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Office of the Principal Legal Advisor,  
Regulatory Affairs Unit, U.S.  
Immigration and Customs Enforcement,  
Department of Homeland Security, 500  
12th Street SW, Washington, DC 20536–5901

**Re: Comment in Response to Fee Adjustment for U.S. Immigration  
and Customs Enforcement Form I–246, Application for a Stay of Deportation or  
Removal [DHS Docket No. ICEB–2020–0005] RIN 1653–AA82**

Dear Principal Legal Advisor:

The National Immigration Project submits the following comment in opposition to the Department of Homeland Security (DHS) proposed fee increase for noncitizens to submit form I-246 to Immigration and Customs Enforcement (ICE) to seek a stay of removal. DHS seeks to raise the fee from \$155 to \$755—a nearly fivefold increase—at the exact moment that ICE has dramatically increased detention and removal numbers, immediately after ICE received even more funding than it has ever had before, and following the Board of Immigration Appeals (BIA) new precedential decision requiring the filing of an I-246 as a precondition to seeking a stay from an Executive Office for Immigration Review (EOIR) adjudicator. This proposed fee increase is not necessary for ICE to adjudicate stays; it is another tool for ICE to punish noncitizens seeking to fight removal.

The National Immigration Project is a national nonprofit membership organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. The National Immigration Project fights for dignity and due process for immigrants and their families through federal litigation, advocacy, and community organizing. We believe that DHS should not weaponize fees to prevent noncitizens from asserting their rights by making the filing of the application unaffordable. The National Immigration Project strongly opposes this proposed fee increase.

#### **I. The analysis in the Notice of Proposed Rulemaking (NPRM) is flawed**

Noncitizens who have been ordered removed may seek a stay of removal from ICE on form I-246, which currently costs \$155.<sup>1</sup> Noncitizens are most likely to seek this stay when their physical removal from the United States is imminent and when there are compelling factors,

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<sup>1</sup> ICE, Application for a Stay of Deportation or Removal, <https://www.ice.gov/doclib/forms/i246.pdf>.

such as a medical emergency, dangerous conditions in their home country, or to prevent family separation. Noncitizens often file stay applications after they have been ordered removed, when new eligibility for relief becomes available and they make a motion to an immigration judge (IJ) or the BIA to reopen or reconsider the removal order to pursue relief. In each of these scenarios, the facts are generally compelling, and the need for fast adjudication before removal is carried out is urgent.

The preamble to the NPRM's fee increase is poorly supported and does not account for the urgent nature of stay applications. To justify the nearly fivefold fee increase, the preamble cites to the response by ICE officers to a 2020 survey about the work involved in adjudicating a stay request.<sup>2</sup> The Fee Analysis for Form I-246, Application for a Stay of Deportation or Removal (Fee Analysis)<sup>3</sup> states that in 2020, ICE sent a survey that covered adjudication of form I-246 in Fiscal Year 2019 to 6500 ICE personnel.<sup>4</sup> The Fee Analysis does not state how many people responded, what their role was in ICE, or whether ICE personnel in similar roles continue to adjudicate I-246 applications. Instead, the Fee Analysis concludes, with little supporting evidence and no explanation of what the adjudication process entails, that it takes ICE 7.27 hours on average to adjudicate an I-246 and that "[i]n the spring of 2025, ICE confirmed with ERO leadership that the conclusions of the survey remain representative of current Form I-246 adjudication activities."<sup>5</sup> This is a curious conclusion considering that since the start of the second Trump administration, ICE has not adjudicated many stay of removal requests. On February 6, 2025, Fox News reported<sup>6</sup> on a directive issued that week that the Acting ICE Director must personally review and approve every person's release from ICE custody absent a court order or a posted bond. The directive's message was loud and clear: no more discretionary releases were allowed. Even if ICE was adjudicating stay of removal requests, the number of stay requests filed in the Spring of 2025, had likely changed considerably because the Trump administration eliminated its detention priorities thereby making everyone a priority and it detained many more people than prior administrations. Reliance on a survey from 2020 was therefore improper given the significant changes to detention by Spring of 2025. As such, without any context regarding the survey, it is impossible to determine how relevant and accurate, if at all, the data is.

Likewise, the analysis of the number of DHS stay requests in the preamble do not account for the significant change in procedure wrought by this BIA precedent. The preamble states that DHS received 3,745 payments for Form I-246 in Fiscal Year 2025. While the BIA does not release public data on the number of stay requests it received, it received 54,496 motions to reopen in Fiscal Year 2025. With a previously unthinkable, daily average of 73,400 detainees, it is logical that there will be many thousands more stay requests to DHS in the coming years, since noncitizens frequently request stays while detained and while seeking reopening of prior removal orders. The NPRM does not account for the substantial increase in stay requests it is likely to receive. Since the NPRM does not take into account the substantial increase in DHS stays that

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<sup>2</sup> 91 Federal Register 24739, 24741 (May 7, 2026).

<sup>3</sup> ICE Fee Analysis, Posted by ICE at <https://www.regulations.gov/document/ICEB-2020-0005-0017>.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.*

<sup>6</sup> Adam Shaw, *Trump's ICE Limits Illegal Immigrant Releases Amid Moves to Shake Off Biden 'Hangover,'* FOX NEWS, Feb. 6, 2025, <https://www.foxnews.com/politics/trumps-ice-limits-illegal-immigrant-releases-amid-moves-shake-off-biden-hangover.amp>.

noncitizens will now be required to file, the entire accounting section of the NPRM is no longer accurate.

While the preamble acknowledges that “an increased fee may dissuade [noncitizens] with limited means from submitting Form I–246,”<sup>7</sup> DHS states that the availability of a fee waiver “sufficiently ensures that [noncitizens] are not discouraged from applying for a stay of removal due to their limited means or inability to pay is sufficient to offset this concern.”<sup>8</sup> The NPRM does not quote from the Fee Analysis document in analyzing whether fee waivers are sufficient. If it did, it would have had to acknowledge that the Fee Analysis clearly states, “ICE has not historically collected data on fee waivers as the **ICE field offices do not issue many, if any, fee waivers.**”<sup>9</sup> [Emphasis added.] Instead, the NPRM simply says that it has *no data* on fee waiver requests.<sup>10</sup>

In addition to failing to acknowledge that the ability to seek a fee waiver is likely meaningless, the NPRM does not discuss the added time it may take for ICE to reach a decision on a fee waiver, and the fact that noncitizens are often seeking stays when they are at imminent risk of removal. Many noncitizens may fear being removed while their request for a fee waiver remains pending. The lack of transparency about how DHS arrived at its \$755 adjudication figure, coupled with DHS’s admission that ICE may *never* grant fee waivers, renders this significant fee increase arbitrary and capricious.

## **II. ICE is non-fee-funded agency that has received billions from Congress and there is no adequate justification for forcing noncitizens to pay \$755 to seek a stay of removal**

The NPRM cites 8 U.S.C. §1356(m) to justify increasing the cost of the DHS stay application to \$755. However, read in context, that section of the statute appears to refer to fees charged by United States Citizenship and Immigration Services (USCIS), not ICE. The relevant sentence reads, “[t]hat fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants.” The reference to “adjudication and naturalization services” as well as the requirement that fees also offset the cost of adjudicating asylum applications—applications which are adjudicated by USCIS, not by ICE—makes clear that this provision of the statute is focused on USCIS fees.

It is logical that USCIS is authorized to recover the cost of its adjudications through fees because, unlike ICE, USCIS is an agency that is almost entirely fee-funded. “USCIS is authorized to recover the full cost of providing immigration and naturalization services (screening, vetting, and adjudicating applicants and their benefit requests). USCIS receives 96

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<sup>7</sup> 91 Fed. Reg. 24741.

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

<sup>9</sup> ICE Fee Analysis, at , n. 4; 8.

<sup>10</sup> 91 Fed. Reg. 24742. (“However, DHS does not have data on fee waivers approved in the past to estimate the potential impacts of a fee increase. Approval of fee waivers is at the discretion of the ICE personnel and the number of fee waivers is not limited.”).

percent of its funding from filing fees and not from congressional appropriations.”<sup>11</sup> When USCIS proposed fee increases pursuant to 8 U.S.C. §1356(m) in 2024, it did so in order to meet its costs other than a small percentage of its operating budget funded by Congress, not to put money into the federal general operating fund.<sup>12</sup>

In stark contrast to USCIS’s fee-funded structure, Congress has funded ICE at unprecedented levels over the past two years. In 2025, Congress appropriated \$75 billion to ICE, more than seven times its prior appropriations of \$10 billion per year, and making it the highest funded federal law enforcement agency.<sup>13</sup> And in June 2026, Congress gave ICE an additional \$38 billion.<sup>14</sup> DHS cannot reasonably premise this proposed fee increase on 8 U.S.C. §1356(m) when ICE already has more money through Congressional appropriations than it is able to responsibly spend as there are continuing reports of ICE sending unvetted agents into the field.<sup>15</sup> DHS’s claimed reasoning for forcing noncitizens to pay to seek stays of removal is also disingenuous, stating, “[i]ncreasing the fee to \$755 would also reallocate the costs of processing the Form I–246 to those receiving the direct services, thereby ensuring that the U.S. taxpayers do not bear a disproportionate burden in funding the immigration system.”<sup>16</sup> Since this administration has taken office, Congress has already forced the U.S. taxpayer to expend over \$100 billion on ICE funding, including for use against U.S. citizens.<sup>17</sup> It is absurd to imagine that increasing a fee on stays of removal would meaningfully change tax outcomes for U.S. taxpayers. Instead, increasing the fee of adjudicating emergency stay applications appears to be a deterrent to obtaining stays rather than an increase justified by any funding need that ICE has.

### **III. The NPRM does not take the recent Board of Immigration Appeals decision, *Matter of Herrera-Nunez*, into consideration**

On June 12, 2026, one month after DHS promulgated this NPRM, the BIA issued a precedential decision, *Matter of Herrera-Nunez*, 29 I&N Dec. 691 (BIA 2026), addressing stays of removal. In that case, Mr. Herrera-Nunez filed a motion to reopen with the BIA so that he could seek adjustment of status based on his marriage to a U.S. citizen. Citing its own backlog, the BIA issued a blanket rule that “as a general policy going forward, [a noncitizen] subject to a final removal order should first request a stay from DHS prior to the Board considering a stay request

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<sup>11</sup> USCIS Policy Manual, Ch. 3 (Current as of June 26, 2026) <https://www.uscis.gov/policy-manual/volume-1-part-b-chapter-3>.

<sup>12</sup> 89 Fed. Reg. 6194, 6207 (Jan. 31, 2024).

<sup>13</sup> Ximena Bustillo and Sam Gringlas, *ICE is now funded through end of Trump's term, raising worries about oversight*, NPR, June 10, 2026, <https://www.npr.org/2026/06/09/nx-s1-5851664/house-reconciliation-vote-immigration-enforcement-ice-border-patrol>. See also, Brennan Center for Justice, *Big Budget Act Creates a “Deportation-Industrial Complex”* (Aug. 13, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/big-budget-act-creates-deportation-industrial-complex>.

<sup>14</sup> Heidi Altman and Ben D’Avanzo, National Immigration Law Center, *What’s in Congress’s New ICE Funding Law?* (June 11, 2026) <https://www.nilc.org/articles/whats-in-congresss-new-ice-funding-law/>.

<sup>15</sup> Ted Hesson and Kristina Cooke, *Exclusive-ICE Struggles to Vet Recruits Amid US Immigration Enforcement Push, Internal Email Shows*, Reuters, Feb. 26, 2026, <https://www.usnews.com/news/top-news/articles/2026-02-26/exclusive-ice-struggles-to-vet-recruits-amid-us-immigration-enforcement-push-internal-email-shows#:~:text=NBC%20News%20reported%20in%20October,from%20training%2C%20the%20official%20said.>

<sup>16</sup> 91 Fed. Reg. 24741.

<sup>17</sup> Jude Joffe-Block, *Man Sues DHS After Agents Tracked Him Down for Sending a Scathing Email to ICE*, NPR, July 6, 2026 <https://www.npr.org/2026/07/06/nx-s1-5883784/dhs-ice-critic-lawsuit-free-speech>.

filed in connection with a motion to reopen or reconsider a Board or Immigration Court order.”<sup>18</sup> *Id.* at 693. The BIA acknowledges in a footnote that DHS charges a fee for applications for stays, *id.* at 694, but does not acknowledge this rulemaking or that DHS is currently seeking to increase the fee by \$600. Pursuant to this BIA decision, noncitizens no longer have the choice to seek a stay with the relevant EOIR adjudicator for free, if they have a motion to reopen or reconsider pending, but instead are required to first expend \$755 before they can seek a stay from EOIR. In other words, a stay of removal process before EOIR that was previously free to access is going to be \$755.

Furthermore, DHS’s justification that noncitizens do not deserve a stay of removal is incorrect. Part of the justification DHS uses in the NPRM to justify the increased fee is that noncitizens requesting a stay have removal orders against them and “are requesting that DHS delay the execution of a lawful removal order through the exercise of DHS’ discretion and not as a matter of right or procedural due process.”<sup>19</sup> However, this reasoning does not take into account the *Matter of Herrera-Nunez* decision requiring noncitizens to first seek a stay with DHS despite presenting an argument that they have the right to remain in the United States and/or due process violations. For example, noncitizens often raise due process violation arguments in motions to rescind and reopen based on exceptional circumstances. One such common and current example is where EOIR has advanced the hearing date and the noncitizen arrived late to the hearing because, unbeknownst to the noncitizen, EOIR scheduled dozens of noncitizens for one docket. However, in cases presenting facts of a late arrival, the BIA has ruled that the proper vehicle is a motion to rescind and reopen based on exceptional circumstances rather than lack of notice.<sup>20</sup> As a result of the *Matter of Herrera-Nunez*, noncitizens in these situations and others giving rise to due process violations will be forced to seek a stay with DHS first rather than going straight to the IJ or the BIA. This extra step making DHS the initial adjudicator insulates the removal process completely within DHS without any oversight by another agency. The insulation is complete because the noncitizen may not be able to afford a stay of removal request at all or, even if they file a stay of removal request, there is no guarantee that DHS will adjudicate the request before removing the person. It is a process that echoes the speed and lack of procedural protections of expedited removal even when Congress intended for the noncitizen to access INA §240 proceedings.

DHS should rescind this proposed rule based on this interceding BIA precedent, which significantly alters the legal landscape for noncitizens seeking stays of removal. Therefore, DHS should rescind the proposed rule and consider the effects of *Matter of Herrera-Nunez* before determining whether or not to issue a new rule with a revised fee.

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<sup>18</sup> The decision does not affect motions to reopen and rescind an in absentia removal order entered under section 240(b)(5)(C) of the INA, which carry an automatic stay of removal pursuant to the statute. 29 I&N Dec. at 692, n. 3.

<sup>19</sup> *Id.*

<sup>20</sup> See *Matter of S-L-H- & L-B-L-*, 28 I&N Dec. 318 (BIA 2021).

#### **IV. The NPRM does not adequately account for the effect of the rule on small entities**

The preamble states, “it is possible that some [noncitizens] may pay the fee through a representative, ultimately the [noncitizen] is responsible for the Form I–246 fee, not the representative. Therefore, DHS certifies this proposed rulemaking would not have a significant economic impact on a substantial number of small entities.”<sup>21</sup> Thus, at the same time it acknowledges that counsel for noncitizens will be affected by this rule, it does not perform any analysis at all on what the effect will be. For represented noncitizens, small law firms and nonprofits will have to address this significant fee hike, either by expending more time on each case, preparing a fee waiver, or by paying the fee itself, DHS simply ignores this effect. The NPRM therefore fails to comply with the Regulatory Flexibility Act which requires this analysis. The fee hike will similarly affect small businesses, both small law firms and nonprofit organizations, and, again, does not address the challenges imposed by the rule.

#### **V. Conclusion**

The proposed fee increase for DHS stays is not supported by the reasoning in this NPRM. The fee increase will punish noncitizens seeking to assert their right to remain in the United States while pursuing lasting relief here. We urge that the proposed rule increasing the I-246 fee be withdrawn.

Thank you for the opportunity to comment. Please do not hesitate to contact Michelle Mendez, [michelle@nipnlg.org](mailto:michelle@nipnlg.org) if you have any questions or need any further information.<sup>22</sup>

Respectfully,



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<sup>21</sup> 91 Fed. Reg. 24743-44.

<sup>22</sup> Victoria Neilson, Supervising Attorney, authored this comment with contributions from Michelle Mendez.