November 9, 2026

Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Submitted via http://www.regulations.gov

Re: Eliminating the Discretionary 60-Day Grace Period (Docket No. USCIS-2026-0364)

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 September 11, 2026, by the Department of Homeland Security (DHS).

AILA and the Council urge DHS to withdraw the proposed rule and retain the 60-day grace period at 8 C.F.R. § 214.1(l)(2). DHS has not demonstrated that eliminating this established framework would produce meaningful net administrative savings, that it adequately assessed the costs and disruption to U.S. employers, workers, and their families, or that it sufficiently evaluated alternatives that would address its stated concerns while preserving orderly employment transitions. Repealing this provision would undermine employers' ability to recruit and retain skilled workers already in the United States, disrupt settled business and personal arrangements, and create additional adjudication and enforcement demands without eliminating the need to determine when qualifying employment ended. These consequences warrant a reasoned, evidence-based assessment that the proposed rule does not provide.

Established in 1946, AILA is a voluntary bar association of nearly 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.

Table of Contents

I. The 2016 Grace Period Rule Represents Sound Economic Policy That Should not be Reversed 2
II. DHS Has Not Provided a Reasoned Basis for Eliminating the 60-Day Grace Period 3
a. DHS Has Not Adequately Explained Its Reversal of the 2016 Grace Period Rule 4
b. DHS Failed to Meaningfully Consider Reliance Interests Created by Its Own Regulatory Framework 5
c. DHS's Cost-Benefit Analysis Is Incomplete and Unsupported 7
i. DHS failed to account for the benefits of retaining high skilled foreign workers and analyze the consequences for U.S. employers 7
ii. DHS failed to adequately account for dependents 10
iii. DHS has not thoroughly measured and reported the burden on which it relies 11
III. DHS Did Not Adequately Explain Its Rejection of Less Restrictive Alternatives Nor Adequately Consider Reasonable Alternatives 14
IV. DHS Fails to Consider the Burden the NPRM Imposes on USCIS and Other Agencies 17
a. Officers would still need to determine when employment ended. 18
b. The NPRM would replace the clear boundaries of the current rule with less predictable outcomes. 18
c. Elimination of the grace period would create more immigration enforcement 19
V. USCIS Is Fee-Funded 19
VI. Without a Valid Burden Rationale, the NPRM Cannot Stand 19
VII. Conclusion 20

I. The 2016 Grace Period Rule Represents Sound Economic Policy That Should not be Reversed

When first adopting the 60-day grace period in 2016, DHS explained that the rule was intended to provide "increased certainty for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers," that it is intended to "promote greater stability and job flexibility, and it would improve employers' ability to hire and retain high-skilled workers."[1] DHS associated these policies with job creation and with broader economic benefits tied to the American Competitiveness in the Twenty-First Century Act of 2000's (AC21) worker-portability framework.[2] The grace period was, therefore, not a humanitarian accommodation; it preserved a short window during which the labor market could reallocate human capital from one U.S. employer to another.

Further, the grace period has created a valuable transition period when an employer terminates the employment of a nonimmigrant worker who has skills that other employers could benefit from, particularly in industries like IT and life sciences industries, where their skillsets are in demand. This mechanism for retaining existing talent represents significant cost-savings to U.S. employers who would otherwise be required to incur recruiting and sourcing expenses.

From an employer perspective, the grace period addressed an identifiable defect in the labor market: without a transition period, an unexpected termination could remove a high-skilled worker from the domestic labor pool before another U.S. employer had a reasonable opportunity to recruit that worker and file the appropriate petition. From the perspective of the high-skilled employee, many have lived and worked in the United States for years and are in the process of pursing permanent residency. They have economic obligations to their local communities, and the time allowed them to look for new employment to continue those obligations or settle their affairs. Such increased job portability is directly aligned with the congressional objectives reflected in AC21, including reducing disruptions affecting American businesses, increasing access to high-skilled labor, and promoting economic growth and job creation.

II. DHS Has Not Provided a Reasoned Basis for Eliminating the 60-Day Grace Period

DHS proposes[3] to eliminate a framework that it previously created to promote job portability, stability, and flexibility for skilled nonimmigrant workers and their U.S. employers. The Administrative Procedure Act (APA) permits DHS to change course but requires the agency to confront its prior findings, consider serious reliance interests, assess reasonable alternatives, and explain the costs and benefits of its decision. The NPRM does not satisfy those requirements. DHS acknowledges the policy change, the reliance

[1] Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 FR 82,398, 82,398 (Nov. 18, 2016).
[2] 81 FR at 82405.
[3] 91 FR 57807

interests, the employer costs, and the available alternatives, yet its analysis does not establish why complete repeal offers a reasonable response to the concerns identified.

a. DHS Has Not Adequately Explained Its Reversal of the 2016 Grace Period Rule

As stated in the NPRM, the grace period advanced the objectives addressed in the rulemaking resulting in the 2016 final rule by allowing qualifying nonimmigrants whose employment ended before the expiration of their authorized stay to pursue new employment or another lawful immigration option without immediately failing to maintain status. During that period, a worker could seek a new job offer and become the beneficiary of a petition requesting new employment and an extension of stay. The worker could also seek a change of status, adjustment of status, or employment authorization under compelling circumstances.[4]

The 2016 rule did not grant employment authorization during the grace period, rather it preserved status for up to 60 days, subject to DHS discretion, while the worker and a prospective employer pursued an available immigration process.[5] When commenters asked how DHS would exercise that discretion, DHS stated that officers would conduct "individualized assessments" based on the "totality of the circumstances" and that many cases may receive grants of the grace period.[6] It identified status violations, unauthorized employment during the grace period, fraud or national-security concerns, and criminal convictions as examples of circumstances that could support shortening or refusing the period.[7]

DHS now proposes to entirely remove 8 C.F.R. § 214.1(l)(2). The NPRM says the grace period creates a "misalignment" with the statutory provisions governing the affected classifications and adds administrative burdens that the 2016 rule did not adequately consider.[8] DHS states that repeal would restore a direct relationship between maintenance of nonimmigrant status and the employment or activity that formed the basis for admission.[9] Neither premise withstands scrutiny. An agency changing policy must acknowledge the change and provide good reasons for the new policy.[10] When the new policy rests on factual findings that contradict findings underlying the prior policy, or when the prior policy generated serious reliance interests, a more detailed explanation is required.[11]

[4] 91 FR 57,807 57,820–21 (Sept. 11, 2026).
[5] 81 FR 82398
[6] 81 FR at 82,439
[7] 81 FR at 82,439; 91 Fed. Reg. at 57,814.
[8] 91 FR at 57,813.
[9] Id. at 57,807–08, 57,813–14
[10] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009).
[11] Id. at 515–16.

DHS acknowledges its change in position, beginning its analysis but not completing it.[12] The NPRM does not identify evidence showing that the benefits recognized in 2016 have ceased to exist. On the contrary, DHS repeats the 2016 explanation that the provision increased worker mobility and helped employers facilitate changes in employment for existing and newly recruited workers and does not dispute the grace period's support of employer certainty, job flexibility, talent retention, and orderly employment transitions.[13]

According to the NPRM, the 2016 rule did not sufficiently consider statutory alignment and administrative burden.[14] Yet, DHS does not explain why the same statutory authority it relied on in 2016 to establish the grace period now leads to a different conclusion in 2026. DHS adopted the grace period under the Secretary's authority to prescribe the time and conditions of nonimmigrant admission under INA § 214(a). The statutes governing the affected classifications tie eligibility to qualifying employment or activity. The 2016 rule did not dispute that relationship — it only established a limited period during which cessation of employment alone would not cause an immediate failure to maintain status, and the NPRM does not identify statutory text prohibiting that exercise of discretion. Moreover, in more than 10 years, the 2016 rule was never successfully challenged and found to be legally deficient in a court of law.

An agency's view of the public interest may change, but the agency must supply a reasoned analysis for its new course.[15] DHS has explained that it now assigns greater weight to immediate departure and administrative simplicity, but it has not adequately reconciled that preference with the factual findings and regulatory objectives supporting the 2016 rule.[16]

b. DHS Failed to Meaningfully Consider Reliance Interests Created by Its Own Regulatory Framework

DHS expressly recognizes that the grace period framework generated reliance interests. The NPRM acknowledges that U.S. employers may have made business arrangements based on the assumption that recently terminated workers could begin new employment without first completing the longer process of seeking admission from outside the United States. It also acknowledges that workers and dependents may have made career and personal plans based on the expectation that they could remain in a grace period while seeking another status. Additionally, the NPRM identifies home purchases, tax payments, and other investments in local communities among the relevant reliance interests.[17]

---

[12] 91 FR at 57,813.
[13] Id. at 57,812–13.
[14] Id. at 57,813.
[15] Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 57 (1983).
[16] 91 FR at 57, 813.
[17] 91 FR at 57,815.

The reliance interests recognized in the NPRM arose from the design of the 2016 rule. The rule was promulgated to provide employers and employees certainty, stability, flexibility, and easier employment changes. Employers and U.S. workers subsequently incorporated those stated objectives into hiring, mobility, and personal decisions. The NPRM discounts those interests and asserts that any reliance would be misplaced because USCIS retained discretion to shorten or eliminate the grace period.[18] DHS also cites FDA v. Wages & White Lion Investments, L.L.C., 604 U.S. 542, 585 (2025), for the proposition that failure to maintain nonimmigrant status would only be identified when adjudicating a subsequent immigration benefit, conveying a belief that an agency's exercise of enforcement discretion is not a serious reliance interest.[19] The agency does not consider the impact of failure to maintain status as significant and ignores a serious reliance interest in the existence of a regulatory process under which USCIS would consider whether the facts warrant a favorable exercise of discretion, which would maintain the nonimmigrant worker's status.

Congress has long sought to balance employer sponsorship requirements with worker mobility. The H-1B portability provision enacted through AC21[20] and the 60-day grace period adopted in 2016 serve that objective. Together, these measures help ensure that a worker's ability to remain in the United States is not wholly dependent on remaining employed by a single petitioning employer. Maintaining reasonable worker mobility has historically been viewed as an important safeguard against excessive dependence on a single employer and promotes a more competitive and efficient labor market.[21] Eliminating the grace period would reduce labor mobility, limit the practical utility of H-1B portability, and increase the pressure on workers to remain with a particular employer in order to preserve their ability to remain in the country. These are unquestionably legitimate reliance interests.

The Supreme Court has explained that an agency changing course must assess the reliance interests engendered by the existing policy and weigh those interests against the competing concerns supporting the new policy.[22] The agency must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[23] In the NPRM, DHS identifies categories of reliance but does not measure their scope. It does not estimate how many employers made business arrangements based on the framework nor assess the costs created when a selected worker must depart before the new employer can complete the immigration process. It also does not explain why less disruptive alternatives, such as a transition rule, prospective application, or modified grace period, could not protect settled arrangements while advancing its stated objectives.

The recent preliminary-injunction decision in Presidents' Alliance on Higher Education and Immigration v. Department of Homeland Security illustrates the distinction between

[18] 91 FR at 57,815.
[19] Id. at 57,815 n.34.
[20] § 105, Pub. L. No. 106-313, 114 Stat. 1251, 1253 (Oct. 17, 2000)
[21] 91 FR at 57,812–13.
[22] Department of Homeland Security v. Regents of the University of California, 591 U.S. 1, 30–33 (2020).
[23] Id.

acknowledging reliance interests and actually analyzing them. The court held that DHS's statements asserting that it had considered reliance interests did not substitute for analysis of the settled expectations created by a longstanding immigration framework, or the consequences of disrupting them.[24] The same problem arises here -- DHS fails to meaningfully examine how employers have structured their mobility and employment decisions on that framework and projecting the costs and consequences of eliminating the 60-day grace period.

c. DHS's Cost-Benefit Analysis Is Incomplete and Unsupported

DHS repeatedly invokes program integrity to justify repeal of the 60-day grace period but identifies no empirical evidence that the grace period has increased fraud, unauthorized employment, or systemic abuse. Instead, the NPRM relies primarily on concerns about statutory alignment and administrative burden. Although DHS notes that status violations, unauthorized employment, fraud, national-security concerns, and criminal convictions may justify shortening or eliminating the grace period in an individual case, the existing regulation already provides DHS the discretionary framework to address those concerns.[25] The NPRM does not explain why those existing safeguards are inadequate or why such concerns warrant eliminating the grace period more broadly.

DHS acknowledges that repeal would increase USCIS referrals to EOIR, increase workload demands on EOIR and ICE, require additional NTA issuance, and impose related enforcement costs.[26] DHS also states that any increased USCIS costs would be recovered through immigration benefit fees.[27] The NPRM does not, however, quantify administrative savings from eliminating grace-period adjudications and compare those savings against the additional enforcement and removal-related costs described elsewhere in the analysis. Cost recovery identifies who will fund the work. It does not establish that the benefits of repeal exceed its costs.

i. DHS failed to account for the benefits of retaining high skilled foreign workers and analyze the consequences for U.S. employers

Studies have shown that in addition to innovation and economic growth, retention of high skilled workers contributes to the "U.S. economy by enhancing the productivity of existing firms and by disproportionately pursuing entrepreneurship and innovation," and that their skills appear to complement U.S. workers rather than replace US workers.[28]

---

[24] Civil Action No. 26-13799-FDS, --- F. Supp. 3d ---, 2026 WL 2690098, at *19 (D. Mass. Sept. 14, 2026), appeal pending, No. 26-2112 (1st Cir.).
[25] 91 FR at 57,814.
[26] 91 FR at 57,809, 57,817–18, 57,824.
[27] 91 FR at 57,824.
[28] See https://www.brookings.edu/articles/how-the-trump-administration-is-eroding-the-immigrant-talent-pipeline/, https://www.pbs.org/newshour/economy/trump-says-skilled-foreign-workers-take-jobs-away-from-americans-its-not-that-simple-experts-say, Mobility Matters: Why Worker Portability Should Drive

DHS repeatedly states in the NPRM that the elimination of the 60-day discretionary grace period is necessary to better align the regulations with the statutory basis for nonimmigrant status and to provide predictability to the foreign workers. However, it fails to adequately address the substantial benefits the grace period provides to employers, which has been praised by the President. On many occasions since his return to the White House, President Trump has defended the need to bring in skilled workers to the United States.[29] American workers may not have the skills to take on the high skilled positions vacated by foreign workers as of yet.[30]

Eliminating the 60-day grace period is contrary to the President's stated goal, given that the current 60-day discretionary grace period framework provides a pathway to high-paying careers for U.S. workers by bringing in the "best and the brightest" from around the world, who will train U.S. workers and make significant contributions to the United States. The NPRM fails to adequately analyze the consequences of the grace period elimination to foreign workers and to recognize the larger impact to employers and the U.S. economy.[31]

The NPRM lists the quantitative cost to petitioners as "None."[32] Yet, DHS identifies 2,886 entities that filed petitions during a possible grace period in FY 2025 alone, 1,852 of them (64.17 percent) small entities.[33] But the agency treats petitioning employers as only indirectly affected, and so outside the Regulatory Flexibility Act (RFA) analysis, including its figures on them only "for transparency."[34] By labeling petitioners as only indirectly affected, DHS also declines to analyze the full costs imposed by the grace period elimination. DHS itself estimates that the 2,886 petitioners "would lose the opportunity to submit petitions" for workers whose employment ended,[35] and then concludes, without quantifying those effects, that "[t]here would be no significant economic impact on [a] substantial number of small entities."[36] For a small employer, losing the ability to hire a qualified worker who is already in the United States is a concrete consequence of the proposed rule. Executive Order 12866 directs DHS to assess the rule's costs, and the APA requires DHS to consider this important aspect of the problem and explain its conclusions. DHS acknowledges that these employers would lose the opportunity to file petitions and may lose productivity, yet it lists their cost as "None" and offers no data for its conclusion that the impact would not be significant.

Reform of Employment-Based Visas.pdf, Cornell University
https://cornell.app.box.com/s/522jdvb9jrlr3elqeb1hanv8pe0fkxry

[29] See https://www.whitehouse.gov/releases/2026/05/powering-americas-future-president-trumps-policies-fuel-historic-demand-for-skilled-american-workers/

[30] See https://thehill.com/homenews/administration/5601588-trump-h1b-visas-talent/

[31] 91 FR 57809

[32] Id. at 57817 (Table 1).

[33] Id. at 57825 (Table 5).

[34] 91 FR at 57824–25.

[35] 91 FR at 57825.

[36] Id.

DHS estimates that an annual average of 65,752 primary beneficiaries experienced cessation of employment or changed employers during fiscal years 2021 through 2025.[37] DHS uses withdrawn approved Form I-129 petitions as a proxy because USCIS does not collect data identifying all workers who use the grace period.

Within that proxy population, DHS identifies[38] annual averages of:

- 3,795 workers for whom a new employer submitted Form I-129 within the grace period;
- 1,119 workers who submitted Form I-539;
- 385 workers who submitted Form I-485; and
- 10 workers who submitted Form I-765 seeking compelling circumstances employment authorization.

DHS acknowledges that repeal may cause workers to leave the United States and suffer lost income while conducting a job search and seeking to return. It also recognizes that employers may incur temporary productivity losses, labor-turnover effects, and return-transportation costs for certain dismissed workers.[36] The NPRM's economic analysis, though, does not monetize those employer costs. Its accounting statement lists the relevant costs as quantified but unmonetized. DHS, therefore, does not adequately account for the costs of replacing and training employees who lack the skills required for employers, the lost time and money employers incur for the foreign worker to leave the country for what could be a substantial time period before the worker could return to the United States to begin new employment, and the downward economic effect of these lost opportunities.

DHS assumes that employers will find equally qualified U.S. workers, continue through the petition process to sponsor the same or another foreign worker, or reassign the work to existing employees.[39] At the same time, DHS acknowledges that the effects of the proposed rule will depend on labor-market conditions, the occupations and skills involved, business conditions, and the substitutability of workers. Yet DHS provides no estimate of the time or cost required to replace a worker the employer selected to file an H-1B petition for, or bring back that worker who had to depart the United States, or reassign the work.[40] That omission is significant given that DHS previously treated employer access to skilled workers as a regulatory benefit in the 2016 rule, finding greater stability and job flexibility would help U.S. employers hire and retain talent. The proposed repeal removes that benefit, yet the NPRM assigns no value to its loss.

The D.C. Circuit has held that an agency acts arbitrarily when it inconsistently frames costs and benefits, fails adequately to quantify important costs or explain why those costs cannot

[37] 91 FR at 57821
[38] Id. at 57,821 tbl. 3.
[39] Id. at 57,817–18, 57,826.
[40] Id. at 57,826.

be quantified, neglects to support predictive judgments, or contradicts itself.[41] Although the decision arose under statutory provisions requiring the SEC to consider specified economic effects, the court's analysis reflects the broader APA requirement that agency action be supported by reasoned decision-making.

Cost is a centrally relevant factor when an agency decides whether and how to regulate.[42] Reasonable regulation requires attention to both the advantages and disadvantages of agency action.[43] DHS should make a reasonable effort to assess important costs or explain why those costs cannot reasonably be quantified. The NPRM provides population data, wage data, historical filing data, and employer data. It identifies 2,886 employers that filed relevant new-employer petitions in fiscal year 2025, including 1,852 entities that DHS classified as small.[44] Those data provide a foundation for a more complete analysis of employer effects.

The NPRM may acknowledge some impacts, but it does not measure them in its analysis. In Presidents' Alliance, the court found DHS's economic analysis deficient because DHS dismissed substantial effects as uncertain while offering no competing estimate or methodology.[45] The court emphasized that uncertainty does not permit an agency to disregard an evident and potentially significant cost.[46] To have sufficient analysis, DHS should assess the time required for a worker who departs to complete petition adjudication, obtain any required visa, and return to the United States, as well as estimate the resulting delay in authorized employment and the employer's productivity loss. DHS should also assess costs incurred when a selected worker cannot return, when work must be reassigned, and when a dependent spouse's immediate departure disrupts separate authorized employment.

ii. DHS failed to adequately account for dependents

DHS acknowledges that dependents, including employment-authorized E, H-4 and L-2 spouses, would lose status when the principal's employment ends, and that "[a]n impact on dependent spouses of the proposed change could be immediate departure and lost compensation."[47] DHS states that its data is not "salient enough" to estimate how many dependents would be affected.[48] The NPRM's family assessment nevertheless concludes

[41] Business Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).
[42] Michigan v. EPA, 576 U.S. 743, 752–53 (2015).
[43] Id. at 753.
[44] 91 FR at 57,825.
[45] 2026 WL 2690098, at *14-16.
[46] Id. at 30–32.
[47] Id. at 57823.
[48] Id. at 57821, 57823.

that "any impact would be negligible."[49] DHS cannot reach that conclusion while conceding that it cannot measure the affected population.

iii. DHS has not thoroughly measured and reported the burden on which it relies

The NPRM describes administration of the grace period as "time consuming and complex" and as "a great adjudicative burden."[50] Yet, DHS concedes that "[b]ecause each analysis is case specific, where some cases will require a more in-depth analysis due to the facts presented, DHS cannot estimate the time this analysis adds to each adjudication."[51] Consistent with that concession, the NPRM lists burden reduction only as a qualitative benefit, and its accounting statement reports annualized monetized benefits as "Not Estimated."[52]

This gap matters because DHS grounds its conclusion in "its experience administering the up to 60-day discretionary grace period over the last 10 years."[53] An agency with nearly a decade of operational experience and access to its own case-management systems is well positioned to measure how a provision affects adjudication time. The NPRM does not report average adjudication times for affected petitions with and without an employment gap, rates of requests for evidence (RFEs) related to the grace period, the number of cases in which the grace period was shortened or eliminated, or any internal time study. Describing a burden as "great" is not a substitute for the data that would show it. At most, DHS shows that the need to consider the grace period "can add steps to the process."[54] That an adjudication involves an additional step is not, by itself, a reasoned basis for eliminating a benefit that DHS adopted through notice-and-comment rulemaking.

The contrast with the rest of the NPRM is striking. DHS's accounting statement reports no annualized monetized benefits and no annualized monetized costs.[55] The only monetized individual amount is an estimated opportunity and travel cost of $168.18 to $264.28, plus $36.25 in mileage for a 50-mile round trip at the GSA rate of $0.725 per mile, for a total of $204.43 to $300.53 per person required to attend an immigration hearing.[56] DHS does not estimate how many additional immigration hearings will result from the proposal. The cost benefit analysis identifies qualitative benefits consisting of administrative simplicity, increased consistency between status and the basis for admission, and improved program integrity.[57] Yet, it offers no comparable estimate of the officer time and cost it says the grace period consumes.

---

[49] Id. at 57827.
[50] 91 FR at 57812, 57814, 57815.
[51] Id. at 57815 n.29.
[52] Id. at 57817 (Table 1); id. at 57817–18 (Table 2).
[53] Id. at 57812.
[54] 91 FR at 57812.
[55] 91 FR at 57,817–18 tbl. 2.
[56] Id. at 57,817, 57,824.
[57] Id. at 57,817 tbl. 2.

The NPRM does not quantify administrative savings. The agency states that it cannot estimate the time that grace-period analysis adds to each adjudication because the analysis varies by request and by the facts of each case.[58] It provides no estimate of the number of officer hours saved, the fiscal value of those hours, or the effect on processing times.

DHS's own account also suggests that the discretionary review frequently confirms the grace period rather than denying it. DHS states that "many cases might result in grants" of the grace period, with shortening or elimination reserved for cases presenting factors such as "violations of status, unauthorized employment during the grace period, fraud or national security concerns, or criminal convictions."[59] Where a review often ends in the same result, the reasonable response is to streamline it, for example, by defining the disqualifying circumstances in advance, not to eliminate the underlying benefit.

DHS should place in the record the data underlying its burden claims, and any available information on adjudication time, RFE rates, and grace period determinations, and should reopen the comment period once those materials are available.

<u>The NPRM's 1.9 million filings figure overstates the burden, as DHS counts every filing in which a grace period could theoretically apply.</u>

DHS reports that from fiscal year (FY) 2018 through May 20, 2026, "over 1.9 million petitions or applications" were filed in which USCIS "potentially had to perform this additional initial assessment."[60] The figure apparently includes every Form I-129 seeking an extension of stay or change of status for new employment, every Form I-539 seeking a change to a non-employment status, every employment-based Form I-485, and every compelling-circumstances Form I-765 filed by a person in one of the eight affected classifications.[61] But that figure does not establish that every filing required a substantive grace-period determination or imposed material additional work. Most of these filings likely involve no gap in employment. For example, a routine H-1B change-of-employer petition filed while the worker remains employed would not involve a discretionary grace-period review. DHS cannot estimate the additional time the grace-period analysis adds per adjudication.[62]

DHS claims that officers must screen each such filing because petitioners "may or may not proactively flag" reliance on the grace period.[63] The agency confirms, however, that a check for continuous employment is part of the ordinary maintenance-of-status review that officers would also perform under the proposed rule and the flagging problem can be solved with a simple form change, therefore undermining the agency's alleged burden.

[58] Id. at 57,815 n.29.
[59] Id. at 57814.
[60] 91 FR at 57815; see also id. at 57820 & n.47.
[61] Id. at 57814–15.
[62] Id. at 57,815 n.29.
[63] Id. at 57814.

DHS's own data show that the affected population is small.

DHS's proxy for the population that actually used the grace period (beneficiaries whose approved Form I-129 was withdrawn and who then had a qualifying filing within 60 days) averaged 5,309 filings per year from FY 2021 through FY 2025.[64] By comparison, the 1.9 million figure equates to roughly 220,000 filings per year.

Measure	Source	Per year
Filings DHS counts as potential grace-period burden	91 FR at 57815	About 220,000
Filings by beneficiaries who used the grace period (DHS proxy)	91 FR at 57821 (Table 3)	5,309
Grace-period filings as a share of the burden population	Calculated	About 2.4%

By DHS's own numbers, the grace period was in play in roughly 2.4 percent of the filings DHS uses to describe the burden.

These filings reflect ordinary employment disruptions that can arise despite an individual's diligent efforts to comply fully with immigration requirements. An employee may lose a job in an unexpected layoff or business closure, give two weeks' notice only to have the employer terminate employment immediately, or resign after accepting a new position only to have that offer rescinded. Even a worker who promptly secures another position must allow the new employer time to obtain required documentation and prepare a compliant petition. A worker who intends to depart may likewise need a brief period to arrange flights, obtain a child's travel documents, and conclude housing and family obligations. The grace period provides a practical means of managing these foreseeable circumstances while preserving immigration compliance.

DHS uses inconsistent populations for burden and cost.

DHS acknowledges that its burden estimate includes all filings "where the grace period could potentially apply," while its cost analysis is limited to the subset that "could have actually used the grace period."[65] This creates an asymmetry: DHS measures administrative benefits using a broad population but limits worker costs to 3,795 people per year, a figure DHS calls an "upper-bound estimate" that DHS acknowledges may undercount affected

[64] Id. at 57821 (Table 3) (five-year averages of 3,795 Form I-129 petitions, 385 Form I-485 applications, 1,119 Form I-539 applications and 10 Form I-765 applications).
[65] Id. at 57815 n.30.

workers because several classifications do not require employers to notify USCIS of employment creation. [66]

An analysis that measures benefits as broadly as possible and costs as narrowly as possible does not supply the "rational connection between the facts found and the choice made" that the APA requires.[67]

III. DHS Did Not Adequately Explain Its Rejection of Less Restrictive Alternatives Nor Adequately Consider Reasonable Alternatives

An agency need not consider every conceivable alternative in its rulemaking. It must, however, address alternatives that are within the ambit of the existing policy and provide adequate reasons for rejecting them.[68] When the record points toward an alternative that could satisfy the agency's objectives, the agency must explain why it rejected that alternative.[69]

DHS considered three alternatives: (1) eliminating the grace period for only some classifications; (2) shortening it; and (3) imposing "precise and stringent evidentiary requirements" before USCIS would consider whether a grace period applies.[70] DHS rejected the first two in significant part because they "would not reduce the administrative burden" or "would not address the burden borne by USCIS."[71]

DHS rejected category-specific repeal because retaining the grace period for any category would not advance the agency's objective of requiring immediate departure when qualifying employment ends. It also reasoned that partial repeal would preserve the administrative burden for the classifications that retained the period.[72] DHS rejected a shorter grace period because USCIS would still need to determine whether the grace period applied, whether to shorten or eliminate it, and when it began and ended. DHS also stated that any grace period would conflict with its objective of requiring immediate departure.[73]

DHS acknowledged that heightened evidentiary requirements could reduce administrative burden by alerting the officer that a request relied on the grace period. It rejected that alternative because officers would still need to examine the evidence and verify the employment end date. DHS also stated that this alternative would not advance immediate departure.[74] Those responses depend on DHS's selection of immediate departure as an

[66] Id. at 57820 n.49; see also id. 57822, 57825 n.73.
[67] State Farm, 463 U.S. at 43.
[68] State Farm., 463 U.S. at 48, 51.
[69] Id. at 56–57.
[70] 91 FR at 57816.
[71] Id.
[72] Id.
[73] Id.
[74] Id.

independent regulatory objective. Once DHS defines success as eliminating every period of status following cessation of employment, every alternative retaining any grace period fails by definition. That reasoning, though, does not explain why immediate departure offers a reasonable solution to a documented problem.

The evidentiary alternative deserves fuller consideration. DHS acknowledges that petitioners and applicants do not always identify reliance on the grace period and that documentation of the employment-cessation date may be unclear or nonstandard.[75] DHS further recognizes that a process requiring filings to clearly identify reliance on the grace period and submit supporting evidence would reduce at least some of the burden associated with determining whether the grace period applies.[76] Although DHS ultimately rejected that alternative, it acknowledged that such an approach would make clear that a filing was relying on the grace period and thereby eliminate part of the threshold applicability analysis.[77] DHS does not estimate the reduction in officer time that the alternative could produce, nor does it compare that benefit with the remaining time needed to verify the evidence.

It did not consider alternatives aimed at the specific sources of burden it identifies. Each of the following would do so while preserving the grace period:

1. Make the grace period non-discretionary, subject to defined exclusions. DHS identifies the "individualized assessments that consider the totality of the circumstances" as a principal source of burden.[78] DHS could provide that the grace period applies automatically, for up to 60 days, unless one of the disqualifying circumstances DHS has already identified is present: "violations of status, unauthorized employment during the grace period, fraud or national security concerns, or criminal convictions."[79] That would replace an open-ended discretionary inquiry with a narrowly defined checklist. Other countries that compete with the United States for skilled workers already provide a non-discretionary post-employment period based on a clear starting date.[80] These systems show that a non-

[75] 91 FR at 57,814.
[76] 91 FR at 57,816.
[77] 91 FR at 57,816.
[78] 91 FR at 57814 (citing 81 Fed. Reg. 82398, 82439 (Nov. 18, 2016)).
[79] Id.
[80] Australia allows sponsored temporary skilled workers up to 180 days to find a new sponsor, change visas or depart. See Australian Government, Department of Home Affairs, changes to work visa conditions for Subclass 457, 482 and 494 visa holders (effective July 1, 2024). Ireland also gives Critical Skills and General Employment Permit holders up to six months from the date of redundancy to find new employment, provided they notify the government within four weeks. Ireland, Department of Enterprise, Tourism and Employment, Employment Permits: Redundancy, https://enterprise.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/Redundancy The United Kingdom shortens a Skilled Worker's permission to remain to 60 days once the sponsor reports that the employment has ended. See Kingsley Napley LLP, Lay Off My Visa: What Happens When Sponsored Workers Are Made Redundant (Mar. 9, 2023). This source also

discretionary grace period tied with a defined start date can be administered without the case-by-case review DHS describes as burdensome.

2. Use the last date of regular payroll as the presumptive employment end date. DHS could simplify this inquiry by treating the last date covered by an employee's regular payroll as the presumptive last day of employment, excluding severance payments or payouts of accrued benefits following termination. This approach reflects the common-sense reality that employers ordinarily do not continue paying regular wages to individuals who no longer work for them. Payroll records provide readily available, routinely maintained evidence of the employment relationship and would establish a consistent starting point for calculating the grace period, subject to contrary evidence in an individual case. This approach would also treat foreign workers and U.S. workers alike by recognizing the same ordinary indicator of when employment ends, rather than imposing a separate, artificial employment-end-date standard solely for immigration purposes.

3. Add a last-day-of-employment field to Forms I-129 and I-539. DHS states that petitioners "may or may not proactively flag" reliance on the grace period, so officers must screen every filing.[81] A single field, together with a checkbox indicating reliance on the grace period, would solve that problem. For example, the forms could ask: (1) whether the beneficiary has stopped working for the sponsoring employer; and (2) if so, the last day of work. The NPRM states that USCIS "has determined that there is no need to update" Form I-129 or any other information collection,[82] which suggests this option was not considered.

DHS's first reason for rejecting the evidentiary alternative it did consider, claiming that adjudicators "would still have the added burden of scrutinizing the documentation and verifying the end date,"[83] applies equally to the NPRM. Its second reason, that the alternative "would not address DHS's goal of aligning the regulatory provisions with the statute,"[84] does not address the burden concern at all. Indeed, DHS concedes the point, acknowledging "a potential reduction in administrative burden from this alternative."[85] DHS must consider

---

says that if fewer than 60 days remain on the visa, it simply ends on its expiry date. The Netherlands gives highly skilled migrants who lose their jobs three months to find new employment, extended to six months for those who have held their permits for at least two years. IamExpat, IND Extends Job Search Period for Work Permit Holders in the Netherlands (Aug. 11, 2026).

[81] Id.

[82] Id. at 57827–28.

[83] 91 FR at 57816.

[84] Id.

[85] 91 FR at 57816.

options that would address its concerns while retaining the existing policy before choosing wholesale rescission.[86]

DHS should conduct a reasoned analysis of less burdensome alternatives before abandoning the entire framework.

IV. DHS Fails to Consider the Burden the NPRM Imposes on USCIS and Other Agencies

DHS concedes that the proposed rule "would marginally increase the volume of USCIS referrals to EOIR annually and lead to a minor increase in workload demands on both DOJ and [ICE]," and that USCIS would devote resources "to issue an increased number of NTAs and to initiate removal proceedings."[87] In FY 2025, USCIS issued 37 Notices to Appear to H-1B beneficiaries who failed to maintain status beyond the grace period.[88] The NPRM does not estimate how much that number would grow once status loss begins the day after employment ends, or what the additional cases would cost EOIR and ICE. This omission undercuts DHS's assertion that eliminating the grace period would allow USCIS to redirect scarce resources towards timely adjudication of meritorious cases."[89] But by DHS's own account, the proposed rule would reduce work in one place (grace period review) while increasing it in another (Notices to Appear and referrals to EOIR), and the NPRM quantifies neither. DHS does not show that the elimination of the grace period frees resources for timely adjudication when it has measured neither the burden removed nor the burden added. It therefore has not produced any net administrative savings.

Nonimmigrant workers required to depart and seek readmission must obtain a visa abroad if they lack one and be inspected at a port of entry. The NPRM acknowledges that "some [foreign nationals] would leave the country and then apply for readmission under a nonimmigrant employment-based status after finding a new job,"[90] but it does not consider the resulting workload for the Department of State or U.S. Customs and Border Protection.

U.S. consulates in India illustrate the capacity constraints that make this omission significant: applicants in some visa categories face wait times of a year or longer simply to obtain an interview appointment, before any additional processing required for visa issuance.[91] Although appointment availability varies by visa category and consular post, these lengthy queues demonstrate the practical consequences of demand exceeding available consular resources. Eliminating the grace period would direct additional workers and their dependents into the overseas visa process even when their transition to a new

---

[86] Regents, 591 U.S. at 30.
[87] 91 FR at 57809, 57824.
[88] Id. at 57823 & n.59.
[89] 91 FR at 57824.
[90] Id. at 57817.
[91] See the Department of State's Global Visa Wait Times, updated October 21, 2026. https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/global-visa-wait-times.html

employer could otherwise be completed through a USCIS filing without departure. Those additional applications would require additional document review, security screening, interviews where required, and visa adjudication, consuming resources that could otherwise serve applicants already awaiting appointments. The proposal could therefore compound existing backlogs while leaving U.S. employers unable to bring selected workers back promptly. DHS should assess these additional demands before characterizing repeal as an administrative efficiency.

A rule justified by burden reduction must account for the burdens it creates. DHS acknowledges several such burdens but quantifies none of them and does not net them against the savings it claims.

a. Officers would still need to determine when employment ended.

DHS's central complaint is that evidence of the employment end date "is nonstandard," may consist of "a generalized payroll document," and may require the officer to "infer the employment end date based on prorating the payment across the pay period."[92] Removing the grace period does not remove that task. An extension of stay or change of status generally may not be approved for a person who "failed to maintain the previously accorded status."[93] To decide whether a beneficiary maintained status, an officer must still determine whether the qualifying employment ended and, if so, when it ended.

The determination is not as difficult as the NPRM suggests. In the experience of AILA members, the end date can ordinarily be established with readily available documents, such as the beneficiary's final pay statement or a letter from the former employer confirming the last day of employment. Adjudicators routinely evaluate employment evidence of this kind, and the NPRM does not explain why it is unusually or uniquely difficult in the grace period context.

b. The NPRM would replace the clear boundaries of the current rule with less predictable outcomes.

DHS describes the current process as "confusing or unpredictable" for petitioners, beneficiaries, and dependents.[94] Before 2017, however, the principal avenue for a nonimmigrant worker between jobs was to submit a request that USCIS excuse an untimely extension or change of status. That relief is available only in USCIS's discretion, only where the delay "was due to extraordinary circumstances beyond the control of the applicant or petitioner," and only where the person "has not otherwise violated his or her nonimmigrant

[92] 91 FR at 57814.
[93] 8 CFR 248.1(b); see 8 CFR 214.1(c)(4); 8 CFR 248.1(a); 91 FR at 57811 nn.11–12.
[94] Id. at 57812, 57814.

status."[95] Because cessation of qualifying employment may itself be treated as a status violation, it is unclear whether those provisions would provide any relief at all. The proposal would therefore replace a defined period with case-by-case discretionary requests, with the potential for no safe harbor. Neither outcome is more predictable for the public or less work for USCIS, whereby defeating the purpose of the elimination of the grace period.

c. Elimination of the grace period would create more immigration enforcement

Under the current rule, a gap of a few days or weeks falls within a bounded period. Under the proposed rule, the beneficiary and dependents "would be considered to be immediately failing to maintain their nonimmigrant status the day after the principal alien's employment or activity ceases."[96] A discrepancy of a single day could decide whether a petition is approved or denied, and whether the beneficiary faces the consequences DHS itself describes, including removability, possible accrual of unlawful presence, and bars to adjustment.[97] Raising the stakes of the same factual question can be expected to increase RFEs, denials, motions to reopen or reconsider, appeals, and issuance of Notices to Appears (NTA). The NPRM does not consider any of these effects.

V. USCIS Is Fee-Funded

DHS states that USCIS "should not be expending its limited resources" on the grace period,[98] yet USCIS is primarily funded by fees set to recover the full cost of adjudication. DHS relies on that fact elsewhere in this NPRM, explaining that the costs USCIS would incur to issue additional NTAs "would be recovered by fees established at an amount necessary to recover all expected costs."[99] The same is true of officer time spent on adjudicating petitions under the existing grace period framework.

VI. Without a Valid Burden Rationale, the NPRM Cannot Stand

The burden rationale is not a secondary point in the NPRM. It appears in the summary, the statement of need, the discussion of alternatives, the regulatory impact analysis and the Regulatory Flexibility Act analysis.[100] If that rationale fails, the proposal rests on DHS's view that the grace period is "not mandated by statute" and "disconnects" status from qualifying employment.[101] That a provision is not mandated by statute does not mean it is prohibited.

---

[95] 8 CFR 248.1(b)(1)–(2); see also 8 CFR 214.1(c)(4); Cyrus D. Mehta & Partners PLLC, Analysis of the 60-Day Grace Period for Nonimmigrant Workers (July 2017), https://blog.cyrusmehta.com/2017/07/analysis-of-the-60-day-grace-period-for-nonimmigrant-workers.html.
[96] 91 FR at 57815.
[97] Id. at 57811 & n.13; INA 237(a)(1)(C)(i), 8 U.S.C. 1227(a)(1)(C)(i).
[98] 91 FR at 57815.
[99] Id. at 57824 & n.69.
[100] 91 FR at 57807, 57808, 57812, 57814–16, 57817, 57824, 57825.
[101] Id. at 57813.

DHS invokes its broad authority to prescribe "the time and conditions" of nonimmigrant admission,[102] which is the same authority that permits it to establish grace periods. DHS regulations also continue to provide other periods during which a nonimmigrant is not engaged in the qualifying activity but is not considered to have failed to maintain status, including the 10-day period following the end of a validity period and the 60-day period following completion of F-1 studies.[103] Those periods arise at the end of an authorized stay rather than during it, but they confirm that the statute does not require uninterrupted performance of the qualifying activity on every day of authorized status.

The burden rationale also carries weight in DHS's conclusion that the rule's benefits outweigh the reliance interests of workers, families, employers and communities.[104] DHS acknowledges those interests, recognizing that affected workers and families "may have, for example, purchased houses, paid taxes, and may have otherwise invested in the local community."[105] DHS suggests that any reliance would be "misplaced" because the grace period is discretionary.[106] But the grace period is a codified regulation, not a prediction about how DHS will exercise enforcement discretion, and USCIS has applied it, in DHS's words, to grant relief in "many cases."[107] If the administrative benefit is unproven, the balance DHS struck cannot be sustained, and DHS must weigh these interests again.[108]

VII. Conclusion

For these reasons, AILA and the Council respectfully urge DHS to withdraw the proposed rule and to retain 8 C.F.R. § 214.1(l)(2). At minimum, DHS should not finalize the rule without properly quantifying the claimed administrative savings, assessing the employer costs it has identified, comparing those savings with the added enforcement burden, evaluating alternatives without treating immediate departure as the premise that determines the outcome and giving the public an opportunity to comment on the revised analysis.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

---

[102] Id. at 57809, 57813; see INA 214(a)(1), 8 U.S.C. 1184(a)(1).
[103] 8 CFR 214.1(l)(1); 8 CFR 214.2(f)(5)(iv); see 91 FR at 57811, 57812 n.16, 57814 n.26. The NPRM's citation at 57814 n.26 to "80 FR 81900, 8923 (Dec. 31, 2025)" appears to refer to 80 Fed. Reg. 81900, 81923 (Dec. 31, 2015).
[104] 91 FR at 57815–16.
[105] Id. at 57815.
[106] Id. at 57815 & n.34 (citing FDA v. Wages & White Lion Invs., L.L.C., 604 U.S. 542, 585 (2025)).
[107] Id. at 57814.
[108] See Fox, 556 U.S. at 515; Regents, 591 U.S. at 30–33.