, DHS fails to explain why existing Congressional appropriations, including the more than $170 billion dollars appropriated to ICE and CBP[28] are insufficient to cover the stated costs. Finally, DHS notes that if the courts allow the 2025 Proclamation fee (as extended by the 2026 Proclamation) to take effect, employers who are consular processing a cap subject H-1B fee will be required to pay both fees.[29] Despite the fact that some employers could be subjected to an additional $203,265, the proposed rule fails to consider the significant quantitative and qualitative impacts of such an exorbitant price tag or consider why both fees would be necessary to cover the perceived funding gaps.[30]

[25] *See* 8 U.S.C. § 1188(a)(2), (g). *See D.B. v. Cardall*, 826 F.3d 721, 735 (4th Cir. 2016) ("[T]he specific terms of a statutory scheme govern the general ones.") (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 646 (2012)); *id.* (quoting *RadLAX*, 566 U.S. at 646) ("The general-specific rule is particularly applicable where 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions,' as it has done in the immigration context."); *see also D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (instructing that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment") (quoted in *RadLAX*, 566 U.S. at 646).
[26] *See FPC v. New England Power Co.*, 415 U.S. 345, 349–51 (1974); *Seafarers Int'l Union v. U.S. Coast Guard*, 81 F.3d 179, 183–85 (D.C. Cir. 1996).
[27] *Cf. Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272, 1276 (D.C. Cir. 1996) (invalidating agency fee mechanism that failed to evaluate fee adequacy or guard against deficient collections).
[28] Public Law 119-21 (2025) and Public Law No: 119-98 (2026).
[29] 91 Fed. Reg. at 54819
[30] *Cf. Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272, 1276 (D.C. Cir. 1996) (invalidating agency fee mechanism that failed to evaluate fee adequacy or guard against deficient collections).

- **Failure to Evaluate Fee Sensitivity:** DHS failed to analyze whether setting a lower fee might produce higher aggregate revenue by preserving higher petition volume (the Laffer Curve effect). Agencies must consider obvious regulatory alternatives.[31]

DHS should withdraw the proposal and develop a comprehensive empirical analysis for the administrative record, with a 60-day comment period. When supplementing the administrative record, DHS should explore the following:

1. An empirical evidentiary basis for the 85,000-petition volume assumption.
2. Model sensitivities showing a volume drop as included in the IFP analysis, and show how collections and agency operations change if volume drops (e.g., to 40,000 or 60,000 petitions).
3. Reconciliation between the 85,000-petition figure and the potential for a greater than 90% H-1B visa petition receipt decline, consistent with the decline following the $100,000 payment that was required for certain H-1B petitions beginning in September 2025.
4. Evaluation of whether alternative policy, procedural changes, or a lower fee could achieve DHS objectives in a less burdensome manner as required by Executive Order 12866.
5. Clarification regarding receiving accounts, statutory authority, controls against duplicate funding across interagency transfers, and controls against recovery for fees that are subject to separate statutory fee-collection authorities.
6. A detailed explanation of DHS's cost-allocation methodology relative to USCIS's historical activity-based costing.

DHS has not demonstrated its claim that the proposed fee will generate $8.8 billion annually. Post-hoc rationalizations provided during subsequent litigation cannot cure omissions in the agency's administrative record.[32] DHS must provide a transparent, evidence-based analysis and afford the public a meaningful opportunity to comment on a revised record.

III. The proposed $103,265 H-1B Fee is Another Unlawful Tax

The Supreme Court has repeatedly distinguished permissible user fees from broader revenue-raising measures. In *Nat'l Cable Television Ass'n, Inc. v. United States*, the Court held that an agency may not simply calculate the total cost of a regulatory enterprise and then "contrive a formula" requiring selected parties to reimburse that amount where some of those costs reflect services furnished to the public rather than benefits provided to the

[31] *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (failing to consider obvious alternatives renders agency action arbitrary and capricious).
[32] *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

payer.[33] The same concern appears in *Fed. Power Comm'n v. New England Power Co.*, where the Court explained that federal user fees must correspond to a sufficiently identifiable benefit conferred on the payer rather than general governmental services.[34] And in *Skinner v. Mid-America Pipeline Co.*, the Court emphasized that Congress must clearly indicate when it authorizes executive agencies to impose financial burdens designed to recover administrative costs that do not directly benefit the regulated parties.[35]

Here, DHS does not propose to recover merely the costs of adjudicating cap-subject H-1B petitions. Instead, the methodology assigns substantial portions of the proposed collections to immigration-court operations, removal-related activities, border-inspection functions, labor enforcement, refugee-related activities, and other governmental operations performed by agencies outside USCIS. To the extent the assessment finances functions that neither adjudicate the triggering petition nor confer a sufficiently direct benefit on the payer, the charge begins to resemble the kind of revenue measure discussed in *National Cable* and *New England Power* rather than a fee for a specific adjudicative service.

The reasoning reflected in the First Circuit's stay-stage decision in *State of California v. Mullin* reinforces this concern.[36] The court denied a stay of the district court judgment vacating the $100,000 H-1B payment requirement and concluded that the government had not made the strong showing of likely success required for extraordinary relief. In doing so, the court emphasized Congress's longstanding practice of expressly authorizing immigration-related fees and expressly specifying their uses, including in INA § 286 itself. While *Mullin* did not construe § 286(m), it highlights the same underlying principle: when the Executive claims authority to impose a substantial financial burden, the statute should clearly authorize the burden actually being imposed.

Applied here, the question is straightforward: even if INA § 286(m) authorizes fees for "adjudication and naturalization services," it does not clearly authorize DHS to collect approximately $8.8 billion annually from one visa category and distribute those funds across multiple agencies and programs that extend well beyond the adjudication of the triggering H-1B petition. Nothing in § 286(m) expressly authorizes that broader interagency financing mechanism. To the extent the proposed assessment goes beyond funding adjudication and naturalization services and instead finances broad governmental functions, the $103,265

[33] 415 U.S. 336, 343–44 (1974).
[34] 415 U.S. 345, 349–51 (1974).
[35] 490 U.S. 212, 223–24 (1989).
[36] 183 F.4th 42 (1st Cir. 2026) (denying stay pending appeal).

fee operates as a tax in substance rather than a fee, and Congress has not clearly authorized such a tax.

DHS's proposed assessment must be evaluated according to its substance rather than its label. Although INA § 286(m) authorizes fees for adjudication and naturalization services, the proposed rule seeks to collect approximately $8.8 billion annually from cap-subject H-1B petitioners and distribute the proceeds across multiple agencies and governmental functions. Because the proposed assessment is not reasonably tied to the direct cost of adjudicating the triggering H-1B petition and would finance activities extending well beyond the benefit received by the payer, it bears substantial resemblance to a general revenue measure. Under *Nat'l Cable Television Ass'n*, *New England Power*, and *Skinner*, Congress must clearly authorize such a burden. DHS should therefore identify the specific statutory language authorizing this unprecedented interagency funding mechanism or withdraw the proposal.

In addition to the reasons that this proposed rule should be withdrawn, as set forth above, we believe that requiring only H-1B petitioners to share the burden of up to an additional $8.8 billion in fees is arbitrary and capricious. DHS expresses a belief "that cap-subject H-1B petitioners are willing to pay and can afford an additional $103,265 fee," but the agency fails to express any rationale, analysis, or justification to support this conclusion.

DHS is treating H-1B employers as a monolith. While DHS proposes to exempt certain colleges, universities, non-profit research organizations, and government research organizations from the additional proposed fee, the remaining H-1B employers are not all one and the same in fiscal stature. DHS ignores the self-evident reality that there are smaller employers and a wide range of non-cap-exempt non-profit organizations and other employers that lack the resources that DHS assumes they have. As just one example, these employers include non-profit social service organizations that employ professionals that provide valuable services to our communities.

DHS points to the recent imposition of the asylum program fee as a demonstrated "willingness" of employers to share the cost. But passive acceptance or involuntary tolerance of that far smaller fee does not equate to an ability to afford a fee upwards of $103,000 per petition. The proposed fee also does not resemble the asylum fee as it does not take into consideration a fee-structure that would account for differences between non-profit organizations, small employers, and the remaining employers. DHS instead would, through this rule, convert the H-1B program into one limited to those who have enormous financial resources that permit them to "pay to play."

DHS acknowledges that the proposed fee intends to recoup the administration of immigration programs, defined very broadly, not just services connected with the H-1B program or costs expressly provided for by statute. To this end, DHS should consider alternative cost-recovery mechanisms, including policy changes that would create efficiency in administrative savings.

IV. Providing a 30-Day Comment Period Undermines the Purpose of the Administrative Procedure Act by Preventing Stakeholders from Having a Meaningful Opportunity to Comment

The 30-day comment period provided by the government in the proposed rule[5] does not permit a meaningful opportunity to comment. The Administrative Procedure Act (APA) requires that agencies provide the public with a "meaningful opportunity to comment," typically a minimum of 30 days, although it is much more common to allow 60 days.[6] Executive Order 12866 states that agencies should provide at least 60 days for public comment on significant regulatory actions.[7] As the rule could impose approximately $8.8 billion in annual charges and establish an unprecedented interagency reimbursement structure, it was classified by Office of Information and Regulatory Affairs as an economically significant and major rule. Despite this, DHS failed to publish the rule in the Unified Regulatory Agenda giving the impacted stakeholders, including U.S. employers, no advance notice of the rulemaking. Providing only 30 days for the public to assess the significant legal, financial, and operational consequences the proposed rule would have, if finalized, is insufficient to satisfy the requirements of the APA, 5 U.S.C. § 553, or established administrative practice.

a. *30 Days Does Not Provide Sufficient Time to Meaningfully Address The Significant Scope, Impact, and Complexity of the Proposed Rule*

The proposed rule spans more than 23 pages in the Federal Register and introduces a cost, fashioned as a fee, that will not only severely impact U.S. global competitiveness but also will have profound business ramifications across virtually all business sectors and geographies in the United States. The proposed rule's discussion of costs omits data and provides an overly simplistic explanation for the fee amount, as further detailed below. Evaluating this information requires careful study of complex data tables and consultation with economic, legal, and fiscal experts to meaningfully analyze and comment upon the accuracy and completeness of the DHS data. A 30-day period does not allow stakeholders to adequately conduct this review and prepare informed, evidence-based comments.

b. *The 30-Day Comment Period Will Result in an Inadequate Administrative Record*

An inadequate comment period weakens the administrative record by limiting the number and quality of substantive submissions, potentially rendering the subsequently issued final rule as "arbitrary and capricious." [10] As the proposed rule is a significant regulatory action with substantial economic impact and is inherently technically complex and highly controversial, there is no reason to limit the public comment period to less than the 60-day timeline provided in Executive Order 12866. The agency did not articulate why a shorter comment period was necessary.

Smaller employers (typically with smaller budgets) that rely upon foreign-born talent to serve in key roles critical to core business operations frequently have neither the resources nor the capacity to analyze the complex variables referenced above and respond in the shortened comment period. Even for larger employers, meaningfully understanding the full impact of the proposed rule in 30 days on their entire business operations is a daunting task. The short window needlessly constricts the possibility that they could engage in the comprehensive review the complex rule requires and, in turn, the ability to provide the comprehensive input that the APA contemplates. The natural result of the abbreviated comment period for this proposed rule, and one that is likely not lost on the agency, is to unjustifiably impede fulsome participation by precisely those entities most likely to be significantly impacted by the proposed changes to the H-1B fee.

The proposed rule's impact on broad segments of the economy necessitates that the public be afforded no less than 60 days to provide meaningful comment on the proposed regulatory changes. For the reasons above, if DHS does not withdraw the rulemaking in its entirety, we respectfully request that the agency extend the comment period for this proposed rule to at least 60 days. This extension will improve compliance with rudimentary APA notice and comment requirements, improve the quality of the administrative record for purposes of agency decision-making, and hopefully encourage reasoned decision-making by the agency.

V. Conclusion

For the reasons detailed above, AILA and the Council urge DHS to withdraw the proposed rule imposing a $103,265 fee on certain H-1B petitions. The proposed rule imposes restrictions that would significantly diminish the viability of the congressionally created H-1B program under the guise of an ultra vires tax. The proposed rule exceeds DHS's statutory authority, including the clear limitations outlined in INA §§ 286(m) and (n), is contrary to the intent of Congress when it established the Homeland Security Act of 2002, and is arbitrary and capricious under the Administrative Procedure Act as it fails to adequately analyze the substantial economic impact of the proposed fee on U.S. employers and their staff or the fee generated revenue projections on agency operations, and does not consider less burdensome alternatives that would still allow for a the H-1B program to be a viable option as Congress intended. At a minimum, DHS must address critical issues missing in the current proposed rule and provide the public a fulsome opportunity to provide meaningful comment.

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION and
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