AMERICAN IMMIGRATION LAWYERS ASSOCIATION

July 8, 2024

Mr. Larry Panetta
Office of Field Operations
U.S. Customs and Border Protection
1300 Pennsylvania Avenue NW.
Room 3.5A, Washington, DC 20229
202-355-1253

Submitted via regulations.gov
Docket ID No. USCBP-2024-0009
RIN: 1651-AB48
Re: 9-11 Response and Biometric Entry-Exit Fee for H-1B and L-1 Visas

Dear Director Panetta,

The American Immigration Lawyers Association (AILA) submits the following in response to the above-referenced request for comments on the Department of Homeland Security's (DHS) proposed rule (Rule) amending its interpretation of the circumstances requiring collection of the 9-11 Response and Biometric Entry-Exit Fee for H-1B and L-1 visas (9-11 Biometric Fee), as published in the Federal Register on June 6, 2024. (89 FR 48339).

Established in 1946, AILA is a voluntary bar association of nearly 17,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws and federal regulations. AILA opposes DHS' proposed regulatory changes implementing a new and unjustified statutory interpretation regarding the collection of the 9-11 Biometric Fee, and we provide our rationale below.

I. Introduction

AILA urges DHS to withdraw its proposed change to the scope of applications subject to the 9-11 Biometric Fee. More than just a "clarification" of existing statutory language, the Rule is contrary both to the governing statute as well as the agency's long-standing interpretation of that statute and is not justifiable based on the unpersuasive policy considerations proffered by DHS.

In its proposal, DHS is proposing to significantly change its interpretation regarding when the 9-11 Biometric Fee, implemented under Public Law 114-113 for H-1B and L-1 visas, is required. This law created an additional fee of $4,000 for H-1B petitions and $4,500 for L-1 petitions when H-1B or L-1 workers comprise more than 50% of the petitioner's U.S. workforce (Covered

Employers). This fee is in addition to the other filing fees associated with these petitions.[1] DHS has long taken the position, as the plain statutory language indicates, that this fee is required only when the fraud prevention and detection fee under INA Section 214(c)(12)(A) is also required[2] (i.e., for an initial request for an H-1B or L-1 classification or a request for a change of employer within those classifications). The Rule suggests that the addition of language to Public Law 114-113 requires it to be interpreted differently, specifically that the 9-11 Biometric Fee must accompany not only the Fraud Fee but also subsequent base filing fees for petitions requesting an extension of stay.

In 2019, in response to the DHS proposed revisions to the USCIS fee schedule that was ultimately enjoined, AILA urged DHS not to adopt the same statutory interpretation it proposes now, citing, among other reasons, the significant harm it would cause for certain U.S. employers, and that it was contrary to the plain language and intent of the statute.[3] In this comment, AILA delineates the reasons for its disagreement with the current proposal, which would require that Covered Employers pay the 9-11 Biometric Fee not only for initial benefit requests with which all employers must include the Fraud Fee but also for requests by the same Covered Employer to extend the same worker's H-1B or L-1 status, even though in the latter scenario the Fraud Fee is not required.[4]

II. AILA's Objects to the Proposed Rule's Because It Violates the Administrative Procedure Act and is an Unreasonable Reading of the Statute

A. DHS Current Proposal

Despite the fact that its previous attempt in 2020 was prevented by a nationwide injunction,[5] DHS once again seeks to reinterpret long-standing and well-settled provisions of Public Law 114-113 so as to expand the instances in which Covered Employers must submit a 9-11 Biometric Fee to include *all* petitions filed for H-1B and L-1 workers that seek new employment or an extension of stay.[6] As before, DHS's alternative interpretation, which the agency itself rejected in 2015[i] and which Congress refused to endorse in 2018,[7] bases its interpretation on the addition of the statutory language "combination" and "including an application for an extension of such status" as follows:

> *Under this alternative interpretation of Public Law 114-113, the language "including an application for an extension of such status" is a substantive amendment, and the insertion of the word "combined" is a clarifying one. It is plausible that Congress added the reference to extension of status so that the*

[1] 89 Fed. Reg 48339.

[2] INA Section 214(c)(12)(A) provides, "In addition to any other fees authorized by law, the Secretary of Homeland Security shall impose a fraud prevention and detection fee on an employer filing a petition under paragraph (1)- (i) initially to grant an alien nonimmigrant status described in subparagraph (H)(i)(b) or (L) of section 1101(a)(15) of this title; or (ii) to obtain authorization for an alien having such status to change employers."

[3] https://www.aila.org/library/aila-council-comment-opposing-uscis-fee-schedule

[4] *Id.*

[5] *See generally Immigrant Legal Res. Ctr.* v. *Wolf,* 491 F. Supp. 3d 520 (N.D. Cal. Sept. 29, 2020).

[6] 89 Fed. Reg. 48339, 48342.

[7] Public Law 115-123.

> *9-11 Biometric Fee would be collected for all extension of stay petitions, not just those where a change of employer is also requested. Under this interpretation, the insertion of the word "combined" can be viewed as a clarifying edit that the increase to the fee is applied only once per petition and not once for the filing fee and once for the Fraud Fee such that it might apply two times for some petitions. In that case, a covered employer would pay the filing fee plus the Fraud Fee plus the applicable 9-11 Biometric Fee ($4,000 for H-1B petitions or $4,500 for L-1 petitions). When the Fraud Fee does not apply, the "combined filing fee and [Fraud Fee]" is simply the filing fee plus $0, such that covered employers would pay the filing fee + $0 for the Fraud Fee + the applicable 9-11 Biometric Fee. This interpretation would give meaning to all of Congress's alterations to the earlier statute.*[8]

Based upon this strained interpretation of the word "combined" in the statute, the Rule proposes to amend 8 CFR 106.2(c)(8) [9-11 response and biometric entry-exit fee for H-1B Visa] and (9) [9-11 response and biometric entry-exit fee for L-1 Visa] to require Covered Employers to include the 9-11 Biometric Fee with all H-1B and/or L-1 petitions, unless the petition requests an amendment without an extension of stay.[9]

In so doing, DHS claims to be "proposing to adopt regulations that better align with Congress's intent for Public Law 114-113,"[10] thus "effectuating Congressional intent to provide necessary funds for the implementation and maintenance of biometric entry and exit data systems as required by Congress under section 7208 of the IRTPA."[11] According to DHS, these amendments will align the federal regulations to be "more consistent with the goal of the statute to ensure employers that employ a substantial number of H-1B or L-1 nonimmigrant workers pay an additional fee by making the 9-11 Biometric Fee applicable to all petitions by covered employers, regardless of whether or not the Fraud Fee also applies."[12] Likewise, Covered Employers' additional remittances will stave-off the "dire threat to DHS's mission, CBP officers, and public safety,"[13] as "DHS cannot maintain its current biometric entry operations or continue implementing other essential entry and exit programs."[14] DHS proposes these changes without sufficiently considering the economic impact on Covered Employers, some of whom may be small employers, and the discriminatory impact on foreign nationals from visa backlogged countries who are required to have H-1B petitions filed on their behalf many times to remain in legal status.

B. Analysis of DHS Interpretation of Public Law 114-113

The Rule more-or-less accurately acknowledges that the litigation that led to the 2020 injunction was "unrelated to the 9-11 Biometric Fee."[15] Indeed, the injunction did not specifically cite or

[8] 89 Fed. Reg. 48339, 48342.
[9] 89 Fed. Reg. 48339, 48343.
[10] 89 Fed. Reg. 48339, 48344.
[11] *Id.*
[12] 89 Fed. Reg. 48342.
[13] 89 Fed. Reg. 48339, 48341.
[14] 89 Fed. Reg. 48339, 48341-48342.
[15] 89 Fed. Reg. 48339, 48340.

discuss the 9-11 Biometric Fee. Nevertheless, the 2020 injunction implicates the viability of this Rule as it suffers from many of the same flaws that led the 2020 version to be enjoined for its violation of both procedural and substantive requirements of the Administrative Procedures Act (APA).

Procedurally, the Rule relies on unexplained data to support broad generalizations that do not account for real-world costs. For example, the Rule focuses on the fact that only 50% of the fees collected go to the 9-11 Biometric Account (with the remaining 50% going to the Treasury), and that this revenue has fallen short of the 9-11 Biometric Account's $1 billion cap that is noted in Public Law 114-113. Unfortunately, the Rule neither emphasizes that the cap amount referenced is cumulative over the life of the provision nor does it compare this shortfall against the actual costs of the exit-entry programs. Thus, the Rule also does not detail the extent to which the increased fee collection will alleviate the budgetary issues that DHS claims to face, leaving the public incapable of assessing the provision's potential effectiveness. Finally, the Rule explicitly acknowledges that it does not have access to L-1 data in the same way it does for H-1Bs and that it is making assumptions that the agency even questions in the Rule vis-à-vis future H-1B and L-1 filers.[16]

C. Costs Affecting U.S. Employers and Foreign Nationals

Further, and as was the case in *Wolf*, the 2024 Rule fails to consider important aspects of the costs impacting U.S. employers and foreign national employees.[17] For example, the Rule does not address the extent to which visa retrogression will impact Covered Employers by requiring them to pay an additional $4,000 for every H-1B extension they file over the decade(s) needed for their worker's complete processing of their applications for permanent residence status. This will have a disparate impact on employers who employ foreign nationals from heavily backlogged countries such as India or China. Employers of H-1B beneficiaries from India frequently must file many more H-1B extension petitions then they file for H-1B beneficiaries from other countries where immigrant visa availability is not as limited. Increasing the cost of an H-1B extension by $4,000 would inevitably require some Covered Employers to make tough choices between paying high fees to USCIS over extended periods so certain beneficiaries can stay in H-1B status and terminating or relocating these employees overseas. In addition to negatively impacting DHS operations by discouraging H-1B filings and thereby *decreasing the amount of* 9-11 Biometric Fees collected, USCIS would also negatively affect the accompanying Asylum Program Fees that were implemented on April 1, 2024, to provide DHS additional funds to better manage the asylum program. The fact that DHS does not acknowledge this issue, let alone consider this in its analysis, raises questions about the Rule's compliance with the APA.

Similarly, the Rule does not adequately consider the numerous reliance interests that significantly increasing the number and amount of 9-11 Biometric Fee payments may severely affect.[18] For example, the Rule does not reference how it will affect the capacity for Covered Employers to control costs and stay within annual budgets and/or their ability to deliver their products or services

[16] 89 Fed. Reg. 48339, 48345.
[17] *Wolf,* 491 F. Supp. 3d at 541.
[18] *Id.* at 541-542.

if the 9-11 Biometric Fee renders supporting a nonimmigrant worker untenable. Additionally, for these workers, the human costs associated with having to leave the United States because the already high costs of the visa process, further exacerbated by an expanded 9-11 Biometric Fee requirement, have made continued sponsorship too expensive are both incalculable and unconscionable. Pricing H-1B workers of Covered Employers out of the U.S. labor market violates the purpose of Section 104(c) of the American Competitiveness in the Twenty-First Century Act of 2000 which was enacted to enable them to stay and work in the United States until their permanent residence is approved. That statutory provision is rendered meaningless if additional fees such as those proposed in this Rule, make it too costly for Covered Employers to sponsor them due to this proposed Rule.

As a policy matter, allowing funding needs to drive the way in which an agency interprets statutory language or changes long-standing practices creates a slippery slope that would weaken predictability and stability on how the agency will interpret when fees are to be paid. There are a variety of filing fees specifically established by Congress applicable to immigration applications, and many others created by DHS regulations. Immigration applicants, employers, and other stakeholders need predictability in the way those fees will be assessed. Where Congress has set forth clear language instructing when a fee is due, and DHS has clearly and consistently applied its interpretation of that language, stakeholders should be able to rely on that language.

Finally, the Rule's added cost on U.S. employers, particularly small businesses, and its impact on the U.S. economy must also be considered against the backdrop of the recent USCIS fee increases, which imposed significant additional costs for a broad range of services, including large increases in fees for H-1B and L-1 petitions. As of April 1, 2024, H-1B and L-1 employers who employ more than 25 full-time employees now must pay an additional $320 and $925 for the base filing fee, respectively, plus the appropriate Asylum Program Fee for each petition filed. These fee increases were not considered in connection with the costs to small employers as part of DHS Regulatory Flexibility Analysis Act, thus necessitating withdrawal of the Rule until such time as a compliant analysis is conducted.

D. DHS Misinterprets Congressional Intent Regarding Public Law 114-113 Fees

Beyond its non-compliance with the APA, the Rule suffers from fundamental flaws that counsel against its adoption as drafted. First, even though DHS acknowledged in 2019 "the absence of specific legislative history elucidating the intent of the statutory changes"[19] and the lack of "known legislative history about the Public Law 114-113 fees before enactment,"[20] DHS nevertheless repeatedly injects Congressional intent that is unsupported by the record. Most glaringly, DHS posits that the goal of Public Law 114-113 is "to ensure employers that employ a substantial number of H-1B or L-1 nonimmigrant workers pay an additional fee by making the 9-11 Biometric Fee applicable to all petitions by covered employers, regardless of whether or not the Fraud Fee also applies, when neither legislative history nor the statute itself evince any Congressional intent to impose an expanded tax on Covered Employers.

[19] 84 Fed. Reg. 62280, 62322.
[20] *Id.*

Additionally, the fact that Public Law 114-113 only dedicates 50% of the 9-11 Biometric Fees to the 9-11 Biometric Account strongly suggests that Congress is as equally concerned with DHS's exit-entry systems as it is with generally funding the Treasury. If Congress wished to alter that balance to highlight the importance of increasing funding for the 9-11 Biometric Account, it could have amended Public Law 114-113 to dedicate a larger portion of each 9-11 Biometric Fee to the 9-11 Biometric Account. That Congress has not taken such action, even when given a chance in 2018, is evidence that DHS has correctly interpreted and implemented Public Law 114-113 consistently with Congress's actual intent in this regard. Accordingly, DHS' decision to unilaterally and unlawfully double, or in some scenarios even triple (or more), its receipt of 9-11 Biometric Fee payments from Covered Employers is unjustifiable.

E. DHS's Unreasonable Misinterpretation of the Plain Language and Legislative Intent Behind the Statute

Ultimately, the Rule's most significant flaw stems from DHS's statutory interpretation of the terms referenced above, which is unreasonable in the context of the history of the statutory language. Once again, without specific legislative history documenting Congress's intent when enacting Public Law 114-113, DHS proposes that the inclusion of the terms "combined" and "including an application for an extension of such status" justifies reinterpreting a statute whose plain language dictates that the 9-11 Biometric Fee is due only in circumstances when the Covered Employer is submitting both a filing fee and a fraud fee. Instead, DHS contorts language and logic to read the statute as requiring payment of the 9-11 Biometric Fee whenever the Covered Employer submits the "combined" filing fee and fraud fee, even if the fraud fee owed is $0.00. To reach this extraordinary interpretation, DHS effectively ignores the relevance of the fraud fee's presence in the statute and, in so doing, renders it meaningless on a selective basis that serves its interests but violates fundamental rules of statutory construction.

DHS's attempt to interpret "combined" as resolving a non-existing "potential ambiguity" as to whether the 9-11 Response Fee applies separately both to the petition filing fee and the fraud prevention and detection fee contorts the statutory language in an apparent effort to accomplish the agency's revenue goals and thwarts the plain instruction Congress provided in creating and implementing this fee. This interpretation also chooses to ignore the fact that Covered Employers also must include the appropriate American Competitiveness and Workforce Improvement Act (ACWIA) fee when submitting an initial H-1B petition *and* the first extension for the same employee.[21] If Congress wanted DHS to interpret the "combined" filing fee and fraud fee as something other than the H-1B petition or petition for a change of employer that requests an extension of stay, it would have also included the ACWIA fee as one of these "combined" fees. However, the ACWIA fee is not mentioned in the plain text of the statute. Instead, Public Law 114-113 unmistakably identifies the 9-11 Biometric Fee as being required only when a filing also includes both the base filing fee and the fraud fee. As the language for L-1 petitions is identical, there is no reason to interpret these provisions differently.

F. Impact of Additional Fees on Small Companies

[21] 8 CFR 106.2(c)(4).

The NPRM also requests public comments on the number of small companies that would be subject to this fee and how often small companies would pay the 9 – 11 Biometric Fee. While specific statistical data is not readily available, it would seem axiomatic that the burden of this reinterpretation would fall heavily on smaller sized businesses. Few larger companies, with thousands of employees, will come close to having L-1 and H-1B workers comprise 50% of their employees. In addition, most mid-sized companies will never approach this threshold. It is only smaller employers that, due to the specific focus of their business operations (which often involve AI and other critical technologies), may be required to pay the additional fees.

These companies, which include start-ups and other entrepreneur led businesses, are by nature more vulnerable to revenue fluctuations. Potentially imposing hundreds of thousands of dollars in additional fees could affect their ability to maintain and/or expand their businesses, resulting both in lost jobs for foreign born and U.S. workers as well as decreased tax revenue. The impact on these smaller employers will also directly conflict with the President's initiatives to promote innovation and entrepreneurship.[22] Before implementing significant additional fees primarily on a small group of employers that are least equipped to absorb these costs, it is imperative that DHS consider the broader implications of its revenue generation efforts.

III. Conclusion

Since Congress implemented Public Law 114-113, DHS has consistently and unambiguously interpreted that the additional fee was to be "combined" with the fraud prevention and detection fee. The Rules change to when the Public Law 114-113 fee would be due is contrary to the statutory language as well as many years of implementation and would be an *ultra vires* regulation unlikely to receive judicial deference. We therefore urge DHS to withdraw the NPRM and instead maintain its current and long-standing interpretation, which more accurately adheres to the statutory language evidencing Congress' intent regarding the applicability of this fee.

AILA appreciates the opportunity to comment on this Rule and urges DHS to withdraw its proposed interpretation, which is unreasonable and will be untenable for many U.S. employers, especially small businesses, and ultimately contrary to both the plain text and legislative intent behind Public Law 114-113. Instead, the agency should continue to apply its long-standing and more reasonable interpretation of the 9-11 biometrics fee.

Sincerely,

The American Immigration Lawyers Association

[22] See generally, President Biden's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, dated October 30, 2023.