



March 10, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Ur M. Jaddou, Director  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
5900 Capital Gateway Drive  
Camp Springs, MD 20746

Carol Cribbs, Deputy Chief Financial Officer  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
5900 Capital Gateway Drive  
Camp Springs, MD 20746

Re: U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 88 Fed. Reg. 402 (Jan. 4, 2023).

Dear Director Jaddou and Ms. Cribbs:

On January 4, 2023, the United States Citizenship and Immigration Services (USCIS) proposed a rule that would increase the immigration and naturalization fees for business visas.<sup>1</sup> This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

Advocacy is very concerned with USCIS' rule that proposes steep increases of 150 to 330 percent on temporary business visas.<sup>2</sup> This proposal also requires that businesses pay an extra \$600 per petition fee to subsidize the U.S. asylum program.<sup>3</sup> USCIS has determined the Asylum Program Fee "is an effective way to shift some costs to requests that are generally submitted by

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<sup>1</sup> U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 88 Fed. Reg. 402 (Jan. 4, 2023). (hereinafter "2023 Proposed Rule").

<sup>2</sup> USCIS, Small Entity Analysis (SEA) for the U.S. Citizenship and Immigration Services Fee Schedule Proposed Rule 12 (Jan. 4, 2023). (hereinafter "IRFA"). This more in-depth document is in the docket on Regulations.gov, at <https://www.regulations.gov/document/USCIS-2021-0010-0032>.

<sup>3</sup> See IRFA, at 10.

petitioners who have more ability to pay.”<sup>4</sup>

USCIS’ Initial Regulatory Flexibility Analysis (IRFA) erroneously states that small entities will not have significant costs from this rule. Advocacy believes that USCIS’ IRFA is deficient and underestimates the economic impact of this rule on small entities. As proposed, the rule will make it cost prohibitive for small businesses and small non-profits to hire necessary staff, shutting them out of these vital immigration programs. This rule will be detrimental to thousands of small businesses, undermining their sustainability and competitiveness. Small entities are less able to pay these fees than large firms, but this fee increase relies mostly on fees levied to the small business community. This outcome contradicts the USCIS’ premise because the proposed rule shifts the burden onto those who cannot afford these new costs.

USCIS must reassess the compliance costs from this rule in a Supplemental Initial Regulatory Flexibility Analysis. As part of that supplemental analysis, USCIS must consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities as required by the Regulatory Flexibility Act (RFA).

## **I. Background**

### **A. The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,<sup>5</sup> as amended by the Small Business Regulatory Enforcement Fairness Act,<sup>6</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>7</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule’s publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.<sup>8</sup>

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation,

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<sup>4</sup> See 2023 Proposed Rule, page 451.

<sup>5</sup> 5 U.S.C. §601 et seq.

<sup>6</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>7</sup> Small Business Jobs Act of 2010 (PL. 111-240) §1601.

<sup>8</sup> *Id.*

federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”<sup>9</sup>

## **B. The Proposed Rule**

Based on a comprehensive biennial fee review and subsequent determination that the agency cannot maintain adequate service levels without adjusting fees, USCIS proposes a rule increasing fees for employers who petition for workers and sponsor them for permanent residence. USCIS is primarily funded by fees charged to applicants and petitioners for immigration and naturalization benefits requests. USCIS also proposes a new fee or surcharge of \$600 per visa petition to be paid by businesses for both temporary and permanent visa categories to fund the separate U.S. Asylum Program.<sup>10</sup>

The proposed fee increases include:

- Filing fees for H-1B visa petitions (skilled/specialty occupation workers) subject to a visa cap would increase by 247 percent, from \$460 to \$1,595. This includes a \$215 H-1B registration fee, up from the original \$10 fee. This fee is for each registration, and each registration is for a single beneficiary.
- Filing fees for H-2A visa petitions (agricultural guest workers) for named beneficiaries would increase by 267 percent, from \$460 to \$1,690. Filing fees for unnamed beneficiaries would increase by 146 percent, from \$460 to \$1,130.
- Filing fees for H-2B visa petitions (non-agricultural guest workers) for named beneficiaries would increase by 265 percent, from \$460 to \$1,680. Filing fees for unnamed beneficiaries would increase by 157 percent, from \$460 to \$1,180.
- Filing fees for L-1 visa petitions (temporary intracompany transferees) would increase by 332 percent, from \$460 to \$1,985.
- Filing fees for O visa petitions would increase by 260 percent from \$460 to \$1,655 per petition.
- Filing fees for P visa petitions would increase by 251 percent, from \$460 to \$1,615 per petition.
- Immigrant visa petitions would increase by 88 percent, from \$700 to \$1,315.<sup>11</sup>

The proposed rule also makes other changes to H-2A visa and H-2B visa petitions, such as imposing different fees for petitions with named and unnamed workers.<sup>12</sup> For many visa categories (such as H-2A, H-2B, O, and P), the rule would also limit the number of named workers that may be included in each petition to 25.<sup>13</sup> USCIS also proposes to extend the

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<sup>9</sup> *Id.*

<sup>10</sup> *See* IRFA, at 10.

<sup>11</sup> *Id.* at 12, Table 6b. USCIS Fees for Form I-129 Classifications, FY 2022/2023.

<sup>12</sup> *Id.*

<sup>13</sup> *See* 2023 Proposed Rule, at 590.

premium processing timeline for all immigration requests from 15 calendar days to 15 business days.<sup>14</sup> Advocacy has conducted extensive outreach to small businesses, nonprofit organizations, and their representatives in the past month. These small entities represent a variety of industries including agriculture, arts, landscape, hospitality, and technology. The following comments are reflective of the issues raised by these small entities and examined by Advocacy.

## **II. USCIS' Initial Regulatory Flexibility Analysis does not satisfy the requirements of the Regulatory Flexibility Act and must be amended and republished for notice and comment.**

Under the RFA, an Initial Regulatory Flexibility Analysis (IRFA) must contain:

- (1) A description of the reasons why the regulatory action is being taken.
- (2) The objectives and legal basis for the proposed regulation.
- (3) A description and estimated number of regulated small entities (using the North American Industry Classification System (NAICS)).
- (4) A description and estimate of compliance requirements, including any differential for different categories of small entities.
- (5) Identification of duplication, overlap, and conflict with other rules and regulations.
- (6) A description of significant alternatives to the rule.<sup>15</sup>

Advocacy believes that USCIS' IRFA does not properly inform the public about the impact of this rule on small entities. USCIS' IRFA fails to analyze the small entities affected by this rule and underestimates the compliance costs of the rule. Advocacy recommends the USCIS reassess the compliance costs from this rule in a Supplemental Initial Regulatory Flexibility Analysis. As part of that supplemental analysis, USCIS should consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities as required by the RFA.

### **A. USCIS' IRFA fails to analyze the numbers of small entities affected by this rule.**

#### **1. USCIS' IRFA fails to identify affected small business industries.**

USCIS' IRFA fails to identify the industries affected by the proposed rule by NAICS code.<sup>16</sup> The RFA requires agencies to identify the industries of small entities affected by the proposed rule, utilizing small business size standards in the NAICS.<sup>17</sup> An RFA analysis requires a detailed categorization of economic impacts by different sizes of small businesses within these industries.

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<sup>14</sup> *Id.* at 595.

<sup>15</sup> 5 U.S.C. § 603.

<sup>16</sup> *See* IRFA, at 12, Table 7.

<sup>17</sup> *See* Note 15.

In USCIS' IRFA, the agency incorrectly averages all industries within a visa category to assess the regulatory impact of this rule.<sup>18</sup> USCIS should have identified the top industries that utilize the H-2B visa by six-digit NAICS code, such as landscaping, hotel, restaurant, and forestry industries.<sup>19</sup> USCIS should also break down these industries by firm sizes to assess the impact of the rule on different sized small entities. A detailed analysis can identify small entities in industries that may have more significant economic impacts and may need more targeted regulatory solutions to minimize these impacts.

**2. USCIS' IRFA is deficient because it is based on a sample size that is too small and may not cover the economic impact on certain industries.**

USCIS utilizes internal data from Form I-129s or temporary visas, finding 553,889 petitions and 86,715 petitioning entities.<sup>20</sup> USCIS drew a random sample of only 650 of these entities for its analysis. Using revenue and employment information, the agency determined that 564, or 86.8 percent, of these entities met the definition of small entities.<sup>21</sup> Advocacy is concerned that this sample size may be too small at less than 1 percent of the population. USCIS only has revenue data for 353 small entities across visa categories utilizing the I-129 form. These include H-1B, H-2A, H-2B, O, L, CW, H-3, E, TN, Q, P, and R visas.<sup>22</sup> USCIS makes conclusions regarding the economic impact of this rule on these visa categories but may not have enough data or a representative sample across affected entities by industry. If a sample of petitions is used, it should be randomized based on clear stratification sectors that are explained in the IRFA. Analyzing a sample of petitions is not the only way to assess small entity impacts. USCIS could also use existing publicly available economic data of small entities in affected industries from the Census Bureau to supplement their analysis.

**3. USCIS' IRFA underestimates the number of small nonprofit entities.**

Advocacy is concerned that USCIS did not properly analyze the numbers of small nonprofit organizations affected by this rulemaking, as required by the RFA. USCIS analyzes a sample size of 650 entities and assumes that entities in four NAICS codes could be nonprofits. The agency estimated that 38 small nonprofits from these selected NAICS codes were in the sample

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<sup>18</sup> See IRFA, at 12.

<sup>19</sup> DOL, Office of Foreign Labor Certification H-2B Temporary Non-Agricultural Program-Selected Statistics FY 2021, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_Selected\\_Statistics\\_FY2021.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2021.pdf). This includes the following NAICS codes: Landscape services (561730), Hotels (721110), Bed and Breakfast Inns (721191), Full-Service Restaurants (722511), Limited-Service Restaurants (722513), and Support Activities for Forestry (115310). These entities have a range of small business size standards from \$9 million to \$40 million in average annual receipts.

<sup>20</sup> See 2023 Proposed Rule, at 551, and IRFA at 5. Collected by DHS over a 12-month period of data on the number of Form I-129 petitions filed from October 1, 2019, through September 31, 2020.

<sup>21</sup> See IRFA, at 5.

<sup>22</sup> *Id.* at 12.

size, or 5.8 percent of the sample size.<sup>23</sup> According to arts organizations, there are many more NAICS codes in their membership that utilize business visas and may be small nonprofits, including theater companies, dance companies and performing arts.<sup>24</sup> Advocacy is concerned that there could be a higher percentage of small nonprofits that could be adversely affected by this rule. These small nonprofit entities do not have the discretionary resources to pay for these high fees and may need more regulatory relief.

## **B. USCIS' IRFA underestimates the economic impact of this rule.**

In this rule, USCIS proposes exorbitantly high fee increases for temporary visas of 150 to 330 percent. A review of completion rates per visa benefit shows that USCIS will charge employers from \$700-\$1,600 per hour to process these temporary visas.<sup>25</sup> USCIS is also proposing a new \$600 Asylum Program fee or surcharge for every I-129 petition (temporary visa) or I-140 petition (immigration visa).<sup>26</sup> USCIS acknowledges that the proposed fee increases in this rule are significant. However, the agency has determined that the Asylum Program Fee “is an effective way to shift some costs to requests that are generally submitted by petitioners who have more ability to pay.”<sup>27</sup> Small businesses are less able to pay these fees than large firms, but this fee increase relies mostly on fees levied to this community. This outcome contradicts the premise of the program by shifting the burden to those who can't afford these new costs.

In the USCIS IRFA, the agency states that for Form I-129 (temporary visas), approximately 90 percent of the small entities in the sample would experience an economic impact of less than 1 percent of their reported revenue. For Form I-140 (immigration visas), USCIS states that approximately 98 percent of the small entities in the sample would experience an economic impact of less than 1 percent of their revenue.<sup>28</sup> Advocacy is concerned that USCIS' economic analysis underestimates the compliance costs from this rule.

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<sup>23</sup> *Id.* at 13, Table 9. USCIS assumed that entities with NAICS codes 712 (Museums, Historical Sites, and Similar Institutions), 813 (Religious, Grantmaking, Civic, Professional, and Similar Organizations), and 6241 (Family Social Services) were not-for-profit.

<sup>24</sup> Advocacy held a call on February 2<sup>nd</sup> with arts groups and their members. The members of these arts groups represent nonprofits and for profit entities, and cover these NAICS codes: All Other Business Support Services (561499), Theater and Dance Companies (711120), Musical Groups and Artists (711130), Other Performing Arts Companies, Promoters of Performing Arts with Facilities (711310) and without Facilities (711320), Agents and Managers for Artists (711410), Independent Artists (711510), Museums (7112110), Other Personal Services (812990), Other Grantmaking and Giving Services (813219), Other Social Advocacy Organizations (813319), and Civic and Social Organizations (813410). These entities have a range of small business size standards from \$9 million to \$40 million in average annual receipts.

<sup>25</sup> See 2023 Proposed Rule, at 448. Advocacy divided the fee amount by the completion rates per benefit request to obtain the amount the agency is charging employers per hour. For example, for H-1B visa capped workers that is \$1,595 fee/1.53 hours = \$1,042 per hour.

<sup>26</sup> See IRFA, at 10.

<sup>27</sup> See 2023 Proposed Rule, page 451.

<sup>28</sup> See IRFA, at 13.

**1. USCIS uses average revenues of all small entities, which hides the impact of the rule on the small entities. USCIS should assess economic significance by type and size of entity.**

USCIS analyzes the average cost to revenue of small entity petitioners for each visa category. However, the small entity petitioners are not assessed by type and size of entity. For example, USCIS averages the economic impacts on all small H-1B visa petitioners, whether the business is a start-up with little revenue or an established small computer design firm with \$30 million dollars in annual receipts.

Advocacy has detailed the drawbacks of averaging impacts across all affected small businesses, which can miss the burdens of a regulation on the smallest businesses and nonprofits.<sup>29</sup> An RFA analysis requires a detailed categorization of economic impacts by different sizes of small businesses within affected industries. While most industries are predominantly made up of small businesses with under 20 employees, the average revenue for all small businesses may not be reflective of these businesses. Without grouping regulatory analysis on the different size and types of businesses affected, the impacts to the smallest businesses can be hidden and agencies cannot craft alternatives to minimize the economic impacts to these entities.<sup>30</sup>

USCIS' analysis underestimates the impact of this rule on the smallest businesses and nonprofits. A small entity requesting one or a few workers per petition will be paying more per employee for the \$600 asylum fee than another entity that hires 25 workers in one petition. Certain visa categories such as the H-1B visa, L visa, and certain O visas only allow one worker per petition. These entities will be paying the full \$600 asylum fee per worker.

*Impacts on H-2A visa small employers*

Advocacy is concerned that the increased fees may be detrimental and disruptive to small farming operations that rely upon the H-2A visa as their primary workforce. These businesses operate in rural locations and are unable to find reliable U.S. employees to work in these agriculture jobs like field workers and livestock workers. This proposal would increase the cost of H-2A visas \$460 to \$1,130 for unnamed visas and \$1,690 for named visas.

Advocacy believes that these costs will be significant for these smaller operations that have low revenues and operate on razor thin margins. For example, a small farm that completes manure application in multiple states normally files three petitions (named and unnamed) for seven workers. Under this rule, the farm costs would rise from \$1,380 to \$4,510. Another small farm commented that they file five petitions for five unnamed workers due to different start times. Under this rule, the farm costs would be increased from \$2,300 to \$5,650. A small farm operation in Nebraska needs 48 workers and anticipates extra costs for 10 separate petitions due to this rule. Small farms commented that they also face other higher costs of production, with

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<sup>29</sup> Michael J. McManus, Issue Brief Number 14: Examining Small Business Impacts in the Regulatory Development Process: The Drawbacks of Averaging, (Aug. 30, 2018), <https://cdn.advocacy.sba.gov/wp-content/uploads/2018/08/07142051/Examining-Small-Business-Impacts-in-Reg-Devt.pdf>.

<sup>30</sup> *Id.*

increased costs of fuel, fertilizer, and other inputs. In addition, the agriculture industry does not set prices and small entities cannot pass on these costs to the customer. This rule may make it more difficult for farms to compete with foreign growers in countries like Mexico.

#### *Impacts on H-2B visa small employers*

Small seasonal businesses that utilize the H-2B visa program also expressed concern that the increased fees would make it difficult to obtain their necessary workforce. Hotel and restaurant owners in resort towns like Mackinac Island and Bar Harbor stressed that they cannot find or hire local workers for these temporary jobs in remote and expensive locations. H-2B visa employers were concerned that USCIS proposes charging different fees for unnamed and named visas, from \$460 to \$1,180 for unnamed visas and \$1,680 for named visas. The H-2B visa has a competitive lottery system, and an employer with a better lottery position can obtain unnamed workers from out of the country. An employer with a worse lottery position often hires named transfers from another employer in the U.S. Small businesses were concerned with the price premium for named workers when these transferred workers have already been vetted by the government.

Advocacy is concerned that small seasonal H-2B employers with low revenues and profit margins will be unable to afford these increased fees. For example, an operator of a small food truck park in Maine will have to file multiple petitions for eight named workers. This small business already pays these workers \$20 per hour, an additional 20 hours of overtime a week, housing costs and transportation costs. Small H-2B employers believe that fee increases from this rule will be disruptive to their operations, and that they may have to limit the hours of their establishments or limit the amount of rooms they can provide.

#### *Impacts on H-1B visa small employers*

Small businesses that utilize the H-1B visa are concerned that this rule would hinder innovative start-ups from obtaining needed staff in niche areas where there are few American workers. For example, start-up companies in the Massachusetts area who are seeking workers in areas like cartography and biotechnology told Advocacy that they have limited funding and revenues. The increased fees from this rule will risk their sustainability and competitiveness. “If this was the fee, I wouldn’t have started my company,” said a founder in the software field. They remarked that the proposal was “a disincentive for business formation in the United States.” This business owner founded the company two years ago and has not yet taken a salary, but now seeks to hire seven H-1B visa workers.

#### *Impacts on small nonprofit employers*

Advocacy is also concerned about the impact of this rule on nonprofits, who do not have the discretionary funds to pay the increased fees and the new surcharge. Advocacy spoke to arts groups who were concerned that these increased fees may have harmful economic impacts on small entities in the international arts ecosystem who pay for these worker visas. This includes nonprofit and for-profit organizations, venues, promoters, and agents. These arts groups believe that these costs may shut out small entities from international talent such as orchestras,



symphonies, dance groups, musical acts. A representative from the League of American Orchestras commented that the nonprofit mission of arts organizations centers around increasing public access to the arts, so the impact of raising ticket prices is carefully considered. These nonprofit organizations are primarily funded by private contributions. Generating increased charitable giving to offset new costs is not easily achieved within a short timeframe.

## **2. The IRFA undercounts the number of petitions filed in its cost estimates.**

In its IRFA, USCIS incorrectly uses current petition counts to analyze the economic impacts of this rule on small entities.<sup>31</sup> The current rules allow an unlimited number of employees in one petition. This proposed rule would limit the number of named workers per petition to 25 for H-2A, H-2B, and certain O visas.<sup>32</sup> Under this proposal, an H-2B employer who normally files one petition for 150 named workers in one job category would now have to file six separate petitions. This small business would incur significantly larger costs, or six times the cost and additional paperwork burdens.

This small business would also be paying the \$600 asylum fee six times. Under this proposal, an employer could be paying the asylum fee many times for the same worker. This repeated fee is not captured in the IRFA because the petition numbers are underestimated. Under the H-2A and H-2B visas, an employer could be paying an asylum fee of \$600 for every action that happens to the worker in a season. Under the H-1B visa, an employer could be paying an asylum fee of \$600 for every action that happens to the worker for a decade.

### *Impacts on H-2A visa small employers*

USCIS' IRFA underestimates the number of petitions that H-2A visa employers could file including: a) additional petitions due to the 25 named workers limit, b) duplicate fees for the same group of workers in the same season, and c) continuing costs for employers, and d) the impact of the conflicting new Department of Labor (DOL) final rule on Adverse Effect Wage Rates.

For example, Advocacy spoke to a small potato farmer who plans to file six H-2A petitions for 106 unnamed workers in different job categories. Under this new rule, the fees would be increased from \$2,760 to \$6,780. If this farmer extends some of these workers by a few weeks, this business could pay duplicate fees and asylum fees for the same group of workers that are now named in the country. Additionally, this farmer would have to request two extra petitions, as the petitions were for more than 25 named workers. The extension price for these workers would increase from \$1,840 to \$10,140. In this case, this small business would be paying for the asylum fee twelve times for this season. If this farmer needs to replace a worker who has absconded, the

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<sup>31</sup> See IRFA, at 12, Table 7. USCIS is analyzing the petitions within one visa category like the H-1B visa. For each visa, the agency analyzes Total Impact to Entity= (Number of Petitions Submitted per Entity x \$X Amount of Fee Increase)/ Entity Sales Revenue.

<sup>32</sup> See 2023 Proposed Rule, page 590, Petition or Application for a Non-immigrant Worker, Form I-129. This provision notes that H-2A named workers, H-2B named workers and certain O workers can have 1 to 25 named workers on their petition.

farmer will also have to pay for a new unnamed petition or \$1,130. USCIS' IRFA should also calculate the continuing yearly costs of these increased fees and asylum fees for employers.

Many small businesses also utilize farm labor contractors, a third party who employs the farm workers and transfers these workers between growers throughout a season to minimize costs and administrative burdens. This rule would greatly increase the price of each transfer between employers, making this once efficient model too expensive. For example, one small FLC in Hawaii uses H-2A visa workers across five unique job orders. In this case, these five employers would pay the increased fees and the asylum fee five times for the same group of workers. This small FLC would also suffer economic harm, as this increase in fees would have eliminated 20 percent of its profits in 2022.

Additionally, Advocacy is also concerned about the impact of a new final rule by DOL that would separate H-2A visa jobs, requiring a single rate for field and livestock workers and a higher rate for certain jobs like truck driving.<sup>33</sup> This final rule would require small farms and ranches to potentially submit more petitions to separate these duties or essentially pay the higher rate for an employee to do both job classifications.<sup>34</sup> Section 603(b)(5) requires that an IRFA include "an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule," yet the USCIS IRFA contains no such identification.<sup>35</sup>

#### *Impacts on H-2B visa small employers*

Employers utilizing the H-2B visa were concerned about the costs of this rule because they already file many petitions because of the unpredictable H-2B lottery process. Advocacy spoke to a small hotel and restaurant that has seven job categories of workers including housekeepers, cooks, and servers. This business currently files 10 petitions due to their H-2B visa lottery placement. Under the proposed rule, this business would pay increased fees and asylum fees ten times for one season. If this employer wanted an extension of a few weeks for these workers, they would also file extra petitions and fees. If Congress approves an appropriation to increase the numbers of visas in the H-2B visa category later in the season, this employer could also obtain supplemental visa petitions to obtain returning workers, for which they would again pay the increased fees. Two employers transferring workers between winter and summer seasons would also be paying for multiple petitions for the same workers in one year. USCIS' IRFA does not, but should, also calculate the continuing yearly costs of these increased fees and asylum fees for H-2B visa employers. Some small businesses utilizing the H-2B visa were also concerned

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<sup>33</sup> U.S. Department of Labor, Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 88 Fed. Reg. 12760 (Feb. 28, 2023).

<sup>34</sup> Comment letter from the Office of Advocacy to the U.S. Department of Labor, (Jan. 31 2022) at: <https://cdn.advocacy.sba.gov/wp-content/uploads/2022/01/31144336/Advocacy-Comment-Letter-H2A-Wage-Rule.pdf>.

<sup>35</sup> 5 U.S.C. § 603(b)(5).

that this rule would multiply the numbers of petitions due to the limit of 25 named workers per petition.

*Impacts on H-1B visa small employers*

The proposed rule increases the registration fee for the H-1B visa lottery by 2,050 percent, from \$10 to \$215.<sup>36</sup> Small businesses are concerned with this steep increase, as USCIS does not adjudicate registrations received through the H-1B visa registration process because this process is automated.<sup>37</sup> USCIS' IRFA only estimates the registration costs for the small businesses if they obtain a visa. However, the lottery selection rate was only 26 percent in FY2023.<sup>38</sup> The USCIS estimate should have been four times this cost.

Small businesses utilizing the H-1B visa are concerned that USCIS' IRFA only captures the increased costs for the employer filing an H-1B visa petition in one year. However, the analysis fails to capture the cumulative yearly costs that are paid by that employer for that worker. An H-1B visa petition allows a stay for up to three years, and the time-period can be extended for up to three years with another petition.<sup>39</sup> An employer can also amend employment terms with a current worker, which would also require another petition. An employer can also petition this same worker to stay permanently in the U.S. with an immigrant visa petition (I-140), and under this rule this petition would increase by 88 percent, from \$700 to \$1,315.<sup>40</sup> This petition can be extended with extra petitions for multiple periods of three years if a worker comes from a country that has country quotas.<sup>41</sup> For example, H-1B visa workers from India may take over a decade to obtain a green card.<sup>42</sup> USCIS should estimate the cumulative costs of this proposal for small entities utilizing the H-1B visa program and adopt alternatives that would mitigate the repetitive increased fees and asylum fees for the same workers.

*Impacts on O & P visa small employers and nonprofits*

Advocacy is concerned that USCIS has failed to analyze the numbers of entities and economic impacts of this rule on the arts community, whose members require large amounts of international performers such as artists, orchestras, and dance troupes. This rule would significantly multiply the number and costs of obtaining these visas and shut out these small entities from this international talent. Under this rule, petitions for the O visa (for workers with

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<sup>36</sup> See 2023 Proposed Rule, page 497.

<sup>37</sup> *Id.* at 446.

<sup>38</sup> USCIS Website, H-1B Electronic Registration Process, (last visited Mar. 2, 2023), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process>.

<sup>39</sup> U.S. Department of Labor, H-1B Visa Program, (last visited March 3, 2023), [www.dol.gov/agencies/whd/immigration/h1b](http://www.dol.gov/agencies/whd/immigration/h1b).

<sup>40</sup> See IRFA, at 18.

<sup>41</sup> U.S. Department of Labor, H-1B Visa Program, (last visited March 3, 2023), [www.dol.gov/agencies/whd/immigration/h1b](http://www.dol.gov/agencies/whd/immigration/h1b).

<sup>42</sup> U.S. Department of State, Visa Bulletin for March, 2023, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-march-2023.html>.

outstanding ability in the arts and their personnel) would increase by 260 percent from \$460 to \$1,655 per petition.<sup>43</sup> Under this rule, petitions for the P visa (for workers in performing groups and support personnel) would increase by 251 percent from \$460 to \$1,615 per petition.<sup>44</sup> Under this rule, certain O visas (for personnel) and P visas would be limited to 25.

For example, an artist booking agency that typically books 21 international artists on O visas would see their fees increased from \$9,660 to \$34,755. The fee increases would render 75 percent of these tours financially impossible, which would damage the jobs of U.S. workers who support these artists, including the venue, the tour staff, and the agency's staff. A nonprofit arts venue presenting 16 international ensembles with some support staff would typically require 23 P visa petitions. Under this rule, nine of these ensembles would face the increased costs of these visas. Seven of these larger ensembles would require seven filings each due to the 25-beneficiary limit and seven petitions for support staff. The cost for these 16 international ensembles would rise from 23 petitions to 65 more expensive petitions, from \$10,580 to \$104,975. This nonprofit organization would be paying the asylum fee 65 times.

### **C. USCIS' IRFA does not consider regulatory alternatives that minimize the impact of this rule on small entities.**

Advocacy is concerned that USCIS has failed to present any significant alternatives in its IRFA, as required by the RFA § 603(c). The statute requires that agency consider, *inter alia*, different compliance or reporting requirements for small entities; clarification, consolidation, or simplification of compliance and reporting requirements for small entities; and exemption for certain or all small entities from coverage of the rule, in whole or in part. The agency states that it cannot do this because it must raise fees to stay operational.<sup>45</sup>

## **III. Advocacy's Recommendations**

### **1. USCIS Should Establish Tiered General Fees and Asylum Fees for Certain Small Entities**

USCIS must consider establishing tiers of fee pricing for the general fee increase and the asylum fee based on small business sizes to minimize the economic impact of this rule to the smallest businesses. These tiers can be based on small business revenue size or by number of

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<sup>43</sup> See IRFA, at 12.

<sup>44</sup> *Id.*

<sup>45</sup> See 2023 Proposed Rule, page 416-419. USCIS stated that it may receive appropriations to fund the FY2023 refugee program and may reduce the estimated budget required. USCIS may also receive extra funding from the expansion of premium processing to other immigration benefit requests and would consider adding the premium processing revenue to the estimated budget in the final rule.

employees.<sup>46</sup> The asylum fees could also be tiered by type of visa. For example, there could be a different fee for H-2A and H-2B visas and a higher fee for H-1B visas.<sup>47</sup> Some H-2A and H-2B employers have suggested that USCIS could also have tiers of fees based on the number of workers per petition. These fees could also be tiered by a certain revenue level.

## **2. USCIS Should Limit the Frequency and Number of Asylum Fee Payments**

USCIS must consider limiting the frequency of asylum fee payments by small entities, particularly to reduce the redundant fees for the same worker. For the H-1B visa program, USCIS could require the asylum payments only one or two times per employee total.<sup>48</sup> For the H-2A and H-2B visa programs, USCIS could require an employer to pay the asylum fee only once per worker per season.<sup>49</sup> For example, an employer would pay the asylum fee for their first petition, but this would not be required for an extension by this worker or a replacement if the worker absconds. There could also be limits on how many times multiple employers should have to pay the asylum fee for the same worker in a season or year.

## **3. USCIS Should Establish Tiered General Fees or Asylum Fees for Small Nonprofits**

USCIS must consider establishing a lower tier of pricing for general fees and asylum fees for small nonprofits. This would minimize the economic impact of this rule on a group that cannot pay these rates. USCIS can also exempt nonprofits from the asylum fees or limit the frequency of paying this fee to once per worker category.<sup>50</sup>

## **4. USCIS Should Change the Limit for Named Workers to 50**

USCIS cites a U.S. Department of Homeland Security Office of Inspector General report to support the proposed rule limit of 1 to 25 named workers per petition. However, this report only recommended that USCIS “consider limiting the number of named beneficiaries that can be

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<sup>46</sup> American Competitiveness and Workforce Improvement Act (ACWIA), Pub. L. 108-447. Under ACWIA, employers with more than 25 full-time equivalent employees in the United States pay \$1,500; employers with 25 or fewer employees pay \$750.

<sup>47</sup> The Fraud Prevention and Detection Fee is \$500 for the H-1B visa and L visa and \$150 for the H-2B visa. Fraud Prevention and Detection Fee, The L-1 Visa and H-1B Visa Reform Act of 2004, Pub. L. 108-447; Fraud Prevention and Detection Fee, INA 214(c)(13); 8 CFR 214.2(h)(6)(i)(B)-(D); U.S. Department of Labor Wage and Hour Division Field Assistance Bulletin No. 2009-2 (Aug. 21, 2009).

<sup>48</sup> See Note 46. ACWIA fees for H-1B visa petitions also have limitations on the frequency of payment. An employer pays this fee for the initial H-1B petition, and the first petition requesting an extension of stay by the same petitioner filing on behalf of the same beneficiary. They would also pay this fee for a change of employer. However, they would not need to pay this fee for a second (or later) petition requesting an extension of stay on behalf of the same beneficiary or for amending petitions without an extra stay.

<sup>49</sup> See Note 47. For the H-2B visa, employers must pay the fraud prevention and detection fee once per petition, regardless of the number of workers requested.

<sup>50</sup> See Note 46. ACWIA excepts the following entities from paying fees: institutions of higher education, nonprofit entity that is related or affiliated with an institution of higher education, nonprofit research organizations, government research organizations, primary or secondary education institutions, and nonprofit entity which engages in an established curriculum-related clinical training program for students.

listed on each H-2B visa petition to help address inequity between small and large petitions.”<sup>51</sup> The report never recommended a specific numerical limit. USCIS must consider increasing the limit on the number of workers per petition to 50, to minimize the impact of this rule to small employers utilizing the H-2A, H-2B, O, and P visas.

#### **IV. Conclusion**

For these reasons, Advocacy believes that USCIS’ IRFA is deficient and underestimates the economic impact of this rule on small entities. This proposed rule will make it cost prohibitive for small businesses and non-profits to hire necessary staff, shutting them out of these vital immigration programs. As proposed, this rule will harm thousands of small businesses, undermining their sustainability and competitiveness.

USCIS must reassess the compliance costs from this rule in a Supplemental Initial Regulatory Flexibility Analysis. As part of that supplemental analysis, DOL should consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities as required by the RFA.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis C. Reyes at (202) 798-5798 or by email at Janis.Reyes@sba.gov.

Sincerely,

/s/

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Office of Advocacy  
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/s/

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<sup>51</sup> U.S. Department of Homeland Security, Office of Inspector General, H-2 Petition Fee Structure is Inequitable and Contributes to Processing Errors, 17 (Mar. 6, 2017), at: <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-42-Mar17.pdf>.

Copy to: Richard L. Revesz, Administrator  
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