BROWN
IMMIGRATION LAW

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

October 28, 2026

U.S. Department of Homeland Security ("DHS")
U.S. Department of Labor ("DOL")
Employment and Training Administration ("ETA")

SUBMITTED VIA FEDERAL REGISTER ONLINE PUBLIC COMMENT TOOL REGULATIONS.GOV

Re: Comment Opposing Proposed Rule, "Eliminating the Discretionary 60-Day Grace Period," (Sept. 11, 2026); DHS Docket No. USCIS-2026-0364; RIN 1615-AD22

We respectfully submit this comment in opposition to the above-referenced notice of proposed rulemaking (NPRM). Our practice represents U.S. employers and foreign national professionals in the E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN classifications, along with their dependents, on nonimmigrant, employment-based immigrant, adjustment, and consular matters. We see directly how 8 CFR 214.1(l)(2) operates in practice after layoffs, restructurings, and job changes. For the reasons below, we urge DHS to withdraw the NPRM. If DHS nonetheless proceeds, it should adopt one of the narrower alternatives identified in Part VI.

I. The Statute Does Not Require Immediate Departure, and DHS Concedes as Much

The NPRM's central premise is that eliminating the grace period "better align[s]" the regulations with the statute. But the NPRM itself acknowledges that the grace period is not mandated by statute, and its legal authority section rests on INA 214(a)(1), 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the "time and conditions" of nonimmigrant admission. DHS exercised that authority in 2016 to create a limited transition period to promote job portability, stability, and flexibility. *See* 81 FR 82398, 82436–39 (Nov. 18, 2016). DHS has not identified a statutory prohibition on such a period. It should explain why the earlier policy reasons no longer justify the regulation.

The statutory-alignment rationale also needs a fuller explanation. DHS proposes to retain the 10-day periods at 8 CFR 214.1(l)(1), the O-1 period at 8 CFR 214.2(o)(12)(ii), and the F-1 post-completion period at 8 CFR 214.2(f)(5)(iv). These provisions have distinct purposes, but their existence shows that the statutory descriptions of visa classifications do not, by themselves, resolve whether a short, expressly regulated transition period is permissible. DHS should explain the relevant distinctions.

Congress has also facilitated H-1B worker mobility. Subject to its conditions, INA 214(n), 8 U.S.C. 1184(n), permits an eligible H-1B worker to begin new employment upon the prospective employer's filing of a nonfrivolous petition before expiration of the worker's authorized period of stay. That provision does not itself mandate a grace period, but the current rule gives new employers practical time to prepare a labor condition application and petition after an unexpected job loss. DHS should analyze that effect on mobility.

II. DHS Has Not Adequately Justified Its Change in Position or Addressed Reliance Interests

An agency changing position must show awareness that it is doing so, provide good reasons for the new policy, and account for serious reliance interests engendered by the prior policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016). DHS acknowledges the change, but its treatment of reliance interests does not satisfy this standard.

DHS's principal response is that any reliance on the existing grace period would be misplaced because the decision to shorten or eliminate it is discretionary and made only when a subsequent benefit request is adjudicated. The Supreme Court rejected materially similar reasoning in *DHS v. Regents of the University of California*, 591 U.S. 1, 30–33 (2020). There, the Court held that the discretionary, non-rights-conferring character of a policy may be relevant to the weight of reliance interests, but it does not relieve the agency of its obligation to assess them. DHS cannot discharge that obligation by labeling reliance "misplaced."

The reliance interests at stake are concrete and have accrued over several years:

1. **Employers** structure reductions in force, severance, and garden-leave arrangements around the availability of a post-employment window, so that affected workers can transition to new sponsoring employers without a gap in status. Employers recruiting laid-off talent likewise build onboarding timelines around change-of-employer filings made from within the United States.
2. **Workers and dependents** have signed leases and purchased homes, enrolled children in school, and made career decisions premised on a reasonable window to secure new employment or change status. Some affected workers are parents of U.S. citizen children, whose citizenship does not prevent the disruption of a parent's sudden departure. The NPRM itself recognizes that affected individuals may have purchased houses, paid taxes, and otherwise invested in their communities in reliance on continued stay, yet it does not measure or weigh those interests.
3. **Dependents** in H-4, L-2, E, and other derivative statuses, including children mid-school-year and employment-authorized spouses, would face loss of derivative status when the principal ceases to maintain status. Their employment and education could be disrupted. DHS

acknowledges that its data cannot reliably estimate how many dependents would have used the current period. It should analyze this cascading effect.

III. The Administrative-Burden Rationale Is Unsupported

DHS relies on the figure of over 1.9 million petitions and applications filed from FY 2018 through May 20, 2026, on which USCIS potentially had to perform an additional initial assessment. That figure encompasses specified Form I-129, I-539, employment-based I-485, and compelling-circumstances I-765 filings. It does not identify how many actually invoked the grace period, required additional adjudication, or consumed measurable officer time. The potentially affected universe does not quantify the actual burden.

DHS's separate proxy data show 18,975 new-employer Form I-129 petitions filed within 60 days after withdrawal of an approved petition during FY 2021–2025, or 3,795 annually on average. Table 3 also reports 1,924 I-485, 5,596 I-539, and 49 compelling-circumstances I-765 filings in that measured window. Withdrawal is an imperfect proxy for employment cessation, and the columns should not simply be added as unique people. These observed filings nonetheless warrant an analysis of the effects of replacing a domestic transition with departure and consular processing.

Eliminating the grace period would also not eliminate the underlying inquiry. Adjudicators must still determine whether the beneficiary maintained status and when prior employment ended in order to:

- apply the discretionary excusal of an untimely extension or change-of-status filing under 8 CFR 214.1(c)(4) and 248.1(b);
- evaluate status violations under INA 245(c) and the 180-day exception at INA 245(k) for employment-based adjustment applicants; and
- assess unauthorized employment.

The rule would therefore leave important factual inquiries in place and may shift some cases into less predictable discretionary channels. DHS should compare measured officer time under the existing provision with expected time spent on alternative adjudications, denials, and motions.

The burden would also migrate to other agencies. DHS acknowledges that the rule would marginally increase USCIS referrals to EOIR and lead to a minor increase in workload for DOJ and ICE. It does not quantify that shift, and it does not account for increased consular visa demand from workers forced to depart and re-apply abroad. An agency cannot claim a burden reduction while declining to measure the burden it transfers elsewhere.

IV. The Regulatory Impact Analysis Is Deficient

Reasoned decision-making requires meaningful consideration of costs. *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The RIA falls short in several respects:

- **No monetized costs or benefits:** The OMB A-4 accounting statement lists annualized monetized benefits as not estimated and annualized monetized costs at both 3% and 7% as not estimated. The only affirmative benefits DHS identifies are qualitative.
- **Petitioner costs understated:** Table 1 lists quantitative petitioner costs as "None," although DHS acknowledges potential productivity loss, return-transportation liability where applicable, and turnover costs. DHS should assess the incremental expense of re-petitioning, consular processing, appointment delays, and delayed start dates, distinguishing costs caused by job loss itself from costs caused by this rule.
- **Beneficiary costs understated:** The RIA's $204.43 to $300.53 estimate covers time and travel for attending a hearing in response to a notice to appear; it does not purport to cover representation or the full cost of proceedings. DHS should make that limited scope clear, examine reasonable cost ranges, and explain how the observed average of 3,795 new-employer petitions translates into its lost-income scenario. It should also examine travel, relocation, and dependents' lost wages.
- **Collateral immigration consequences not addressed:** The RIA does not account for downstream consequences of status violations for future extension, change-of-status, and adjustment eligibility.

V. Collateral Effect on Compelling-Circumstances Employment Authorization

The NPRM expressly proposes to revise 8 CFR 204.5(p)(1)(i) by removing the reference to 8 CFR 214.1(l)(2). Its proposed text retains the reference to 8 CFR 214.1(l)(1) and other periods before validity begins or after it expires. DHS calls the revision technical, but it has a substantive consequence namely: An otherwise eligible E-3, H-1B, H-1B1, L-1, or O-1 principal with an approved Form I-140 would no longer be able to use the post-cessation grace period to satisfy the status requirement for an *initial* compelling-circumstances EAD request. The 49 such applications in DHS's five-year proxy data may be few, but this is an exceptional-case benefit. DHS should analyze the effect and identify any remaining alternative. E-1, E-2, and TN are not listed as eligible principal classifications in that provision.

VI. Recommendations

We urge DHS to withdraw the NPRM. If DHS proceeds, we request that it adopt one or more of the following alternatives:

1. **Retain the grace period with clearer evidence rules:** Provide a nonexclusive list of records establishing cessation, such as an employer letter, payroll record, or separation notice, and allow an explanation when an employer will not cooperate.
2. **Preserve a meaningful period for involuntary terminations and reductions in force:** DHS should analyze both the benefit and the practical difficulty of documenting whether a departure was voluntary.
3. **Preserve a transition for beneficiaries of approved Form I-140 petitions** and an avenue for an initial compelling-circumstances EAD request when otherwise eligible.
4. **Clarify when "cessation" occurs:** Explain how to evaluate paid notice, garden leave, an ongoing employment relationship on payroll, accrued-leave payouts, and severance following termination. Pay alone should not be deemed conclusive evidence of continued qualifying employment.
5. **Apply any final rule prospectively**, only to cessations after its effective date; expressly protect benefit requests already filed in reliance on the current rule and individuals already within a grace period; and set the effective date at least 180 days after publication.

Conclusion

The proposed rule rests on a statutory premise DHS itself concedes, dismisses substantial reliance interests with reasoning the Supreme Court has rejected, and supports its burden rationale with an unrefined population count. It also fails to quantify its costs. We respectfully urge DHS to withdraw the NPRM.