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OF THE
UNITED STATES OF AMERICA

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U.S. Citizenship and Immigration Services
Department of Homeland Security
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By electronic submission: www.regulations.gov

**RE: U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain
Other Immigration Benefit Request Requirements
84 Fed. Reg. 62280 (November 14, 2019)
RIN 1615-AC18**

Dear Chief Deshommes:

The U.S. Chamber of Commerce submits the following comments regarding the proposed rule referenced above. The Chamber greatly appreciates the fact that the Department of Homeland Security (hereinafter the “agency,” “DHS,” or the “Department”) and U.S. Citizenship and Immigration Services (hereinafter referred to as “USCIS” or “CIS”) is concerned that the current USCIS Fee Schedule is insufficient to recover the costs associated with processing various immigration benefit requests.¹ Our members recognize that a significant revenue shortfall will likely have a profoundly negative impact on the services they would receive from the agency. Given the processing delays many American companies have recently faced regarding the immigration benefit requests they have filed on behalf of their employees, businesses of all sizes and across a host of industries do not want to experience further uncertainty and disruption in their workforces.

While our members acknowledge the agency’s stated concern about a projected annual \$1.26 billion shortfall,² they have serious reservations regarding the approach DHS is proposing to take to address this situation. Many companies acknowledge that increases in the fees that fund the Immigration Examinations Fee Account (hereinafter referred to as “IEFA”) *could* be used to address the processing delays they are currently experiencing, but the agency’s proposal

¹ 84 Fed. Reg. 62280, 62282 (Nov. 14, 2019).

² *Id.*

makes short shrift over how it will utilize these resources to improve the processing of employment-based immigration benefit requests. Many businesses view this proposal as asking their companies to spend considerably more resources for immigration benefit requests without any details from DHS as to how these additional resources will inure any benefit to businesses in the form of increased processing certainty or efficiency from USCIS. Put another way, businesses view these substantial new program costs with no perceived improvements for the end-users of these programs as nothing more than a new tax on businesses that rely upon immigrant workers to meet their workforce needs. Many companies have expressed their willingness to pay for improved customer service from USCIS, but in many respects, they consider this proposal as imposing increased costs on them for, at best, the same suboptimal services they currently receive from USCIS, and at worst, a decline in the level of service.

The agency's stated concerns regarding a significant budgetary shortfall to justify its fee increases is viewed with skepticism by many companies. While the agency predicates its fee increases to avoid the aforementioned potential cost overruns, many businesses struggle to accept these agency assertions when DHS is proposing to divert over \$112 million annually from USCIS to U.S. Immigration and Customs Enforcement (hereinafter referred to as "USICE" or "ICE").³ The agency justifies this transfer utilizing what is best described as an extremely broad interpretation of DHS' authority to utilize and repurpose the monies deposited in the IEFA. The Chamber views this proposed transfer of funds from the IEFA to ICE as an action that clearly contravenes Congress' stated intent regarding the separation of funding streams for immigration services and enforcement functions in the Homeland Security Act of 2002. The Chamber opposes this new policy and we implore DHS to abandon these regulatory provisions when it finalizes this proposal.

The Chamber is very concerned about the agency's plan to expand the scope of high-skilled nonimmigrant worker petitions that will be subjected to the significant 9/11 Response and Biometric Entry-Exit Fee for H-1B and L-1 Visas. These fees are imposed upon companies that are referred to as "50-50" companies and the fees are \$4,000 per H-1B petition and \$4,500 per L-1 petition. The agency's newfound interpretation under its proposal is not only inconsistent with the agency's historical regulatory interpretation of when these fees are required to be paid by an employer; their actions also run afoul of the statutory text governing when these fees are to be assessed against employers subjected to these fees. The Chamber views the agency's proposed action regarding the collection of these fees to be in excess of the authority granted to it by Congress. USCIS should abandon this proposed change and continue to interpret the governing statutory text in the same manner it has done so for the past decade.

Lastly, the agency's proposed changes regarding how it will administer its premium processing service for employers seeking a prompt adjudication of an immigration petition on behalf of an employees is concerning for several reasons. Notably, the agency's proposal to extend the 15-day clock wherein which it must adjudicate a petition under its premium

³ 84 Fed. Reg. 67243, 67246 (Dec. 9, 2019).

processing service will only serve to increase the level of uncertainty for employers who utilize premium processing to meet their workforce needs in a timely manner. We hope DHS rethinks its initial approach and alters its proposed changes to provide employers that need to utilize the premium processing service with more certainty as to when the agency will respond to these types of petition requests.

FEE INCREASES SHOULD ACCOMPANY IMPROVEMENTS TO AGENCY ADJUDICATIONS

USCIS' Assessment of Policy Changes Should Consider How Several Changes Have Negatively Impacted the Agency's Ability to Timely Process Visa Petitions

The Chamber understands and appreciates that DHS is primarily concerned about updating the agency's fee schedule to ensure that the level of revenue it generates through the fees for the services it provides is sufficient to cover the agency's operating costs. Given this stated concern,⁴ it is odd that in the very section of the proposal's preamble discussing the review of the Immigration Examinations Fee Account, the first item the agency chose to discuss in USCIS' future cost projections was the \$112 million fund transfer from USCIS to ICE under this proposal.⁵ As a matter of comparison, the discussion of the issues that American companies are most concerned about, such as the timely processing of visa petitions, are the very last topic discussed by the agency in this section of the proposal.⁶ More important, the agency's proposal explicitly stated before any discussion of the issues of importance to the business community, which includes the modernization of the agency's application systems and on-boarding the necessary level of staffing to meet future agency workload needs, that DHS was not proposing "any changes related to the issues discussed in this section."⁷

If the agency moves forward with finalizing this rule without considering how its own policies have contributed to the longer timeline for petition adjudications and processing delays that many employers are currently experiencing, it would be an unfortunate missed opportunity for DHS and USCIS to rethink how they can better utilize their resources to not only improve processing efficiency and cut down on delays that are important to American businesses, but to also improve our nation's security, which is important to all of our members and the country as a whole.

Specifically, USCIS should consider revisiting the following policies, among others, to make better use of the funds in the IEFA:

⁴ 84 Fed. Reg. 62280, 62286 (Nov. 14, 2019).

⁵ See *Id.* and 84 Fed. Reg. 67243, 67244, (Dec. 9, 2019). The former publication cited the \$207.6 million dollar figure, but the additional analysis cited in the latter publication in the Federal Register clarified that the transfer amount from CIS to ICE would be the lower \$112 million figure.

⁶ 84 Fed. Reg. 62280, 62294 (Nov. 14, 2019).

⁷ *Id.*

- **Mandatory In-Person Interviews.** This 2017 policy change requires all individuals seeking to obtain lawful permanent residency through their employer to be subjected to an in-person interview before they can obtain their green card. Prior USCIS policy provided adjudicators with the discretion to conduct such interviews on a case-by-case basis. These in-person interviews are resource intensive and the agency has not convincingly proven to stakeholders any meaningful utility obtained by this significant use of agency resources. USCIS could revert to its prior policy or tailor the usage of these interviews to individuals where there is evidence that the individual might pose a threat to national security, public safety, or is a fraud risk, which would not only provide more resources to timely adjudicate other benefit requests, but it would also allow the agency to better focus its resources on those individuals who might pose a risk to our nation.
- **Rescission of Deference to Prior Approvals.** Prior agency policy allowed USCIS adjudicators to defer to a prior agency approval if an employer was seeking to extend an employee's status in the U.S. and the extension requests involved the same parties, the same underlying facts as the initial determination, there was no clear error in the prior adjudication, and there was no material change in circumstances. The current policy forces USCIS to re-adjudicate issues that were previously decided and this unnecessary duplication of agency effort not only squanders resources that could be used to cut down on the processing delays that drive the current adjudicatory backlogs, but those newly freed resources could also be used to conduct more thorough investigations of individuals that might pose a safety or fraud risk to the country.
- **Significant Increases in Requests for Evidence (RFEs).** An analysis of USCIS data showed that the rate of RFE issuance for H-1B petitions jumped from 20.8% in FY16 to 39.6% for H-1B petitions filed in the first three quarters of FY19.⁸ Similar trends have been seen in the RFE issuance for L-1 petitions, with 32.1% of L-1 petitions receiving an RFE in FY16 and 53.7% of L-1 petitions receiving an RFE in the first three quarters of FY19.⁹ Many companies convey to us that these requests oftentimes seek information that is either irrelevant to the adjudication or they seek information that the employer has already provided to the agency. The increased issuance of these requests drastically slows down the adjudication of petitions, which contributes greatly to the current processing backlogs that affect stakeholders. If USCIS became more judicious in its issuance of these requests, it would free up resources that could be used to both focus on security/fraud risks and increase the agency's processing efficiency.

The three policies described above are in no way intended to be an exhaustive list of policies that, if revisited, could help USCIS manage its processing backlog and significantly curtail the delays employers across a host of industries are currently experiencing. The processing delays that businesses in all industries must confront cause real world disruptions in

⁸ Manna, Melissa, *Requests for Evidence and Visa Denials Continue to Climb in 2019*, The National Law Review, (Aug. 7, 2019), accessed on December 27, 2019 at <https://www.natlawreview.com/article/requests-evidence-and-visa-denials-continue-to-climb-2019>.

⁹ *Id.*

their operations. IT services providers, heavy equipment manufacturers, and financial services firms incur significant costs where they are forced to deal with workforce disruptions caused by a lapse in their employees' status caused by processing delays. To the extent that DHS is interested in engaging in a broader dialogue with the Chamber, our members, and other like-minded trade associations to discuss these issues, we would welcome that opportunity.

USCIS Must Provide Detailed Justifications for its Specific Fee Increases

The Chamber is very concerned about the agency's justification for the increased fees for the various employment-based petitions cited in this proposal. While the agency states that it is utilizing a weighted average increase of 21% to adjust the fees under the fee schedule, a closer look at the individual fees being increased show that the increased fees associated with the services that American businesses commonly utilize to meet their workforce needs are increasing by a significantly higher amount than the weighted average of 21%.

For example, DHS intends to revamp how various nonimmigrant worker programs will utilize the Form I-129 in the future by creating several variations of the form that will be specific to the benefit sought by the employer. The Chamber appreciates the effort by the agency to craft benefit-specific forms to provide petitioners with increased clarity as to what information is necessary to complete the petition. However, as the I-129 is broken down based upon specific visa categories, one sees that the agency is proposing widely varying increases (and in some cases, decreases) to the fees associated with these new forms. The list below shows the disparities being proposed by DHS for the different programs that are currently covered under a single, uniform I-129 form with an associated fee of \$460:

- **I-129H1, Petition for a Named H-1B Worker** – the current fee of \$460 would increase by \$100 dollars to \$560, which represents a **22% fee increase**;
- **I-129H2A, Petition for an H-2A Worker**– the current fee of \$460 would increase by \$400 for a named H-2A beneficiary to \$860, which represents an **87% increase**, whereas the same petition for an unnamed H-2A beneficiary would decrease by \$35 to \$425, representing an 8% decrease in the fee;
- **I-129H2B, Petition for an H-2B Worker** – the current \$460 fee would increase by \$265 for a named H-2B beneficiary to \$725, which represents a **58% fee increase, whereas** the same petition for an unnamed H-2B worker would decrease by \$65 to \$395, representing a 14% decrease in the fee;
- **I-129L, Petition for L Nonimmigrant Worker** – the current fee would rise \$355 to \$815, which represents a **77% increase in the fee**;
- **I-129O, Petition for O Nonimmigrant Worker** – the current fee would increase by \$255 to \$715, which represents a **55% increase in the fee**; and
- **I-129E&TN, Petition for E and TN Classification workers** – the current fee would increase by \$245 to \$705, which represents a **53% increase in the fee**.¹⁰

¹⁰ 84 Fed. Reg. 62280, 62326 (Nov. 14, 2019).

Given the variance in the proposed fee increases for these different nonimmigrant visa classifications, it would stand to reason that the agency would provide individualized justification for these divergent levels in each individual fee increase. Unfortunately, the agency did not provide such justifications for each new, program-specific I-129 form. The agency's proposal provided generalized assertions that the fees are calculated to "better reflect the costs associated with processing the benefit requests for the various categories of nonimmigrant worker."¹¹ Moreover, the agency specifically cited that these increased fees would result in the costs of the Administrative Site Visit and Verification Program (ASVVP) being covered by the fees paid by the petitioners for workers in the aforementioned categories in proportion to the extent to which the ASVVP is being used to investigate matters involving those specific benefit requests.¹²

On its face, these assertions regarding these new I-129 fees covering the costs associated with ASVVP appear to be rational. However, USCIS failed to provide the public with any evidence, data, or other relevant information pertaining to the costs incurred by the agency when conducting site visits through the ASVVP. To that end, these fee increases for all these classification-specific I-129 forms cannot be viewed in a vacuum, as there are other fees associated with nonimmigrant visa petitions that would serve the same purpose of fighting fraud through the ASVVP e.g. the \$500 Fraud Prevention and Detection Fee for certain H-1B and L-1 workers. The agency provides no information as to how these \$500 fees, which are filed by employers when they are seeking an initial petition for an H-1B or L-1 workers or are seeking to file a change of employer petition for said worker, are insufficient to cover the costs of operating the ASVVP, and if the fees are insufficient, to what extent does the agency fall short. Without this type of information, the agency cannot reasonably expect stakeholders to properly evaluate its proposal with respect to whether these fee increases are being properly adjusted by USCIS to cover their costs associated with the ASVVP on a proportional basis.

In addition to the fee increases on the new I-129 forms, many companies are concerned about the fee increases associated with the employment-based immigrant visa petition process. Under current law, when an employer files an I-485 Adjustment of Status Application for an alien worker, the company can also file an I-765, Application for Employment Authorization, and an I-131, Application for Travel Document, without paying any additional fees to the federal government if they apply for these two benefits concurrently with the I-485 or if they file for them after the I-485 has been accepted by USCIS but the adjudication of the I-485 is still pending at the agency.

DHS wants to do away with this notion of "bundling" the I-485 petition with the interim benefits of employment authorization and travel documentation and charge separate fees for the I-485, the I-765, and the I-131. The agency justifies this decision under the assumption that

¹¹ 84 Fed. Reg. 62280, 62307 (Nov. 14, 2019).

¹² 84 Fed. Reg. 62280, 62308 (Nov. 14, 2019).

doing so will reduce the proposed fee increases for the I-485 and other forms.¹³ While the Chamber appreciates the agency's concerns, with respect to potential increases in the I-485 fee, an examination of the DHS' six alternative fee scenarios it considered in this proposal show that the highest the I-485 fee was ever raised was \$1,155, a mere \$15 over the current \$1,140 fee level that represents a paltry increase of 1.3%.¹⁴ This slight increase in the fee is comparatively small compared to changes being proposed to the fees for the interim benefits associated with the I-485 form. Given that many of our member companies that petition for permanent residency for their workers do not simply file for the I-485 on behalf of their workers and petition for all of the interim benefits describe in the proposal, we are concerned that American businesses are being asked to bear an outsized proportion of the burden in providing the revenue generated under this proposed fee schedule. We hope DHS provides more insight and data regarding its calculations of the fees as this regulatory process moves forward.

Specifically, the agency's estimates regarding the disaggregation of the fees for the I-485, I-765, and I-131, will represent a \$970 increase in the initial filing of I-485 application to \$2,195, which represents a 79% increase in the overall fees for the combined I-485, I-765, and I-131.¹⁵ To that end, these fee increases will have some of the most negative impacts upon industries that utilize the EB-3 Other Worker category, such as meat/poultry processors, home healthcare providers, hospitality/lodging, among others, as the rate of pay for workers in those industries is not as high as in other fields and the fees represent a larger percentage of the wages to be paid to those individuals. The more that these increased fees make the marginal worker in those industries more costly to employ, the harder it will be for companies operating in those industries to find legal workers to fill their workforce needs when American workers are unavailable to take those jobs.

Similarly, the proposed changes in how the fees are restructured for the I-485, the I-765, and the I-131 will have an outsized impact on employers that hire a significant amount of immigrant workers from India and China. The current immigrant visa backlogs ensure that these intending immigrants will likely be in line for several years, in many cases over a decade, which means that individual will have to apply the interim benefits of work and travel authorization multiple times before they receive their immigrant visa when it becomes available under the State Department's Visa Bulletin.

We urge the agency to consider these profoundly negative impacts before it makes any decision to finalize these provisions in its proposal. While retaining the current regulatory provision that allow these three applications to be "bundled" and only subject to one fee would help avoid these negative consequences, the agency could alternatively consider expanding the validity period for both the work authorization and travel authorization documents from a period of one year in duration to two years. Doubling the validity period of these documents would cut

¹³ 84 Fed. Reg. 62280, 62304 (Nov. 14, 2019).

¹⁴ 84 Fed. Reg. 62280, 62328-62331 (Nov. 14, 2019).

¹⁵ 84 Fed. Reg. 62280, 62305 (Nov. 14, 2019).

down on the number that individuals stuck in the immigrant visa backlogs would have to reapply for these benefits and it would provide the agency with the ability to recalibrate its proposed fee changes in this area such that all intending immigrants that are seeking to adjust their status to that of a lawful permanent resident are not stuck bearing a significantly higher burden than others moving forward.

DHS Should Reconsider its Arbitrary Named Beneficiary Limits for Certain Nonimmigrant Visa Categories

DHS' proposed changes to the I-129 Forms for the H-2A, H-2B, and the O visa categories include a 25 person limit on the number of named beneficiaries that can be included on a single petition.¹⁶ DHS' justification for this change is that by limiting the number of named beneficiaries simplifies and optimizes the adjudication of these petitions, which can lead to reduced average processing times for a petition, as "petitions with more named beneficiaries require more time and resources to adjudicate than petitions with fewer named beneficiaries."¹⁷ The Chamber acknowledges that USCIS adjudicators must perform more tasks in evaluating named beneficiaries than unnamed beneficiaries on an I-129 petition, but given that many seasonal employers include named beneficiaries because they have worked in the U.S. for their businesses before and they have been subjected to federal background checks in the past. Significantly higher fees for named workers over unnamed workers runs the risk of disincentivizing the hiring of workers that have proven in the past to be good employees who do not pose a security or safety threat to the country.

The arbitrary limit of 25 named beneficiaries on these type of petitions by DHS is not likely to have the agency's intended benefit of decreasing the overall workload of USCIS' adjudicatory staff. The anecdotal evidence offered by our members that care about the H-2A and H-2B programs have been adamant for many years that they cannot find enough workers, which suggests that the demand for these workers is more likely to grow. Spreading out all the potential nonimmigrant visa beneficiaries being sought by an employer over several petitions will merely spread out the volume of work that USCIS needs to perform. Employer also worry about the possibility of inconsistent adjudications among the different petitions that a single employer will be forced to file under this proposal.

In addition, the named beneficiary limitation will make it significantly more expensive for companies that need to fill several positions at their workplace because it will force them to file for multiple petitions to obtain all the workers that the company needs. For example, think of a citrus grower in Central Florida that needs 100 H-2A workers and this grower has longstanding relationships with his prior workers so each I-129H2A petition has 25 named beneficiaries on it. Under current law, this grower would pay \$460 with all the workers that the company wants to hire on one petition. Contrast that with how the grower would fare under the new DHS proposal,

¹⁶ 84 Fed. Reg. 62880, 62309 (Nov. 14, 2019).

¹⁷ *Id.*

the grower would have to make four separate payments of \$860 to cover all 100 of the named beneficiaries on each petition. This would increase the growers cost just for the USCIS petitions to \$3,440. That is \$2,980 more than what current law requires of the grower in this hypothetical, which represents a 648% increase in the grower's USCIS filing fees. These types of hypotheticals will not be unique to agricultural producers; DHS' proposed changes will impact seafood processors, landscaping companies, entertainment producers, among many other companies that rely upon these nonimmigrant workers. We hope DHS understands the potential negative impacts these changes will have on businesses that rely upon the H-2 and O visa programs to meet their workforce needs and considers either eliminating the named-beneficiary limits it has proposed or raising the limit from 25 named beneficiaries per petition to 50.

THE PROPOSED \$112 MILLION TRANSFER TO U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT IS CONTRARY TO CONGRESSIONAL INTENT AND MUST BE ABANDONED

DHS' proposal seeks to transfer over \$112 million from USCIS' Immigration Examination Fee Account (IEFA) to ICE to reimburse that agency for enforcement activities.¹⁸ This action would run contrary to Congress' intent to separate the functions of providing immigration services from immigration enforcement activities under the Homeland Security Act of 2002. The Chamber appreciates DHS' desire to protect the integrity of our nation's immigration system and acknowledges that U.S. Immigration and Customs Enforcement has a critical role to play in maintaining our nation's security. Nevertheless, the importance of ICE's mission and DHS's desire to protect our nation's immigration system do not provide the legal authority necessary for DHS to transfer money from CIS to ICE in the manner described in this proposal.

When Congress organized the Department of Homeland Security, it clearly delineated the difference between what was then entitled the Bureau of Border Security (which now encompasses U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement) with the Bureau of Citizenship and Immigration Services (which is now USCIS) to such an extent that it barred the transfer of fees that were under the jurisdiction of one bureau to the other bureau. Specifically, Congress expressed its sense that the mission of both bureaus was "equally important" and they should be "adequately funded."¹⁹ To that end, the Homeland Security Act contains explicit statutory text barring the transfer of fees that were imposed for a particular service under the jurisdiction of one bureau to the other bureau absent Congress' authorization of such transfer under Section 286 of the Immigration and Nationality Act (hereinafter referred to as the "INA").²⁰

¹⁸ 84 Fed. Reg. 67243, 67244 (Dec. 9, 2019).

¹⁹ Homeland Security Act of 2002, Pub. L. 107-296, Section 474, 6 USC 294.

²⁰ See Homeland Security Act of 2002, Pub. L. 107-296, Section 476, 6 USC 296, which states in relevant part:
(c) FEES – Fees imposed for a particular service, application, or benefit shall be deposited into the account established under subsection (a) that is *for the bureau with jurisdiction over the function to which the fee relates*.

The IEFA, contemplated §286(m) and §286(n) of the INA, does not provide the ability for money to be transferred in the manner suggested in the proposal.²¹ In the proposal, DHS attempts to shoehorn several enforcement activities cited in its December 9th notice in the Federal Register, the vast majority of which concern fraud investigations, as “adjudication and naturalization services” defined under INA 286(m). However, for the agency to attempt to define these enforcement activities as “adjudication services” would render this long-standing Congressional distinction as utterly meaningless. Congress did not create a statutory distinction between two types of immigration-related functions for the executive branch to repeal through regulation. DHS does not have the authority conflate enforcement activities with adjudication and naturalization services, thus the ability to transfer the IEFA fees to ICE is prohibited by the statute. DHS should abandon this idea in its entirety, and the money that would have been transferred should either be utilized to further reduce the fee levels for other services under the proposal, or this money could be used to procure more human and other resources to help improve the processing efficiency of USCIS adjudications.

THE STATUTORY TEXT OF PUBLIC LAWS 111-230 AND 114-113 PRECLUDE DHS FROM REINTERPRETING WHEN EMPLOYERS MUST PAY “50-50” FEES

The Chamber vehemently opposes the agency’s proposal to reinterpret the unambiguous statutory language that governs when certain H-1B and L-1 employers must pay what are commonly referred to as “50-50” fees. Companies that are subject to these “50-50” fees must a) have more than 50 employees in the U.S. and b) at least 50% of their workforce must comprise H-1B or L-1 workers. DHS has long interpreted the meaning of the statutory text in both P.L. 111-230²² and P.L. 114-113 to only require the payment of these fees, which currently stand at \$4,000 per H-1B petition and \$4,500 per L-1 petition, when both the filing fee and the fraud prevention and detection fee under INA § 214 (c)(12) were due at the time of filing.

The clear statutory text in the INA regarding when employers must pay the fraud prevention and detection fee states that the fraud fees are only required when an employer seeks a) an initial grant of H-1B or L-1 status to an alien worker or b) when the employer is seeking to obtain authorization for an alien already in possession of H-1B or L-1 status to change employers.²³ As such, when these statutory fees were first established under P.L. 111-230 and

(d) FEES NOT TRANSFERABLE – *No fee may be transferred between the Bureau of Citizenship and Immigration Services and the Bureau of Border Security for purposes not authorized by section 286 of the Immigration and Nationality Act* (8 USC 1356). (emphasis added)

This language clearly limits when money from fees of one agency can be transferred to the other.

²¹ See INA 286 (m) and (n), where none of the statutory language provides any explicit or implicit authority for USCIS to transfer money out of the IEFA to any other agency. Comparing this to INA 286(v)(2)(B), which splits up the allocation of the Fraud Prevention and Detection Fees among three agencies, Congress clearly provided DHS with more leeway as to how the money from those fees could be used. Congress could have made similar accommodations for the fees under the IEFA, but it did not. Therefore, USCIS cannot transfer these fees to ICE under this proposal.

²² Under P.L. 111-230, these fees were set at \$2,000 for an H-1B petition and \$2,250 for an L-1 petition.

²³ See INA § 214(c)(12)(A), 8 U.S.C. § 1184(c)(12)(A).

then reauthorized, increased, and repurposed under P.L. 114-113, USCIS only collected these “50-50” fees from employers when a fraud prevention and detection fee was also due.

In many ways, the changes that were made to the statutory text in P.L. 114-113 serve to undermine the agency’s position in reinterpreting this text to allow them to charge these fees whenever an employer seeks to extend an H-1B or L-1 employee’s status in the country. Specifically, the statutory text included in P.L. 111-230, which stated in relevant part “the filing fee and fraud prevention and detection fee required to be submitted with an application for admission...” was changed to “the **combined** filing fee and fraud...to be submitted with an application for admission, **including an application for an extension of such status**, shall be increased...” (emphasis added on the new language). The new language Congress added to these statutory provisions in 2015 clarified two issues that DHS had struggled with in implementing P.L. 111-230.

The first issue that this new language resolved was whether the “50-50” fee would only be charged to employers when the fraud prevention and detection fee was due. In our view, Congress’ inclusion of the word “combined” put this issue to rest, as the general meaning of “combine” means to unite or to merge, and in order for the “50-50” fee to be paid for by the employer, its payment had to be merged with the payment of the fraud fee. USCIS and employers had always understood the original text in P.L. 111-230 “the filing fee **and** fraud prevention and detection fee” (emphasis added) were joined by “and” in the sense that *both* components were “required to be submitted” with the application before the “50-50” company was required to pay the “50-50” fee. Congress inserted the word “combined” to ensure that the meaning of the word “and” could not be reinterpreted to mean “or,” which precludes any reading of the current statutory text to require the “50-50” fee to be paid when *either* the application fee or the fraud detection and prevention fee was required. Simply put, Congress confirmed that the word “and” could not be interpreted to mean the word “or;” as such, if no fraud fee is owed by the employer in the application process, then no “50-50” is due for that application as well. This precludes DHS from imposing the change it seeks in forcing certain H-1B and L-1 employers to pay the “50-50” fee every time they seek to extend their workers’ status in the U.S.

The second question that Congress answered with this language was whether the term “application for admission” included petitions requesting an extension of stay for an individual H-1B or L-1 nonimmigrant. Once again, Congress clarified and eliminated any ambiguity as it determined that the term “application for admission” included a petition for an extension of stay for an H-1B or an L-1 nonimmigrant such that the “50-50” fees would apply to those extension petitions where both a) the nonimmigrant worker’s status was extended and b) the fraud prevention and detection fee was due to be paid by the employer in that petition. In introducing this category of application with the word “including,” Congress made clear that such “an application for an extension of such status” was a subset of, and already included in, the preceding phrase “application for admission as a nonimmigrant.” This new dependent clause merely addressed a type of nonimmigrant petition where the fraud prevention and detection fee

was “required to be submitted” with the rest of the application, not other applications where the fraud fee was not due.

Had Congress sought to include all extension petitions filed by certain H-1B and L-1 employers to be subject to these “50-50” fees every time they filed an extension, Congress would have chosen different language to clarify that was their intent. Unfortunately for DHS, Congress did not do so, and the agency must operate within the confines set forth by the legislative branch. In this case, Congress chose to distinguish between situations where extension of stay petitions necessitated a fraud prevention and detection fee to be paid by an employer, which would force a “50-50” employer to also pay the “50-50” fee in those situations, and those situations where the payment of a fraud fee was not required, thus a “50-50” fee was not required either. As such, “50-50” employers are required to pay a “50-50” fee when they are seeking to hire an H-1B or L-1 worker that currently has H-1B or L-1 status in the U.S. because they work for a different employer. These petitions have the effect of extending that worker’s status in the country, and because they will be a new hire by that “50-50” firm, they are required to pay the fraud prevention and detection fee when that petition is filed, thus triggering the requirement that the employer must also pay the “50-50” fee in that petition as well. This is the only way one can read the statutory language governing the “50-50” fees that gives meaning to all the language in the respective fee provisions.

Under the agency’s proposed reinterpretation, it would make different parts of the language governing these fees meaningless. The most egregious example of this would be the way the agency would treat the word “combined” in reference to the linking of the payment of “50-50” fee with the payment of the fraud prevention and detection fee. The agency literally goes to such great lengths to say that “combined” fees can be the filing fee plus \$0 when the fraud fee does not apply.²⁴ The stretching of the English language that the agency is engaging in simply does not pass the laugh test, as a fee with no value is just that – no fee. You simply cannot combine a fee with another fee that has no value.

The agency makes a passing reference to “various policy reasons” to support its proposed change to how “50-50” fees are to be collected in the future, and it specifically cites that the federal government’s collections of these fees have fallen far short of the CBO estimates.²⁵ While one can certainly appreciate the agency’s candor in identifying the desire to be achieved in expanding the scope of the application of these “50-50” fees, it still does not provide a legitimate basis for this policy departure because the agency cannot unilaterally change the legislative text. The agency may prefer a different policy, but Congress directly spoke to this issue and it decided otherwise. If DHS wants to see a policy change on this issue, it must work with Congress to change the statutory language to that end. We urge the agency to eliminate these provisions in the proposed rule and to continue applying the law with respect to these “50-50” fees in the same manner that the agency has done so for the past several years.

²⁴ 84 Fed. Reg. 62280, 62323 (Nov. 14, 2019).

²⁵ *Id.*

PROPOSED PREMIUM PROCESSING CHANGES INCREASE BUSINESS UNCERTAINTY AND PASS ON COSTS OF GOVERNMENT INEFFICIENCY TO THE PUBLIC

DHS proposes to make several key changes to the regulations governing the operation of premium processing. The Chamber finds these proposed changes troubling, with the most concerning changes being those that increase the amount of time in which USCIS must adjudicate a petition with a premium processing request. These changes create more uncertainty for businesses that need to ensure they have the necessary talent to meet their workforce needs in a timely manner.

The first troubling change to premium processing is that DHS seeks to undermine the protections afforded to stakeholders under the Administrative Procedure Act by proposing to amend its current regulations to allow USCIS to simply notify the public of future premium processing fee inflationary increases through changes to Form I-907 instructions and by notice on the USCIS website.²⁶ This would remove these types of changes from being made through the notice-and-comment process in the Federal Register. The Chamber acknowledges that Congress provided DHS with the authority to adjust this fee annually to keep up with inflation, but this fee has been increased three times in the past 4 years. It does not appear that the agency is struggling to update this fee under its current process of providing proper notice to stakeholders through the rulemaking process, and we hope that the agency does not go through with taking future premium processing fee changes outside the scope of the conventional rulemaking process.

The Chamber is also concerned about the change in the calendar for when USCIS must issue a decision for a petition that is accompanied by a premium processing request. Under current law, the agency must complete the processing of these types of petitions within 15 calendar days.²⁷ The agency does not provide any justification for why this interpretation needed to be changed, other than “DHS has determined that the June 1, 2001 interim rule was incorrect,” and that the agency is currently free to reinterpret this long-standing interpretation without providing a legitimate rationale to explain why USCIS was incorrect in promulgating the 2001 rule.²⁸ Stakeholders need more information from the agency to properly comment on this aspect of the agency’s proposal. Changing this processing limit from 15 calendar days to the agency’s overly broad definition of 15 business days is one that will significantly slow down the processing of these petitions which the agency is supposed to adjudicate in an expeditious manner. Specifically, the proposed definition of business days is defined as follows:

“...business days are those on which the Federal Government is open and does not include weekend, federally observed holidays, or the days on which Federal Government

²⁶ 84 Fed. Reg. 62280, 62311 (Nov. 14, 2019).

²⁷ See Establishing Premium Processing Service for Employment-Based Petitions and Applications, 66 FR 29682, (June 1, 2001).

²⁸ 84 Fed. Reg. 62280, 62311 (Nov. 14, 2019).

offices are closed, such as for weather related or other reasons. The closure may be nationwide or in the region where the adjudication of the benefit for which premium processing is sought will take place.”²⁹

This definition is far too open-ended for businesses to be certain that they’re getting what they paid for in requesting the premium processing service for their employees’ petitions. The term “other reasons” for the purposes of defining a federal office closure could conceivably be a massive earthquake or mudslide in southern California that halts the processing at the California Service Center indefinitely. While no one wants to downplay the catastrophe that horrible calamities such as those would have, businesses cannot continue to meet their company’s needs if they don’t possess a reasonable level of certainty regarding the 15-day premium processing clock. If the agency is intent on moving from 15 calendar days to 15 business days as its baseline, then the agency should redefine business days as “all weekdays, except for those which fall on federal holidays.”

CONCLUSION

We appreciate the concerns that USCIS has regarding potential budgetary shortfalls. The Chamber supports a fee schedule for the agency that would allow it to function in a manner that provides American companies with the timely adjudication of immigrant and nonimmigrant visa petitions, as that would provide much needed certainty for companies that are seeking to expand their business operations in the U.S. Unfortunately, the current construction of USCIS’ proposed fee schedule suffers from many critical defects that need to be addressed before DHS finalizes this proposal.

Thank you for considering our views.

Sincerely,



Jonathan Baselice
Executive Director, Immigration Policy
U.S. Chamber of Commerce

²⁹ *Id.*