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U.S. Department of Homeland Security
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Via electronic submission: www.regulations.gov

Re: U.S. Citizenship and Immigrations Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements
88 Fed. Reg. 402 (January 4, 2023)
RIN-1615-AC68

Dear Deputy Chief Cribbs:

The U.S. Chamber of Commerce submits the following comments on the above-referenced notice of proposed rulemaking ("NPRM" or "proposal"). The business community appreciates the fact that U.S. Citizenship and Immigration Services ("USCIS") must periodically update its fee schedule to ensure that the government recovers the full costs associated with the provision of immigration benefits requests. However, many businesses are very concerned with how USCIS has proposed to increase its fees. The most significant cost increases for various immigration benefits are targeted at American companies of all sizes and across all industries. If this proposal is finalized as is, the exorbitant fee increases that would be imposed on businesses under the agency's one-size-fits-all approach would have a profoundly negative impact on the U.S. economy.

The insights that the Chamber received from its members regarding this proposal were resoundingly negative, as these fee hikes will only exacerbate their current inability to adequately meet their workforce needs. In particular, many small businesses fear that this rule would be incredibly devastating to their companies, as these fee increases will hinder their ability to compete in the marketplace. Many companies believe that USCIS fell short of meeting its regulatory burdens in formulating this proposal, specifically with regard to USCIS's need to consider significant alternatives to the proposal under the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. For the reasons stated below,

we urge USCIS to rethink the approach it took in this NPRM, perform the necessary tasks to ensure the agency complies with its statutory burdens, and be more transparent in how it is formulating its fee schedule. To effectively accomplish these tasks, USCIS should provide stakeholders with a revised notice of proposed rulemaking to ensure that the public's concerns are adequately addressed before USCIS finalizes its new fee schedule.

Significant Fee Increases on Employers Will Adversely Impact American Businesses

We heard from many companies claiming that the proposed fee increases in the NPRM would result in substantially negative financial implications for their businesses. Every company that provided input on this proposal acknowledged that USCIS has not updated its fee schedule in several years and that the agency must do so to ensure that it has the financial resources to adequately fund its operations. USCIS explicitly acknowledges that this proposal represents an overall weighted increase in service fees of 40% to ensure the full recovery of its operational costs,[1] but the cost increases that are to be imposed upon American businesses are (with few exceptions) significantly higher than the agency's weighted average for all immigration benefit types. Examples of these inordinately high fee increases being significantly above the agency's weighted average include the following:

- H-1B Registration fee would rise from **$10 to $215**, representing a **2,050% cost increase**;
- I-129 Petitions for H-1B specialty occupation worker would rise from **$460 to $780**, representing a **70% cost increase**;
- I-129 Petitions for E, H-3, P, and TN workers would rise from **$460 to $1,015**, representing a **121% cost increase**;
- I-129 Petitions for O nonimmigrants of Extraordinary Ability or Achievement would rise from **$460 to $1,055**, representing a **129% cost increase**;
- I-129 Petition for L intracompany transferee workers would rise from **$460 to $1,385**, representing a **201% cost increase**;
- I-526E petition for an EB-5 Regional Center Investor would rise **from $3,675 to $11,160**, representing a **204% cost increase**;
- I-829 petitions for EB-5 Investors to Remove Conditions on Permanent Residency would rise from **either $3,750 or $3,835** (depending upon whether biometric services are sought) **to $9,525**, representing **154% and 148% cost increases**, respectively;
- I-956 Regional Center Designation Applications would rise from **$17,795 to $47,695**, representing a **168% cost increase.**[2]

[1] 88 Fed. Reg. 402, 405 (Jan. 4. 2023)
[2] See Table 1, 88 Fed. Reg. 402, 410-11 (Jan. 4, 2023).

Other key immigration benefit requests for the business community include I-129 filings for H-2A and H-2B workers and I-140 Immigrant Petitions for Alien Workers. Regarding the H-2A and H-2B petitions, USCIS chose to differentiate the cost for filing these petitions based on whether the putative beneficiaries of the petition are named by the employer. The proposal's fee increases for these categories are as follows:

- H-2A Petitions for Named Beneficiaries would rise from **$460 to $1,090**, representing a **137% cost increase**;
- H-2B Petitions for Named Beneficiaries would rise from **$460 to $1,080**, representing a **135% cost increase**;
- H-2A Petitions for Unnamed Beneficiaries would rise from **$460 to $530**, representing a **15% cost increase**, and;
- H-2B Petitions for Unnamed Beneficiaries would rise from **$460 to $580**, representing a **26% cost increase**.[3]

With regard to I-140 petitions, the fee increase would raise the current price of $700 to $715, which at first blush would appear to be a minor 2% cost increase. However, USCIS created a brand-new **$600 Asylum Program Fee** that would be imposed upon the filing of any Form I-129, regardless of the nonimmigrant visa classification sought, and any Form I-140. This additional $600 payment per petition adds another significant expenditure to employers such that the overall fee increases for seeking these types of critical workers would have the following end results from a cost perspective:

- H-1B petitions would cost an additional **$920/1,135 per petition**, which equates to either a **200% or 247% total cost increase**[4]**;**
- O petitions would cost an additional **$1,195, a 260% total cost increase**;
- TN, E, H-3, or P petitions would cost an additional **$1,155, a 251% cost increase**;
- H-2A Named Beneficiary Petitions would cost an additional **$1,230, representing a 267% cost increase**, whereas costs for H-2A Unnamed Beneficiary Petitions would rise by **$670, a 146% cost increase**;
- H-2B Named Beneficiary Petitions would cost an additional $**1,220, representing a 265% cost increase**, while H-2B Unnamed Beneficiary Petitions would rise by **$720, a 157% cost increase**;

[3] Id., at 410.

[4] The difference is calculated based on whether the Petitioner must file the H-1B Registration Fee, which under this proposal, accounts for the $215 dollar difference above. See 88 Fed. Reg. 402, 410 (Jan. 4, 2023).

- L petitions would rose an additional **$1,525**, representing a **staggering 332% increase** in the cost of filing the petition, and;[5]
- Form I-140 would cost an addition **$615, representing an 88% increase.**

Lastly, the fee increases for Adjusting Status to that under Form I-485, Extending or Changing Status under Form I-539, or applying for an employment authorization document (EAD) under Form I-765 are also very important to the employer community. While these fee increases are less significant than those outlined above, businesses believe that if USCIS considered other alternatives in compiling this proposal, the burden of these fee increases would be shared across the board in a much more equitable fashion than what was proposed.

The Practical Impact and Concerns Associated with These Fee Increases

As previously stated, the feedback received on this proposal was overwhelmingly negative. Several companies informed us that this proposal would add significant new costs for their company's operations. Multiple multinational firms indicated that if this NPRM were finalized, their immigration expenses would need to increase by several million dollars to maintain their current operational capacity. On the other end of the business-size spectrum, smaller firms across a host of industries conveyed to the Chamber that these fee increases will be incredibly harmful to their companies. Many of these firms predict that these increased fees will prevent their business from growing, and in the most extreme cases, would have prevented their company from entering the market.

USCIS makes a point throughout its proposal of restoring the balance between its two guiding principles in setting its fee schedule, those being the ability-to-pay principle and the beneficiary-pays principle.[6] The agency adopts the definitions given to these principles from the U.S. Government Accountability Office. The beneficiary-pays principle requires that the beneficiary of a given service pays for the cost of providing that service, whereas the ability to pay principle states that those who are more capable of bearing the burden of fees pay more for the service than those with less ability to pay.[7] Many companies, particularly smaller businesses, view USCIS's approach as being unmoored from both of these stated principles. The fee increases will impose significant cost burdens that some companies claimed they would not be able to bear to meet their workforce needs. In addition, the elevated fees will force business to not only cover the cost for the service that the company needs, but also

[5] 88 Fed. Reg. 402, 549-550 (Jan. 4, 2023).
[6] 88 Fed. Reg. 402, 424 (Jan. 4, 2023).
[7] See Id., citing GAO, "Federal User Fees: A Design Guide" (May 29, 2008), https://www.gao.gov/products/GAO-08-386SP, at 7-12.

cover a significant portion of the costs for immigration services being sought by other stakeholders.

Many businesses feel this new proposal, with the outsized burden being placed upon them for various immigration benefits their companies are not seeking, is discriminating against both the business community and the critical workers that businesses need. This feeling is prevalent among companies that employ foreign national workers from countries that are subject to the significant immigrant visa backlogs. The reason why many companies feel this way is because if a company is forced to file several forms for the foreign national worker, along with the several applications for that worker's dependent spouse and children, the substantially higher costs associated with retaining that worker in the U.S. compound over many years. Simply put, the need to keep renewing the status of the worker and his or her family members in the U.S. until an immigrant visa becomes available for them will make the proposition of talent retention much more expensive than it is today.

Given the difficulties that many companies are experiencing in meeting their workforce needs, the addition of these new significant cost burdens will likely force impacted companies to rethink their strategic planning and investment forecasts with respect to their U.S.-based operations moving forward. In its recently published *2023 Immigration Trends Report*, Envoy Global found several startling trends among many American companies that, if left unchecked, could do lasting damage to America's competitive edge in the global economy. Many of the companies surveyed noted that the barriers within our nation's immigration system are preventing them from accessing the critical talent they need to grow and prosper domestically. In turn, many of these companies have moved some of their operations offshore due to these difficulties. The notable conclusions included the following:

- 81% of companies transferred foreign national employees to an office abroad because of visa-related issues in the U.S. in the last year;
- 80% of companies relocated employees to work remotely overseas because of visa-related issues in the U.S. in the last year;
- 86% of companies hired employees outside the U.S. for roles originally intended to be based inside the country because of visa-related uncertainties, and;
- 82% of employers saw a foreign national employee forced to depart the U.S. because they were unable to obtain or extend an employment-based visa in the last year.[8]

[8] 2023 Envoy Immigration Trends Report, retrieved at https://www.envoyglobal.com/resources/pdfs/reports/Envoy-2023-Immigration-Trends-Report.pdf, accessed on March 7, 2023.

The current shortcomings of America's immigration system are creating a set of troubling phenomena in our country and these exorbitant fees would simply be USCIS erecting another barrier to America's economic competitiveness. Many companies have shown that when they cannot move a foreign talent to the U.S. to work, they will simply move the work to the worker that is outside the U.S. Several multinational firms whose global talent is focused on foreign national workers in the H-1B, L-1, TN, and E classifications also voiced their concerns to us about the potential for retaliatory actions from the other countries caused by these stark fee increases.

At the same time, there are many companies that are also concerned about the limitations placed on the number of beneficiaries for specific visa classifications. The most feedback that the Chamber has received on this problem has come from agricultural employers that rely upon H-2A workers and other seasonal employers that rely upon H-2B workers. This limitation also impacts the O, P, and H-3 nonimmigrant classifications. As such, employers across a host of industries, including agriculture, retail, technology, manufacturing, and many others, will have to confront the dual threat of the proposed fee increases and the limitations on the amount of beneficiaries they can include on a single petition.

Put simply, these companies will have to file more petitions at a significantly higher price point to hopefully obtain the same number of workers in the future. None of these developments will help any of these companies compete in an increasingly competitive global marketplace. In fact, many companies will find that these changes will make it cost-prohibitive to attract the talent they need for the business to succeed.

The Gravity of the Likely Harms to Be Inflicted on Businesses by the USCIS Proposal

Several Chamber members provided us with various data and anecdotes as to how devastating this new fee structure would be to their companies. Some of the problems that American companies will face if this proposed fee schedule is finalized in its current state are summarized below. The Chamber believes that USCIS gravely underestimated the economic impact of this rule on all businesses, failed to identify conflict with other rules and regulations, and did not consider any significant alternatives that would avoid the harm that this proposal will likely impart upon the business community.

Multiple large multinational firms that rely upon a mix of H-1B, L-1, TN, E, and various employment-based green card workers informed us that the additional costs for their firms would be in the millions of dollars. Many of the large companies that we discussed this proposal with declined to provide us with a dollar amount in terms of the rule's impact. Regarding the companies that did provide us with estimates, some

expected their annual immigration costs to increase in the **$2-3 million** range, while others estimated that the NPRM would cost their company **$15-18 million** in increased fees for a given year. The average expected increase in immigration fee costs for large multinational firms that provided us with hard data was approximately **$9.75 million per company.**

One small technology firm specializing in payment processing indicated that his start-up business required him to hire some key H-1B employees from abroad. The additional costs to his business that this fee schedule would have had on his bottom line, had the rule been in effect, would have amounted to **60%** of his company's startup capital. Had this rule been in effect at the time he was considering opening his own business, this entrepreneur stated unequivocally that he "would not have started his business in the U.S." and he would likely have returned to his home country with his family. He added that this new fee schedule, if it were to go into effect, would "repel entrepreneurs like me that want nothing else but to pursue their own American dream."

Several small hotels in vacation destinations across the country indicated that the increase in fees, the 25 person-per-petition limit, and the bifurcation between petitions for named and unnamed beneficiaries, will increase their costs way beyond what is portrayed in USCIS's tabulations. One such company indicated that they file multiple petitions for both names and unnamed beneficiaries. Citing their recent activities in obtaining much needed H-2B workers in various occupational classifications, if the company needed to file the 11 petitions (4 for named beneficiaries, 7 for unnamed) it needed to meet its workforce needs, the company's fee obligations would be **$17,000 more** if this NRPM were in effect at that time.

This would have had many unfortunate consequences, not the least of which is that it probably would not have been able to file all the petitions it needed to fully staff the hotel. Had the turns of events came to pass, the hotel owner said that it would have had to cut back on its restaurant hours, it would have likely limited the number of rooms it let out because it would have been unable to clean them, and it would have had to cut back on its expenditures for amenities that are critical draws for its customers. Furthermore, the hotel owner conveyed to us that there comes a point where the rising fee amounts make applying for workers cost prohibitive, and the end results include lost revenue for the company, less tax revenue for the local community, and less opportunities for advancements, pay raises, and bonuses for the American workers that are so critical to the hotel's success.

Similar concerns were expressed by landscaping firms with respect to the new H-2B fee requirements. A small midwestern landscaping firm noted that the increased fees would have cost his company at least **$20,000 extra** had it been in

place for last year's seasonal labor needs. These additional costs would have prevented his company from making the necessary capital investments in new equipment that allowed it to take on more contracts than it had historically, which in turn allowed it to bring in more revenue.

In addition, many farmers cited similar concerns to H-2B employers, as similar problems exist under the new bifurcated fee construct for H-2A workers. Many agricultural stakeholders have expressed to us that when seeking foreign national workers, oftentimes the farm is looking for over 100 workers. This is a common practice even for small farming operations. The 25 person-per-petition limit on a named beneficiary petition will have an impact by forcing agricultural commodity producers to file more petitions to obtain the workers they need to harvest their crops. The likely result of these rule changes will be that farmers and ranchers will be spending thousands of dollars more to try to meet their workforce needs.

Last, but certainly not least, EB-5 stakeholders are dismayed by the significant fee increases being imposed upon them under this proposal. These exorbitant fee increases affect both EB-5 investors and EB-5 Regional Center operators alike. The $29,900 increase in the cost of obtaining a Regional Center designation raises the cost to enter the market to such an extent that many stakeholders are worried that this will stifle the dynamism of a program that once served as a critical investment tool for many businesses across the country.

In addition, the enactment of the EB-5 Reform and Integrity Act ("RIA") made various changes to the EB-5 program, many of which have still not been implemented by USCIS. Specifically, the RIA called upon DHS to perform a fee study before implementing the new program fees, which the Department failed to complete in time allotted to it by Congress.[9] These yet-to-be-implemented components of the legislation include the establishment of several program fees. Given the instructions Congress set forth in Section 106(b) of the EB-5 RIA in the formulation of these fees, the creation of these new fee levels in this proposal constitutes a potential overlap and conflict with the fees level that are proposed in the NPRM. The reason why these fees overlap and conflict with USCIS' fee proposal is due to the specific text in the RIA stating clearly that the "fee must be set at a level to ensure the full recovery only of the costs of providing such services..."[10] (emphasis added). The prudent thing for USCIS to do in this situation would have been to refrain from adjusting these fee levels prior to the implementation of the EB-5 fees under the RIA. USCIS chose not to do this and in doing so, the agency made no reference to potential for duplicate, overlaps or conflicts with the EB-5 RIA, which is a necessary requirement for USCIS under the Regulatory Flexibility Act.

[9] See Pub. L. No. 117-103, 136 Stat. 1104 (Mar. 15, 2022).
[10] Id.

USCIS Should Use Increased Fees to Improve Processing Efficiency and Certainty

Before USCIS implements a new fee schedule, the agency should provide insight to stakeholders with regard to how USCIS intends to use these funds to improve its adjudicatory processes. Companies across a host of industries are very concerned that USCIS intends to obtain additional revenues and use those funds to merely expand its capacity to adjudicate petitions using its current, inefficient methods. USCIS has made many administrative policy changes that the Chamber has welcomed over the past couple of years, but USCIS cannot rest on its laurels. Persistent processing backlogs at USCIS continue to harm businesses and the Chamber is eager to work with the agency to help make its processes more efficient.

One issue is the consistency and predictability in USCIS' adjudications. The significant paperwork burdens USCIS imposes upon employers not only hinder the ability of companies to meet their workforce needs in a timely manner, but it also increases the agency's workload. Chamber members continue to see a considerable number of Requests for Evidence ("RFEs") being issued by USCIS and, according to the companies we conferred with on this topic, these RFEs do not often lead to denials in these cases. This leads many companies to conclude that these RFEs are merely a byproduct of USCIS not being able to make efficient use of its scarce agency resources. We believe that USCIS can take several steps to make its adjudications more consistent.

One way in which USCIS can improve its adjudicative predictability is to ensure that its adjudicators have received the necessary training on various agency policies, including the reinstated deference policy, as well as clear internal guidance regarding the appropriate evidentiary standards to reduce unnecessary RFEs, Notices of Intent to Deny (NOIDs), and denials. Another key issue that could help improve USCIS's processing efficiency is clarifying the definition of "material change" and rescind the *Matter of Simeio Solutions, LLC* policy that requires companies to file an amended H-1B petition every time a new Labor Condition Application is filed for a change in worksite. Lastly, USCIS should continue to look for ways to expand the availability of online, electronic processing of immigration benefit requests. Chamber members are eager to work with the agency to expand these opportunities moving forward. These three changes would go a long way to not only helping companies compete in the marketplace, but it would help USCIS optimize the use of its agency resources.

Premium Processing Concerns That USCIS Must Address in its Proposal

Chamber members have consistently highlighted two key issues regarding the treatment of premium processing services in USCIS' proposal. One of these concerns

includes USCIS' decision to not include premium processing revenues in calculating its proposed fee schedule. The other issue that concerns companies is USCIS' proposed changes to lengthen the period of time in which the agency may adjudicate an immigration benefit request when the petitioner has requested premium processing services.

Premium Processing Revenues Not Considered in Formulating the Proposed Fee Schedule and Offsetting USCIS' Other Adjudicatory Expenses

Given the significant increases in fees being proposed in this NPRM, there is unanimity among the business community in terms of the dismay expressed over premium processing fees not being considered in the formulation of USCIS's proposed fee schedule. The apoplexy over this development is driven in part by a few key factors. One of these factors is the enactment of the Emergency Stopgap USCIS Stabilization Act ("USCIS Stabilization Act") in 2020, which provided USCIS with the ability to raise the standing premium processing fee by 42% to its current $2,500 level. In addition, it expanded the availability of premium processing options to other benefit requests, thus providing USCIS with more opportunities to raise extra revenue through premium processing.[11]

Specifically, the USCIS Stabilization Act permits USCIS to use its premium processing revenue to not only provide the premium service to stakeholders requesting the faster adjudication service, but also to "otherwise offset the cost of providing adjudication and naturalization services."[12] Unfortunately, USCIS chose to not include premium processing revenue in its calculations under this proposal and stated as much in USCIS' Frequently Asked Questions document it issued in conjunction with this proposal.[13] Businesses find this incredibly frustrating because significant fee increases are being proposed in order to ensure that the agency generates the extra $1.9 billion it needed to cover the more than $5 billion dollars USCIS claims that it needs to match the agency's processing capacity with its expected workload.[14]

The Chamber fully appreciates that USCIS needs to generate more revenue, as its fee schedule has not been updated in roughly 7 years. However, USCIS' own FAQ claims that it expects to generate $1.2 billion through its premium processing services.[15] Adding $1.2 billion dollars to the $5.2 billion that USCIS expects to generate under its new fee schedule would lead to $6.4 billion in total agency revenue.

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[11] See Pub. L. No. 116-159, 134 Stat. 738-741 (Oct. 1, 2020).
[12] 8 USC 1356(u)(4); 134 Stat. 740 (Oct. 1, 2020).
[13] See Proposed Fee Rule FAQ, (Feb. 23, 2023) (accessed on March 10, 2023).
[14] Id.
[15] Id.

From a percentage standpoint, if USCIS considered the premium processing revenue in formulating its fee schedule, this revenue stream would represent **18.75% of USCIS' total revenue** during FY22 and FY23. When a federal agency is contemplating a revenue source that would account for one of every 5 dollars it would generate in a given time period, it calls into question the veracity of USCIS' determination that "premium processing revenue is not sufficient to appreciably affect non-premium fees,"[16] which includes those very fees that USCIS is proposing to substantially increase for all American businesses that employ foreign national workers.

Another factor at play here is that this proposal was published before USCIS made two additional announcements expanding premium processing services. These announcements extended premium processing to specified high-skilled immigrant visa applicants and certain international students seeking to obtain or extend their Optional Practical Training Status in the U.S.[17] One can presume that if USCIS had significant concerns about its ability to effectively implement these premium processing expansions, it probably would not have done so under these circumstances, but the agency moved forward with these announcements in close succession. For these reasons, the Chamber urges USCIS to include the net revenue it will generate from its premium processing services in its overall calculations in setting its fee schedule. Doing so should allow the agency to reduce its proposed fee increases for American companies across several immigration benefit requests.

Premium Processing Timetable Changes

Many employers are very worried about USCIS' proposal to change how the agency will calculate the clock to ensure that premium processing requests are adjudicated within the defined period.[18] Currently, USCIS regulations establish that a

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[16] 88 Fed. Reg. 402, 419 (Jan. 4, 2023)

[17] See *USCIS Announces Final Phase of Premium Processing Expansion for EB-1 and EB-2 Form I-140 Petitions and Future Expansion for F-1 Students Seeking OPT and Certain Student and Exchange Visitors*, U.S. Citizenship and Immigration Services (Jan. 12, 2023), available at https://www.uscis.gov/newsroom/alerts/uscis-announces-final-phase-of-premium-processing-expansion-for-eb-1-and-eb-2-form-i-140-petitions; see also *USCIS Announces Premium Processing; New Online-Filing Procedures for Certain F-1 Students Seeking OPT or STEM OPT Extensions*, U.S. Citizenship and Immigration Services (March 6, 2023), available at https://www.uscis.gov/newsroom/news-releases/uscis-announces-premium-processing-new-online-filing-procedures-for-certain-f-1-students-seeking-opt

[18] In response to the enactment of the Emergency Stopgap USCIS Stabilization Act in Pub. L. No. 116-159, Premium Processing timetables vary for the different benefit requests covered. The covered benefits include the following: 15 calendar day timetable for most I-129 classifications; 30 calendar day timetable for a Form I-765 for F-1 students seeking OPT or STEM OPT extensions, and; 45 calendar days for Form I-140 E13 multinational executive and manager and Form I-140 E21 national interest waiver classifications. See https://www.uscis.gov/forms/all-forms/how-do-i-request-premium-processing (accessed on March 10, 2023).

stakeholder's petition subject to premium processing must be adjudicated using *calendar* days. In this proposal, USCIS is seeking to change that timeframe from *calendar* days to *business* days, thus providing the agency with more time to complete the adjudicatory process.[19] Businesses strongly oppose this programmatic change, as the reason companies choose to pay extra for premium processing is the significantly shorter time that the company will wait for the immigration benefit request to be adjudicated.

It doesn't stand to reason that, holistically speaking, USCIS will provide stakeholders with improved services through the imposition of increased fees under this proposal, but with regard to providing premium processing services, the agency will be forced to revise its practices in a manner that is clearly inferior to its current policies. USCIS' own data in its Regulatory Impact Analysis illustrates that the agency has been very effective in adjudicating premium processing requests and has only needed to provide refunds in 0.13% of the premium processing cases it failed to adjudicate the request within its established time frames.[20]

From the standpoint of businesses, the premium processing option is relied upon by all sorts of companies who have specific workforce needs that must be met in a timely fashion. Whether it is an H-1B or an L-1 that is needed for a specific project at a semiconductor manufacturer or a financial services company, a group of H-2A workers that need to harvest an unexpected bumper crop, or forestry workers that are needed to trim thousands of acres of trees during an unexpected summer drought to prevent the risk of a large forest fire, these services are designed to help companies meet their critical workforce needs quickly. As such, the Chamber implores USCIS to not abandon its calendar-day approach to premium processing.

More Transparency is Needed on USCIS' Activity Based Costing Model

Many companies have raised concerns regarding the lack of information regarding USCIS' Activity Based Costing ("ABC") model upon which this proposed fee schedule was based. The Chamber made multiple requests to take the agency up on its invitation for the demonstration on how the agency arrived at its fee calculations,[21] but the agency never responded to our requests. The documents provided to the public by USCIS did not provide the type of insight necessary to ascertain how the data in the model was compared across the fiscal years that USCIS examined. Given these difficulties, the Chamber cannot comment on the statistical validity of USCIS' model, but the Chamber would greatly appreciate if USCIS provided a public forum

[19] 88 Fed. Reg. 402, 501 (Jan. 4, 2023).
[20] Regulatory Impact Analysis, USCIS Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, Table 23, p. 82-83 (Jan. 4, 2023).
[21] See 88 Fed. Feg. 402, 419 (Jan. 4, 2023).

whereby the agency would describe to stakeholders how the methodology and data used in USCIS' ABC model allowed the agency to reach its conclusions.

All Fee-Paying Stakeholders Should Bare Part of the Burden for USCIS' Asylum Program

The Chamber believes that it is critical for the U.S. to honor its heritage as a nation that welcomes those fleeing persecution. However, providing a welcoming environment for refugees and asylees does not necessitate the creation of a cost-prohibitive fee structure that hinders the ability of American companies to meet their workforce needs. Businesses believe that USCIS can fashion an updated fee schedule that simultaneously allows the federal government to accommodate the needs of refugees as well as the needs of American companies. Unfortunately, the agency's current proposal rests on a faulty assumption that for one group to benefit, another group must suffer. This inequitable construct cannot be maintained as USCIS moves to finalize a new fee schedule rule.

The proposed $600 asylum fee that is to be imposed on every Form I-129 and Form I-140 is, in the view of many businesses, a gross overreach of authority being exercised by the agency. USCIS has never imposed a surcharge as significant as this upon a distinct population of stakeholders for the sole benefit of another group of stakeholders. USCIS justifies this as a measure that places greater emphasis on the ability-to-pay principle in adjusting its fee schedule.[22] On the contrary, many Chamber members, particularly small businesses, insist that they would not have the ability to pay for all the petitions they need to file in order to meet their workforce needs. Their worries are driven in no small part by these asylum fees that they would be required to pay under this proposal.

More importantly, these additional asylum fees would have a profound, discriminatory impact on companies that employ foreign nationals from countries that are suffering from today's lengthy immigrant visa backlogs. The $600 fee will apply to all I-129 and I-140 filings. For example, let us examine the putative Indian national that is working in the U.S. on an H-1B and whose employer is seeking a green card for them. This individual may be stuck in the backlog for two decades waiting for a green card to become available. It is not outside the realm of possibility that the employer of this individual will apply for the worker's H-1B eight times, in addition to seeking the I-140 for the worker. Those nine "bites" at the new asylum fee "apple" will equal $5,400 just in the asylum fees that must be paid by the employer, and when compared to an individual from a non-backlogged country, the employer and their worker might only be on the hook for the two initial applications for H-1B status and the I-140, which

[22] 88 Fed. Reg. 402, 453 (Jan. 4, 2023).

would be a much smaller total amount paid in asylum fees at $1,800. There is no better word that one can use to describe that state of affairs than "unjust."

This surcharge is not the only way that USCIS can ensure that its asylum program is fully funded. The Chamber implores the agency to abandon any intention of implementing such an imprudent fee upon American employers. To that end, USCIS' fee schedule proposal was published several weeks before DHS and DOJ published its Circumvention of Lawful Pathways NPRM.[23] Given that both Departments are combining stricter rules for putative asylum claimants with expanding legal pathways for entry, it stands to reason that USCIS' assumptions regarding future asylee flows will need to be reconsidered. If these or similar limitations on asylum claims are finalized, those policy changes could be a catalyst for a marked decrease in the number of asylum claimants moving forward. As such, we urge USCIS to reconsider the imposition of any additional asylum fees, or in the alternative, consider the idea of spreading out the costs of adjudicating asylum claims to all fee-paying stakeholders.

More Transparency is Needed Regarding the Proposed H-1B Registration Fee

As stated above, USCIS is proposing to increase the H-1B registration fee from $10 to $215, a 2,050% increase. In percentage terms, this is the most substantial increase proposed by the agency. USCIS does not provide stakeholders with an adequate justification explanation for why a fee for an automated process must increase in such an exponential fashion.

In creating the new H-1B registration process, USCIS anticipated it would create "efficiency and cost savings when comparing an electronic registration process relative to the current paper filing and cap selection process."[24] Raising the registration price to $215 undercuts the agency's stated purpose to cut the costs for petitioners. This fee would be onerous for all employers that seek to sponsor beneficiaries for cap-subject H-1B visas. Moreover, this fee is not tied to the processing of an immigration benefit request per se; the fee is merely tied to whether an employer will be granted the opportunity to file a petition to seek that immigration benefit, with no guarantee that said petition will be approved.

USCIS states that the increased fee related to the H-1B registration process will cover the activity costs for a) informing the public and b) management and oversight.[25] If this is the case, USCIS should disclose with specificity how those agency priorities will be served by the increased fees. In the final rule, we respectfully request that the

[23] 88 Fed. Reg. 11704 (Feb. 23, 2023).
[24] 84 FR 60307, 60311 (Nov. 8, 2019).
[25] 88 Fed. Reg. 402, 501 (Jan. 4, 2023).

agency provide additional transparency regarding how it arrives at a final fee amount and how it will allocate the additional funding to benefit the H-1B registration process.

Fee Schedule Revenue Should Focus on Adjudicatory Services, Not Enforcement Functions

Under the Homeland Security Act of 2022, the boundaries of USCIS' authority covered the federal government's responsibilities to adjudicate immigration benefit requests. The federal government's interests in investigating wrongdoing and punishing violators of the law belonged to U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection. In 2005, Congress provided USCIS with limited enforcement responsibilities when it created the Fraud Detection and National Security (FDNS) Directorate, but with the passage of time, the mission of FDNS continued to expand without any corresponding grants of authority from Congress to expand its mission.

As USCIS continued to expand FDNS' mission, the statutory revenue sources for FDNS have become insufficient to cover the directorate's costs. To address this shortfall, USCIS has moved a growing amount of funds out of the Immigration Examinations Fee Account ("IEFA") to fund FDNS' operations. Given the statutory constraints on FDNS and the fact that ICE and CBP are better equipped to deal with immigration law enforcement functions, the Chamber recommends that USCIS moves these expanded enforcement functions out of USCIS and into ICE and CBP. Upon doing so, USCIS can redirect the funds for FDNS back into its core adjudicatory functions. This will help improve USCIS' efficiency and provide the agency with the ability to reduce the overall fee increases in its proposal.

USCIS Fails to Comply with Regulatory Flexibility Act Requirements

For many reasons stated above, the Chamber is confident that USCIS grossly underestimated the economic impact of this rule. However, there are many other issues that the Chamber believes are problematic regarding USCIS' small entity analysis. One such issue is USCIS' failure to properly analyze the employer data for companies that filed Form I-129 for needed workers. Specifically, the agency drew a very small random sample from the overall data set upon which to base its conclusions. There are concerns that the random sample of only 650 entities out of the 86,715 entities within the data set is insufficient to form a truly representative sample. USCIS could have sought data from other publicly available sources, including the Census Bureau, to support its analysis, but it failed to do so.

Another problem with the USCIS' Small Entity Analysis is that the agency failed to consider significant regulatory alternatives to its proposal that would have lessened

the negative impact on the business community. The only alternatives USCIS considered in its Regulatory Impact Analysis were a) no new fee exemptions under the fee schedule and b) whether USCIS should maintain fee bundling on the Form I-485 when a petitioner wants to adjust status and obtain the interim benefits of an employment authorization document under Form I-765 and an advance parole travel document under Form I-131. None of these alternatives would have the type of cost impact such that these could be considered as significant alternatives to USCIS' proposal that will harm all types of American businesses.

The types of alternative proposals that USCIS could have considered include, but are not limited to, the following:

- The impact of not decreasing any fees under the proposed schedule, or alternatively, ensuring that any fee under the schedule would at least be raised by a minimum amount to ensure that everyone's costs have kept up with inflation. According to the U.S. Department of Labor's Inflation Calculator, this would amount to a cumulative rate of inflation equivalent to 24%.[26] Depending upon the impact of a given fee, USCIS could have used this as a baseline and made adjustment to the fees in a more equitable manner than what USCIS published in its NPRM.
- Creating tiered fee levels based upon the size of one's company, which is similar in concept to what Congress created in American Competitiveness and Workforce Improvement Act regarding training fees whereby small companies pay lower fees than larger firms.
- Creating tiered fee levels for the proposed asylum fee where smaller companies would pay a lesser amount for the asylum fee or creating tiered asylum fees that would apply to more immigration benefit requests than just the Form I-129 and Form I-140, thus not placing this cost burden entirely on the business community.
- Establishing a set limit on the number of times an entity must pay the asylum program fee for a specific beneficiary.
- Adjusting the named beneficiary limits on H-2A, H-2B, O, and P non-immigrant visa petitions from 25 beneficiaries to 50, which would help limit the cost burdens on employers of these types of workers.

Given the shortcomings of the USCIS regulatory analyses, the agency must reassess the compliance costs of this new rule and consider significant alternatives that will provide the agency with the funding it needs to operate efficiently while not inflicting significantly harmful costs upon American businesses. As such, the regulatory analyses need to be republished by USCIS, and the agency must provide

[26] U.S. Bureau of Labor Statistics CPI Inflation Calculator, found at https://www.bls.gov/data/inflation_calculator.htm, (accessed on March 10, 2023).

stakeholders with both notice of the revisions in their analysis and an opportunity for the public to comment on those revisions.

Conclusion

The Chamber appreciates USCIS's desire to ensure that it can fully recuperate the costs for its adjudicatory services. However, the short-sighted, inequitable approach taken by the agency is inherently flawed. Not only are the proposed fees for businesses ridiculously high, but the lack of transparency regarding the data and methodology used by the agency to form its conclusions raise serious questions about not only the accuracy of these estimates, but also whether USCIS complied with its statutory requirements under the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. We hope USCIS adjusts its approach to this regulatory effort along the lines of our recommendations.

Thank you for considering our views.

Sincerely,

Jonathan Baselice
Vice President, Immigration Policy
U.S. Chamber of Commerce