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IMMIGRATION LAW

Brown Immigration Law P.C., L.L.O.

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U.S. Citizenship and Immigration Services ("USCIS")
U.S. Department of Homeland Security ("DHS")

SUBMITTED VIA FEDERAL REGISTER ONLINE PUBLIC COMMENT TOOL
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RE: DHS Docket No. USCIS-2026-0298; RIN 1615-AD20 — Fee for Certain H-1B Petitions

I respectfully submit this comment regarding the Department of Homeland Security's proposal to impose an additional $103,265 fee on each H-1B cap-subject petition on behalf of myself personally and on behalf of the firm I lead. By way of background, Brown Immigration Law P.C., L.L.O. is a law firm based in Lincoln, NE and founded in 2006. Personally, I've practiced in the field of U.S. business immigration law for 28 years and I'm also licensed in Ontario, Canada, and have assisted many corporate clients with U.S., Canadian and international immigration issues. To date we've helped thousands of individuals and companies and well understand the importance of the H-1B status in the U.S. immigration ecosystem.

To start, we recognize the government's legitimate interest in recovering the costs associated with administering the immigration system. However, the proposed $103,265 charge has no real-world connection to the actual cost of adjudicating the particular immigration benefit for which the fee is imposed. The proposed charge is extraordinary in both its amount and its structure and although it is framed as a cost recovery vehicle it is meant as a poison pill to dismantle and destroy the H-1B program as the fee is excessive and arbitrary and punitive to those employers who seek talented degreed employees who might not otherwise be available to fill key roles.

While DHS estimates that approximately 85,000 cap-subject petitions would be subject to the fee, and such a fee would generate approximately $8.78 billion annually, the reality would be quite different. In September 2025 the White House via Presidential Proclamation sought to attach a $100,000 fee to those new H-1B filings that came from individuals currently outside of the U.S. While federal courts have enjoined this Proclamation for the last few months, previously less than 100 H-1B petitions were filed that triggered the fee as stipulated. Rather than pay the exorbitant fee a significant majority of employers will choose not to file H-1B Cap Petitions. For this reason the claimed revenue is an illusion built entirely on a pipedream and the expectations of past over subscription in the H-1B Cap lottery which don't apply to such an unusual situation.

The proposed increase does not operate merely as a conventional filing or adjudication fee. Respectfully, DHS owes us all a more detailed explanation of the legal and factual basis for treating these broader governmental costs as costs of providing the individual H-1B adjudication service.

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1. The proposed charge raises serious fee-versus-tax concerns

The distinction between a permissible regulatory fee and a tax is constitutionally significant. In National Cable Television Association v. United States, 415 U.S. 336 (1974), the Supreme Court explained that a fee is generally associated with a benefit provided to the person paying the charge, whereas an exaction that finances broader public purposes can implicate the government's taxing power.

That distinction warrants careful consideration here. An employer filing an H-1B petition is requesting adjudication of a particular immigration benefit. The cost of reviewing and adjudicating that petition is necessarily distinct from the government's broader costs of administering immigration enforcement, border operations, immigration adjudication infrastructure, and other governmental programs.

The NPRM should therefore explain, with specificity, how the $103,265 amount corresponds to costs incurred in providing the H-1B adjudication service itself. If substantial portions of the proposed charge instead finance governmental activities that are not caused by, or uniquely attributable to, the individual H-1B petition, the Department should explain why those amounts constitute a "fee" rather than a broader revenue-raising assessment.

This issue is particularly important because INA § 286(m), 8 U.S.C. § 1356(m), is the principal statutory authority identified by DHS for the proposed fee. The Department should demonstrate that the full amount imposed on each petitioner falls within the scope of the costs Congress authorized DHS to recover through fees.

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2. DHS should provide a transparent calculation of the actual cost of H-1B adjudication

Having practiced in this field for 28 years, in my experience whenever the government has sought to raise a filing fee or other revenue pursuant to the INA and its regulations the government owes the public a proper accounting of the time actually allocated to the adjudication of such cases.

The NPRM should distinguish between:

1. the direct cost of receiving and adjudicating an H-1B petition;
2. reasonable indirect costs necessary to provide that adjudication service; and
3. broader governmental expenses that benefit the public generally or relate to immigration programs beyond the individual H-1B petition.

Our interpretation of the INA suggests that number 3 has no basis in law in being considered in the fees associated with any proposed increase. Including that in the total is contrary to the INA and thus not defensible in court.

Ultimately DHS should provide the public with a detailed calculation showing the amount attributable to each category.

The Supreme Court's discussion in National Cable Television is relevant because the Court cautioned that an agency cannot necessarily transform all of its regulatory expenditures into a permissible fee merely by allocating those expenditures among regulated parties.

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3. The economic impact of the proposed charge is likely to be substantial

A $103,265 additional charge represents a fundamentally different economic decision for an employer than a conventional filing fee.

For many employers, particularly startups, small businesses, research organizations, and rapidly growing companies, the proposed charge could materially affect whether the employer is able to sponsor a highly skilled worker at all.

The economic consequence is not limited to the amount paid to the government. Employers may respond by eliminating positions, delaying hiring, relocating particular functions outside the United States, or choosing not to make investments that depend upon access to specialized talent. Over the years we've worked with countless clients who have faced immigration restrictions or increased costs and made decisions to either grow their operations elsewhere (in jurisdictions other than the U.S.), or cease growth in the U.S. As a firm we've hired specialized talent, including talent that doesn't typically exist in the U.S. market and that fee would be a complete barrier to our ability to grow that line of our business with that talent pipeline.

The NPRM itself recognizes that the proposed fee may affect employer behavior and projects approximately 85,000 cap-subject receipts. Given our experiences with companies in this field, and with our experiences spanning nearly three decades of Cap behavior we would like a clear understanding of what customer impact studies have been undertaken to establish this pie-in-the-sky number, as every conversation we've ever had about the $100k fee imposed last September involved devising ways to avoid paying the fee at all costs. There is no interest in paying this arbitrary and capricious fee unless it is absolutely required to be paid to secure the most important/consequential talent. That being said, there must be clear and convincing proof of the likely revenues to justify such a massive budget decision to ensure there is a positive impact to our nation's finances. We ask that DHS conduct and disclose a more comprehensive analysis of the potential effects on employment, investment, entrepreneurship, research, and U.S. competitiveness before implementing such a proposal.

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4. The proposal should account for the disproportionate effect on small and emerging businesses

The proposed fee currently applies as a uniform $103,265 charge regardless of the petitioner's size or financial resources.

A charge of this magnitude may be a manageable expense for large multinational corporations while representing a prohibitive barrier for a startup, small business, or newly established company. This could hurt developing companies in their efforts to grow and scale.

We ask that DHS explain why a uniform fee is appropriate when the underlying adjudication service does not necessarily impose materially different costs based upon the financial resources of the petitioner. And if possible, it should consider either a sliding scale based on size of petitioner, or an exemption mechanism based on size of petitioner.

The Department should also consider whether the proposed structure could unintentionally favor the largest employers by making sponsorship economically inaccessible to smaller competitors.

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5. The proposal should distinguish immigration-system costs from the cost of the individual benefit

The public has an important interest in an adequately funded immigration system. However, that burden is born by the various processing fees already charged by USCIS, and the existing funding mechanisms for the other agencies that form a part of DHS. The INA does not establish that all costs associated with operating the immigration system may properly be assigned to one particular category of immigration benefit.

If the Department determines that certain governmental activities provide a general public benefit, it should explain the statutory basis for requiring H-1B petitioners alone to finance those activities, or more appropriately change the INA itself to permit such a fee to exist. Until such a legislative change is enacted, this burden on H-1B Cap petitions is not permitted by statute.

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6. Requested action

For these reasons, we respectfully request that DHS:

1. provide a detailed accounting of the actual costs of adjudicating an H-1B cap-subject petition;
2. identify each category of cost included in the $103,265 calculation;
3. explain the statutory basis for charging H-1B petitioners for costs incurred by agencies other than USCIS;
4. demonstrate how each included cost is sufficiently connected to the adjudication or provision of the H-1B benefit;
5. address the constitutional distinction between a regulatory fee and a tax;
6. provide additional analysis of the proposal's effects on small businesses, startups, employment, investment, entrepreneurship, and U.S. competitiveness; and

7. reconsider the proposed $103,265 amount if the Department cannot establish a sufficiently direct and legally authorized relationship between the charge and the costs of providing the H-1B benefit.

The United States has a legitimate interest in recovering the costs of immigration adjudication. That objective, however, should be pursued through charges that are authorized by Congress, which in this case means permitted by the INA and directly connected to the governmental services and benefits for which they are imposed.

We thus respectfully request that DHS carefully reconsider the proposed $103,265 fee in light of its statutory basis, constitutional implications, and potentially significant economic consequences.

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