



February 28, 2022

Kevin E. Bryant  
Deputy Director  
Office of Directives Management  
600 19<sup>th</sup> Street, NW  
Washington, DC 20036

*Via electronic submission: [www.regulations.gov](http://www.regulations.gov)*

**Re: Schedule of Fees for Consular Services – Nonimmigrant and Special Visa Fees.  
86 Fed. Reg. 74018 (December 29, 2021)  
RIN-1400-AF33**

Dear Deputy Director Bryant:

The U.S. Chamber of Commerce submits the following comments on the above-referenced regulatory proposal. Businesses appreciate the fact that the Department of State must periodically update the consular fee schedule to ensure that the government recovers the full costs associated with the provision of consular services. However, many businesses are concerned that the fee adjustments laid out in this notice of proposed rulemaking (“NPRM”) are based upon significant flaws in the State Department’s Cost of Service Model (“CoSM”). If left unaddressed, companies are worried that these fee increases would impose substantial overcharges to stakeholders that could hinder economic growth in many areas of the country.

We urge the Department to provide stakeholders with more transparency as to how it formulated these new cost estimates, particularly regarding the amount of time consular officials would typically spend on specific tasks and what types of tasks were included in the Department’s cost estimates. Many of our members believe there are several issues that the State Department should revisit with stakeholders before finalizing this proposal, as there is the very real potential for these proposed changes to cause unintended, negative consequences for American businesses.

### **These Fee Increases Represent Significant Additional Costs for Employers**

Several companies informed us that the proposed cost increases to the consular services described in the NPRM would incur considerable financial implications for their businesses. The percentage increases for the respective

consular services help illustrate the impact these proposed changes would have on businesses:

- Applications for a business traveler visa, a border crossing card, and a student/exchange visitor visa would rise from **\$160 to \$245**, representing a **53% cost increase**;
- Applications for various nonimmigrant work visas, including the H, L, and O visa classifications, would rise from **\$190 to \$310**, representing a **63% cost increase**;
- E visa applications for treaty traders, investors, and their workers would rise from **\$205 to \$485**, representing a **137% cost increase**, and;
- Applications for waivers from the J-1 visa's two-year residency requirement would jump from **\$120 to \$510**, representing a **325% cost increase**.<sup>1</sup>

The Chamber fully appreciates that the State Department must ensure that it recuperates the costs associated with the provision of these consular services. However, what may seem to some as nominal cost increases can have profound impacts upon many types of American employers. For example, a modestly-sized agricultural commodity producer that needs the services of 50 H-2A workers during the harvest will have their consular costs increase by **\$6,000**, going from \$9,500 under today's fee schedule to \$15,500 under the proposed schedule. This may seem like a modest price increase, but to that farming operation, that additional expense could mean the difference between investing in new equipment this season or postponing the expenditure, leaving the company less productive and less profitable.

Seasonal businesses that rely upon H-2B seasonal workers to meet their nonagricultural workforce needs have similar concerns. Many landscaping operations, seafood processing plants, and other H-2B employers are very similar to H-2A employers in that the nature of their business is labor intensive and they oftentimes operate on thin margins, especially if they are smaller, family-owned businesses. These types of cost increases could force landscapers to forego obtaining new lawnmowing equipment or prevent a seafood processor from replacing an outdated cooking boiler in their facilities. While the circumstances might be very different across employers and industries, the additional costs will prevent businesses from deploying their capital in a manner that can help the business innovate, expand, and create more job opportunities for American workers.

### **Businesses Question the Accuracy of the State Department's Cost of Service Model**

The State Department argues that the specific fee increases included in the NPRM are needed to recover the costs of providing these due to the estimates they

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<sup>1</sup> 87 Fed. Reg. 74018, 74023 (Dec. 29, 2021).

arrived using its most recent Cost of Service Model (“CoSM”). The Department states that the CoSM update reflects steadily increasing unit costs since the last adjustment in petition and non-petition based NIVs in the early and mid-2010s.<sup>2</sup>

Noting the dramatic decrease in work volumes during the pandemic, the Department projects that demand for consular service will be depressed for several years into the future. As such, the Department decided to use a 10-year, rather than a 5-year, average of historical and projected workload volumes to calculate unit costs in this CoSM. The Department decided that doing so would minimize volatility in unit costs. Using this longer time frame to assess workload volumes, the Department estimates that demand for consular services is still lower than in prior CoSMs and will remain so for quite some time. “As a result,” the Department noted, “the calculated unit cost for these services, which is total service cost divided by total service volume, has increased.”<sup>3</sup>

While we acknowledge that inflationary pressures can increase costs for services over time, many businesses take issue with the Department’s assertions regarding the depressed demand for consular services in the near term. Companies across a host of industries are struggling mightily to meet their workforce needs. While companies have become very resourceful in their efforts to hire American workers to fill job openings, many companies cannot fill all their labor needs domestically and are seeking critical talent from abroad. In short, more companies are looking to America’s immigration system to meet their workforce needs. These trends would suggest that the demand for consular services would increase moving forward, or at the very least, not decrease as substantially as what the State Department concluded in its NPRM.<sup>4</sup>

Recent government data bears this out with respect to the usage of the H-2B program. For the second half of FY22, the H-2B program provides 33,000 visas to seasonal employers that cannot meet their workforce needs domestically. In the filing period between January 1-3, 2022, the U.S. Department of Labor received a total of 7,875 individual H-2B applications requesting a total of 136,555 worker position. In that 72-hour period, American employers sought to fill over 100,000 more job openings this spring than there are visas available to fill those needs.

Given the current state of the American economy, the stark demand for critical talent is not exclusive to companies that employ seasonal H-2B workers. The unemployment levels in many high-skilled fields have been incredibly low for some

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<sup>2</sup> 87 Fed. Reg. 74018, 74021 (Dec. 29, 2021).

<sup>3</sup> Id.

<sup>4</sup> See Id, where the State Department felt that demand for consular services in the next two fiscal years, FY23 an FY24, would like

time now. According to a recent National Foundation of American Policy study, the number of job vacancies in several IT fields reached 1.2 million, which represented a 15% jump in openings over a six month period.<sup>5</sup> To that end, recent BLS data shows that the unemployment rate for computer and mathematical occupations dropped from 3.0% in January 2020 to 1.5% in August 2021.<sup>6</sup> Given the dearth of available high-skilled workers in the U.S., many Chamber members will continue their efforts to find high-skilled talent abroad and utilize many of the nonimmigrant visa categories covered under this proposal.

Businesses have other questions regarding the assumptions the State Department made to fashion its new CoSM. One other important topic companies have raised is whether consular facilities remain closed due to the pandemic. While we appreciate that the State Department offered stakeholders some limited access to review its CoSM data,<sup>7</sup> more transparency is needed from the State Department for the business community to determine whether the NPRM's fee increases are based on legitimate assumptions. As of October 2021, 60% of consulates worldwide remained partially or fully closed to nonemergency nonimmigrant visa appointments, with 40% of all consulates worldwide still remaining fully closed. The NPRM makes no mention of how this state of affairs has influenced the ability of consular officials to timely process the applications listed in the proposal, and whether the reopening of consulates would help boost processing efficiencies.

Last, but certainly not least, the Department makes no mention as to whether its CoSM accounted for the costs associated with the State Department's adjudications of National Interest Exceptions ("NIEs") under the several COVID-19 travel restrictions that either were or are still in place today. Businesses fully appreciate the fact that these presidential proclamations created new requirements that increased the number of hours that consular officials needed to expend in adjudicating various types of consular applications. However, the Department provided no explanation in its NPRM as to how these proclamations factored into its formulation for its cost estimates. Presumably, these proclamations will not exist in perpetuity, and employers hope that the State Department made reasonable assumptions as to how such proclamations would impact its cost modeling. Unfortunately, there is nothing in the NPRM to show employers how these presidential proclamations, particularly the increased resources needed to comply with them, influenced how the new CoSM used by the Department helped them arrive at their proposed fee increases. Further transparency would help alleviate any trepidation

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<sup>5</sup> Stuart Anderson, H-1B Visas Are Scarce As Computer Job Vacancies Reach 1.2 Million, Sept 27, 2021, accessed online on Feb. 27, 2022, at <https://www.forbes.com/sites/stuartanderson/2021/09/27/h-1b-visas-are-scarce-as-computer-job-vacancies-reach-12-million/?sh=77e3c2b18830>.

<sup>6</sup> Id.

<sup>7</sup> 86 Fed. Reg. 74018, 74018 (Dec. 29, 2021).

that employers have regarding the veracity of the Department's conclusions in establishing its proposed consular fee schedule.

### **Potential DHS Reimbursement for Consular Adjudication of National Interest Exceptions Would Necessitate Revisiting These Fee Increases**

The COVID-19 related presidential proclamations that limited the entry of foreign nationals into the U.S. over the past two years have profoundly impacted the global mobility of critical workers to American employers. The consular processing backlogs caused by the pandemic and these pandemic-related entry restrictions will continue to hinder the ability of companies to meet their workforce for some time moving ahead. These policies were instituted in real-time during a national emergency and different administrations went about implementing these National Interest Exception (NIE) procedures in different ways. It remains an open question as to which cabinet level department should have been charged with effectuating the adjudication of these NIE requests.

When the first series of COVID-19 entry restrictions were imposed by the Trump Administration, both the State Department and the Department of Homeland Security were provided with the authority to adjudicate NIE requests. However, once these proclamations were implemented in practice, DHS assumed the primary role in adjudicating NIE requests. This lasted through the first few weeks of the Biden Administration, but that changed drastically when the Department of State took over the vast majority of these adjudications as the months passed. Many Chamber members recall these developments vividly, as these changes in policy caused significant disruptions for their businesses. Key executives and critical workers found themselves stuck abroad for inordinate amounts of time as these changes were effectuated and the criteria for obtaining an NIE became much more strict.

The Immigration and Nationality Act maintains a clear distinction between visa adjudication, which is the purview and responsibility of the Department of State, and admission and entry decisions, which are the purview and responsibility of the Department of Homeland Security. Given that the State Department began to be the primary arbiter of NIE requests in late February 2021 and has remained so since, it begs the question as to whether this was a proper role for the State Department to assume, or whether this was a task that, for legal reasons, should have stayed primarily under the purview of DHS. In short, the NIE adjudication is not a visa decision; rather, it is an entry decision. An approved NIE for an individual meant that the traveler could come to the U.S. despite a Presidential Proclamation that would have otherwise prohibited his or her entry into the country. Under the new paradigm set early on in the current administration, many foreign nationals would apply to consulates for NIE adjudications in the context of applying for a new visa (assuming

they needed one). If they already had a visa or permission to travel under the Visa Waiver Program, they would apply directly to a consulate to obtain the requisite NIE so they could enter the U.S.

Since DHS is responsible for admission and entry decisions and DOS is responsible for visa decisions, each time DOS adjudicated an NIE for a prospective traveler to the U.S. under a proclamation that restricted entry into the U.S., some companies take the view that the State Department completed this work on behalf of DHS, the department that should have been adjudicating these requests. The NIE decision was material to entry and entry only, not to a visa or any other statutory function of the State Department. Given that DOS and DHS have their separate appropriations funded to them by Congress, there are several sources that suggest it may be proper for the State Department to seek reimbursement from DHS for these services rendered.

The Economy Act of 1932 allows for inter-entity reimbursements for services rendered under certain conditions. Regarding federal appropriations law, under 31 U.S.C. Chapter 13, there are specific rules with how funds allocated by Congress shall be spent by the executive branch. Specifically, 31 U.S.C. Sec. 1301(a) requires that an appropriation “shall be applied only to the objects for which the appropriation was made.” If an agency were to use its own appropriation to do the work of another agency, and not recover the cost of such work from the other agency, the agency that performed this task potentially violates Sec. 1301(a) by misapplying its own appropriation. At the same time, the other agency getting the service at no cost also may run afoul of the Sec. 1301(a) because its appropriation has been unlawfully augmented. The Economy Act authorizes inter-entity reimbursements when they are appropriate, and when certain conditions are met.

Similarly, guidance from the [Statement on Federal Financial Accounting Standards Statement #4](#), which was cited by the State Department in this proposal,<sup>8</sup> recognizes this principle of reimbursement when one federal agency performs the work of another. It states, in relevant part, “Each entity’s full cost should incorporate the full cost of goods and services it receives from other entities.” It also states, “Recognition of all significant inter-entity costs is important when these costs *constitute inputs to government goods or services provided for a fee or user charge*” e.g., the fees charged for nonimmigrant visas by the Department. Finally, SFFAS No. 4 instructs federal agencies to recognize as reimbursable goods or services that are (1) significant to the receiving entity; (2) form an integral or necessary part of the receiving entity’s output; and (3) can be identified or matched to the receiving entity with reasonable precision.

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<sup>8</sup> 86 Fed. Reg. 74018, 74020 (Dec. 29, 2021).

In sum, the adjudication of NIEs utilized significant consular staff time and resources to adjudicate these requests. There is nothing in the Department's proposal that would suggest that it analyzed the specific costs associated with consular staff performing the specific functions associated with the adjudication of NIE requests and analyzed them in manner that was separate and apart from its other consular functions. Without this information being made available to the public, there is no practical way that the State Department could acknowledge that these adjudications were a sort of "one-time" service that should have limited influence on its cost predictions for a future where there are no such entry restrictions. More importantly, if the State Department has not ascertained this information, there is no way that it could potentially seek reimbursement from DHS for these services rendered to ensure that both departments maintain their compliance with federal accounting standards.

If the State Department fails to account for these unique circumstances and separate the costs associated with adjudicating NIE requests from the costs of other consular processes in its CoSM model, the Department would inflate the total costs associated with the provision of consular services in a manner that does not reflect the realities associated with the Department's performance of these functions. We urge the Department to consider reexamining the resource inputs associated with the NIE process, account for the funds needed to complete those consular services, and recalculate the proposed nonimmigrant visa fees accordingly.

### **Policy Changes that Would Cut Costs for Consulates and Employers**

There are several policy ideas the State Department could pursue that would help boost consular processing efficiency. The American business community would welcome these ideas alongside an adjustment in the consular fee schedule. One policy change that would help boost efficiency is to allow for stateside visa revalidation. This was federal policy through the mid-2000s and it allowed various nonimmigrants in the U.S. to mail their passports to the State Department's Visa Office where they obtain updated visas in their passport. This would allow individuals to avoid incurring the expenses associated with traveling abroad for a visa interview. In addition, it would provide a benefit to the employee, as they would not need to take the time to travel abroad for the interview. This would allow the State Department to utilize their resources more effectively for other foreign nationals who required a visa appointment abroad.

Another policy that would help boost processing efficiencies would be to allow the remote processing of consular services. For example, when a foreign national comes in for their interview and submits his or her paperwork, there is no logical reason why State Department staff elsewhere in the world, particularly in the U.S.,

should be prevented from reviewing this type of paperwork. This would help speed up processing times and help cut down on the current consular processing backlogs.

Lastly, there are several technological improvements worth exploring that would help boost efficiencies and help the State Department cut down on the specific costs per services. These technological improvements could be used to standardize the process for obtaining a consular appointment across the globe, or they could be used to bring about virtual visa interviews using the latest videoconferencing technology. These types of investments would inure long-term dividends to the State Department, as they could be done in a fashion that not only helps boost the overall security and integrity of providing these consular services, but the types of efficiencies that would be built into the system would allow for the Department to be able to cut down on the costs per service in a significant manner.

## Conclusion

We appreciate the State Department's desire to ensure that it can fully recoup the costs for providing consular services to interested stakeholders. However, there are many concerns that the business community would like the State Department to address before this rule is finalized.

We look forward to working with the State Department as it contemplates moving forward on this regulatory proposal. Thank you for considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Baselice', with a large, sweeping flourish extending to the left.

Jonathan Baselice  
Vice President, Immigration Policy  
U.S. Chamber of Commerce