American Immigration Lawyers Association

918 F Street, N.W. Washington, D.C. 20004 (202) 216-2400

April 1, 2007

Via email: OSComments@dhs.gov

Director, Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Ave. NW, 3d Floor
Washington, D.C. 20529

Re: DHS Docket No. USCIS—2006-0044
Comment to Proposed Rule "Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule" (72 Fed. Reg. 4888 (February 1, 2007))

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) is a voluntary bar association of more than 10,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a very broad view on immigration matters because our member attorneys represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. AILA members also represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers, on a permanent basis. Our members also represent asylum seekers, often on a pro bono basis, as well as individuals seeking U.S. citizenship.

AILA acknowledges the philosophy behind OMB Circular No. A-25, that activities "that convey special benefits to recipients beyond those accruing to the general public" should be funded by user fees rather than appropriated funds. This approach is applied to U.S. Citizenship and Immigration Services (USCIS) through INA section 286(m), which states that "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." We understand that, because of limited resources and a desire to run government in a more business-like manner, revenue sources other than appropriations must be utilized.

We therefore accept that USCIS will charge user fees. However, we do not accept making user fees the agency's nearly-exclusive source of funding. As discussed in detail

below, we question the appropriateness of some of the uses to which USCIS plans to put the funds, we are concerned about the public impact of some of the fee increases, we have doubts about the efficacy of the agency's plans for the funds, and we believe that the proposed fees were improperly calculated.

Above all, we do not accept the amounts of the proposed fees. USCIS is trying to charge its customers like a business, but it clearly does not run like one. Unlike most businesses, it has no competitors and no market incentives to achieve efficiencies. Unlike comparable businesses—those that are intrinsically a monopoly—it lacks a regulatory body other than Congress to question usurious rates. And, as long as USCIS receives negligible amounts of money by way of appropriations, Congressional oversight will remain highly limited. That is no more acceptable than the amounts of the proposed fees themselves.

The Need to Request Appropriations.

The proposal includes activities not appropriate for user fee funding.

USCIS seems to be starting from the premise that it is required to fund itself entirely from user fees, no matter what the activity. This premise is erroneous in two ways. First, the statute does not require fee-based funding—it merely allows it: "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."[1] (emphasis added.)

Second, the statute authorizes USCIS to set fees for providing adjudication and naturalization services. The INA does not provide authorization for fees to cover other activities. USCIS has chosen to expand its mission beyond such adjudication and naturalization and enter into the realm of law enforcement. We will save for another day the debate over whether those law enforcement activities belong in USCIS, which Congress, when it established the Department of Homeland Security (DHS), deliberately split off from the rest of the former INS functions. Suffice it to say, the intent was that USCIS would be the adjudicative arm, and ICE and CBP the enforcement arms, of DHS.

That adjudications mission, however, has drifted. In his February 14, 2007, statement to the House Judiciary immigration subcommittee, USCIS Director Emilio Gonzalez listed five priorities to be addressed by the fee increases, with fraud prevention and national security enhancements listed first and training to ensure a skilled workforce next to last.[2] The Federal Register notice respecting the fee increase also states, "USCIS' security related activities and objectives are its highest priority in allocating resources."[3]

---

[1] INA section 286(m)

[2] Statement of Emilio Gonzalez, Director, USCIS, Department of Homeland Security, Regarding a Proposal to Adjust the Immigration Benefit Application and Petition Fee Schedule, before the House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Feb. 14, 2007.

[3] 72 Fed.Reg. 4888, 4892 (Feb. 1, 2007)

USCIS' web page logo sounds out the theme "Protecting America - We are USCIS", with no mention of adjudications or service, only of law enforcement and security. And the first paragraph of a recent newspaper profile of the USCIS Director noted "…U.S. Citizenship and Immigration Services helps nab an average of five criminals a day, including the occasional murder suspect -- a point that agency Director Emilio Gonzalez underscores when he discusses the USCIS role in the Homeland Security Department."[4]

AILA has no quarrel with DHS engaging in law enforcement, security activities and fraud detection. Quite the contrary—that's in large part what DHS was set up to do.[5] However, AILA does quarrel with law enforcement being the stated goal of the "service" branch of the agency and with the utilization of filing fee revenues to pay for these activities. The authorizing statute limits the fee-funding scope to "*providing* adjudication and naturalization services" (emphasis added) and administering the fees. [6] Many of the costs anticipated by this fee regulation—most particularly, those undertaken by the National Security and Records Verification (NSRV) directorate—should not be charged to the fee account. These are law enforcement activities, not the provision of adjudication and naturalization services, and thus should be paid for as all other law enforcement is financed—through appropriated funds.

We also find it odd that the discussion of the financial needs of the NSRV does not seem to account for an existing source of significant funds: every petitioner for H-1B and L-1 benefits is required to pay a one-time $500 anti-fraud fee. [7] In the proposed rule, the revenues from this fee are dismissed with a passing reference to "several smaller, specific accounts,"[8] as though the amounts received from this fund are insignificant. To the contrary, this account should more than cover the activities of the Fraud Detection and National Security (FDNS) Division of the NSRV.

One-third of this anti-fraud fee is supposed to go to DHS. The 65,000 cap-subject H-1Bs alone yield $32.5 million in revenues, or $10.8 million as DHS' yearly share. Individual L-1 petitions, L-1 consular applications under blanket petitions, and H-1B change of employer requests also provide revenues of which DHS gets one-third. The total section 268(v) receipts for DHS—all of which are presumably going to USCIS in light of the fact that USCIS has taken on this law enforcement function—have been estimated by the agency itself at $44 million.[9] This amount is nowhere accounted for in the fee proposal. Instead, despite these revenues, part of the fee increase is justified by allocating $31.3 million and 170 staff to this same program.

In any event, a number of the proposed fee-funded activities and operations do not involve the provision of adjudications and naturalization services, but are of wider benefit

[4] Washington Times, Feb. 20, 2007
[5] We do, however, believe that those activities were deliberately separated from the adjudications function, and more appropriately reside with ICE. However, as previously mentioned, that is a debate for another day.
[6] INA section 286(m)
[7] Consolidated Appropriations Act, 2005, section 426
[8] 72 Fed.Reg.4888, 4891 (Feb. 1, 2007).
[9] DHS Budget in Brief, fiscal year 2006, p. 63, fn 2.

to the general public. Thus Congress, not applicants, should fund them. Examples include payments to the FBI for fingerprint, name, and security checks which benefit national security; processing of Freedom of Information Act requests, for which other government agencies receive appropriated funds; 100% of the USCIS administration costs including headquarters offices and field locations worldwide; and information technology. In addition, funding for Internal Security and Investigative Operations for the investigation of misconduct of Federal and contract employees should not come from user fees as USCIS proposes. USCIS should request appropriations to fund the investigations of allegations against its own employees.

Fees should be applied toward the accurate and timely adjudication of benefits to which the vast majority of applicants are entitled. Enforcement activities and fraud detection should be funded separately and outside the fee account. In the present proposal, they are not.

Immigration is of public benefit, and should be treated as such.

The rationale for the USCIS user-fee funding system appears to be that immigration and naturalization benefits provide value only to the recipients. Yet, many policy makers, individuals, and organizations recognize that the contributions of immigrants greatly benefit the U.S. as well. Immigrants reflect the very essence of our society: seeking individual freedom, equality and a better life.

A recent report published by the Center for an Urban Future[10] finds that "During the past decade, immigrants have been the entrepreneurial sparkplugs of cities from New York to Los Angeles--starting a greater share of new business than native-born residents, stimulating growth in sections from food manufacturing to health care, creating loads of new jobs, and transforming once-sleepy neighborhoods into thriving commercial centers."

Citing a study by the Ewing Marion Kauffman Foundation, the report found that "today's new Americans still tend to be far more entrepreneurial than native-born residents. In 2005, an average of 0.35 percent of the adult immigrant population (or 350 out of 100,000 adults) created a new business each month, compared to 0.28 percent for the native-born population (or 280 out of 100,000 adults). . . Moreover, the percentage of immigrants starting business has generally been on the rise. . ."

As stated by Dan Siciliano, Executive Director, Program in Law, Economics and Business at Stanford Law School, in his April 24, 2006 testimony before the Senate Judiciary Committee on the economic impact of immigration, "The U.S. economy has become increasingly reliant on immigrant workers to fill the growing number of less-skilled jobs for which a shrinking number of native-born workers are available." He goes on to cite recent economic analysis, including work by Giovanni Peri of the University of California, which shows that the United States sees real economic benefits from

[10] "A World of Opportunity," Center for an Urban Future, February 2007.

immigration such as, "Native-born wages increased between 2.0 and 2.5 percent during the 1990s in response to the inflow of immigrant workers. Overall annual growth in the Gross Domestic Product is 0.1 percentage point higher as a result of immigration--a misleadingly small number that represents billions of dollars in economic output and, when compounded across a generation, represents a significant improvement in the standard of living of our children and grandchildren."

We must do a better job welcoming new immigrants rather than closing doors to them. Raising the user fees will send the message to foreign nationals that the doors to America are closed. USCIS must open itself to the idea that a federal funding source is now a necessity to cover some costs. AILA understands USCIS' reluctance to rely on an uncertain revenue stream due to shifting political realities. However, with the stakes rising for our newest citizens, USCIS can no longer espouse a disdain for requesting help from Congress and the taxpayers who benefit from immigration.

Fee increases will make citizenship and immigration benefits subject to a means test.

The rule proposes to increase immigration and naturalization benefit application and petition fees by what USCIS describes as a weighted average of $174, from an average fee of $264 to $438. If the fee schedule is adopted as proposed, 15 fees would increase by amounts between $65 and $200; eight fees would increase by amounts between $200 and $300; one fee would increase by an amount in the $300 to $400 range; and six fees would increase by more than $400.

USCIS states that it "recognizes that this proposed rule would have an impact on persons who file the affected applications and petitions and biometric fees." However, it offers no solution to those least able to pay other than to cite its authority to waive certain fees on a case-by-case basis. Since, as discussed later, USCIS proposes to severely limit the circumstances in which it will waive the fee, the waiver is no solution at all.

The fee increases proposed by USCIS will impose extreme hardship on immigration applicants and may result in delaying or creating barriers to naturalization. According to the Migration Policy Institute,[11] "High costs for naturalization may be one factor that discourages low-income immigrants from naturalizing at the same rates as higher-income immigrants. In 2000-2001, when the fee for adult naturalization was $225, 41 percent of lawful permanent residents who were eligible but had not naturalized had incomes considered 'low income' (below 200 percent of the poverty level). Those who had recently naturalized had considerably higher incomes -- just 28 percent had low incomes. In 2002, there were about 8 million lawful permanent residents (LPRs) who were eligible but had not yet obtained citizenship. The large increase in naturalization fees may now further hamper the ability of millions of eligible LPRs to naturalize."

[11] "Immigration Fee Increases in Context," Migration Policy Institute Immigration Facts, February 2007, No. 15

Furthermore, "Naturalization of immigrants in the United States brings significant benefits for the country," according to a February 2007 report of The Migration Policy Institute.[12] "First, obtaining citizenship allows immigrants to participate fully in the civic life of the country by permitting them to vote in elections, run for office, and work in many government jobs. Further, naturalization is a powerful symbolic gesture of commitment to the United States. In taking the oath of citizenship, naturalizing immigrants pledge to support the values and laws of the United States and renounce their allegiance to any other country. Naturalizing citizens also commit to serving on a jury if called to do so. Further, in order to naturalize, immigrants must learn a basic level of English and study US history and government. The ability to naturalize provides a strong incentive for immigrants to deepen their integration into the country by improving their English and learning more about the country of residence."

The fee increases will effectively impose a means test on the ability of immigrants to attain U.S. citizenship, which is contrary to our national values. The United States was built on the principals of equality and inherent value of each individual, both native born and immigrant. If we need immigrants to sustain our economic system and invest in the American dream, we should not be erecting monetary barriers to their achieving U.S. citizenship.

The Need to Improve Efficiency and Service.

Inconsistency and poor quality in adjudication cause significant inefficiencies.

Inconsistent and inefficient adjudication are problems in the immigration process, with the agency plagued by a widespread perception that it is hostile toward its foreign national customers. These problems result from a number of factors, including the issuance of unnecessary Requests for Evidence and erroneous denials which significantly increase the costs of adjudication. The CIS Ombudsman's 2006 Annual Report to Congress stated:

> Lack of standardization in USCIS adjudications among service centers, among field offices, and between officers within the same office remains a pervasive and serious problem. The Ombudsman's 2005 Annual Report (at pp. 15-18) identified this problem and the Ombudsman has observed little, if any, improvement.[13]

AILA agrees. AILA has seen little improvement in the area of issuance of unnecessary Requests for Evidence and erroneous denials. Continuing problems include:

- Boilerplate Requests for Evidence which fail to make reference to evidence submitted and evidence lacking.

[12] Id.
[13] CIS Ombudsman, Annual Report 2006, June 26, 2006.

- Requests for Evidence which demonstrate a failure to adhere to the preponderance of evidence standard in adjudication.

- Requests for documents already submitted.

- Unexplained requests for documents not required by law.

- Denials of applications and petitions which state only a conclusion of legal ineligibility without any analysis.

- Re-adjudication of established facts.

Increases in user fees are not justified until USCIS can provide its paying customers with a feasible plan to eliminate the inconsistent adjudication that significantly impedes efficiency. Such a plan should include not only additional training, but tracking of adjudications and a system of holding accountable adjudicators who repeatedly fail to properly adjudicate petitions and applications.

USCIS is plagued by the perception that it is hostile to customers and actively seeks to deny an application or petition.

A review of the many comments to this proposed regulation already submitted shows that USCIS has a public relations problem: immigrants and prospective immigrants believe that the agency is actively hostile toward them.

Adjudication patterns fail to dispel this perception. A deposition of a senior USCIS supervisor taken in the course of federal court litigation several years ago provided a rare glimpse into service center adjudication. This testimony indicated that adjudicators often denied cases they "didn't like" and then after the fact located non-precedent AAO decisions to support the decision.[14]

USCIS also displays a disturbing trend in statutory and regulatory interpretation. Adjudications officers, often without any guidance from headquarters, consistently apply the most restrictive possible interpretation to a given statutory or regulatory provision. Fortunately, at times the USCIS management has moderated the agency's interpretation through policy memoranda.

[14] July 29, 2003 Deposition of Tracey Coleman in Bally Total Fitness Corp. v. INS, U.S. District Ct. Nor. Dist. Ill., Eastern Div., No. 02-C-8826

Examples include:

- Adjudication standard for physicians in underserved areas following Schneider v. Chertoff, 450 F.3d. 944, 9th Circuit2006.[15]

- Exempting periods of stay in H-4 and L-2 status toward H-1B and L-1 limits. Not requiring current H-1B status for AC21 benefits.[16]

- Re-adjudication of previously approved petitions.[17]

- AC21 Section 103 exemption.[18]

- Permanent offer of employment.[19]

AILA applauds the flexibility of USCIS to review and revise prior agency thinking on many issues. However, we cannot ignore the failure of the agency to establish and enforce reasonable interpretations at the outset, allowing the appearance of hostile adjudication to fester before taking remedial action.

Much of the problem derives from the agency's inability to promulgate regulations on substantive subjects, forcing adjudicators to devise their own policies and principles with respect to a wide array of subjects. This lack of regulations on key subjects deprives adjudicators of clear guidance, and contributes to an atmosphere that falls short on establishing and implementing an agency-wide commitment to the principles of fair and consistent adjudication and respect for the customer. The result is an utter lack of transparency in adjudication standards.

USCIS' recent across-the-board investigation of religious worker immigrant petitions demonstrates questionable judgment in the allocation of resources as well as a profound lack of respect for established legal standards. Halting all adjudications of a particular petition type and requiring site visits for most petitions is a particularly resource-intensive endeavor that yields little by way of effective results. Reports from the handful whose

[15] Memorandum from Michael Aytes, Assoc. Dir. for Domestic Operations, "Interim guidance for adjudicating national interest waiver (NIW) petitions and related adjustment applications for physicians serving in medically underserved areas in light of Schneider v. Chertoff,…" HQ70/6.2 (Jan. 23, 2007).
[16] Memorandum from Michael Aytes, Assoc. Dir. for Domestic Operations, "Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status…" HQPRD70/6.2.8, HQPRD70/6.2.12, December 5, 2006.
[17] Memorandum from William Yates, Assoc. Dir. for Operations, "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity." HQPRD72/11.3, April 23, 2004. However, we have seen some resistance in the field to actually implementing this guidance.
[18] Memorandum from Michael Aytes, Assoc. Dir. for Domestic Operations, "Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on Section 103 of the American Competitiveness in the Twenty First Century Act of 2000," HQPRD70/23.12, June 6, 2006.
[19] Memorandum from Michael Aytes, Assoc. Dir. for Domestic Operations, "Guidance on the Requirement of a 'Permanent Offer of Employment' for Outstanding Professors and Researchers." June 6, 2006.

petitions have broken out of this freeze enough to get a site visit indicate that the investigators lack fundamental knowledge of the standards for religious worker qualification or an understanding of what they are seeing. We understand that there have been findings that these types of petitions have a higher than usual incidence of fraud. But enforced gridlock is not the answer to the problem.

These examples feed the perception of an attitude of hostility and suspicion toward its customers. USCIS must establish a plan to effectively evaluate the performance of adjudicators and to hold adjudicators accountable for decisions which are not based on the established legal standards that USCIS is obligated to uphold. This starts with ensuring that those standards are codified and communicated. Until USCIS can demonstrate a plan to effectively transform itself into an agency dedicated to the fair and efficient adjudication of immigration benefits, it should not demand higher payments from the customers that it has failed to consistently treat with respect and fair adjudication.

USCIS has also failed to demonstrate a commitment to effective communication with its customers.

AILA is concerned that, while USCIS plans to spend significant resources in the area of public communications, the agency has failed to articulate a plan to adequately monitor the performance of outside contractors who appear to be its primary public contact with its customers.

AILA is frustrated with the agency's experiments with contractor-based customer communication initiatives thus far. In its prefatory comments to the proposed regulation, USCIS applauds its customer service initiatives, stating that it "…reduces the frequency or repeated, redundant applicant and petitioner contact with USCIS employees, thus improving USCIS efficiency." However, the agency has provided no evidence that these efforts have actually improved customer communication. The "repeated" and "redundant" contact by its customers is often the attempt to determine the status of applications, petitions and motions delayed beyond normal processing times. In many USCIS offices it simply is no longer possible for an applicant, petitioner or attorney representative to speak with an agency employee who actually has the knowledge and authority to look up a case and provide a meaningful response to "What's going on?"

For example, in late 2006, USCIS initiated an email-based attorney inquiry pilot program with the Chicago District Office. Attorneys are given an email address to which to send inquiries. These inquiries are answered by contractors who are located away from the District Office and who are unable to provide any meaningful information in response to most inquiries. A typical response to a long-delayed post-interview Adjustment of Status application provides no information:

> Thank you for your e-mail to the U.S. Citizenship and Immigration Services (USCIS).
> The following response is provided for your information/action.

> We have read your inquiry and understand your concern about the processing of your client's application. With the information provided, we have searched our system and it shows that the application has been forwarded to the Adjudications Office, and is now under review and not yet ready for a decision. The office that is handling your client's case will notify you as soon as they make a resolution on your application.

Obviously, a response such as the above would result in attorneys and/or foreign nationals making repeated inquiries to USCIS to try to obtain some meaningful information regarding the delays in processing cases. And repeated responses from the contractors involve the expenditures of more USCIS funds, creating a vicious cycle of waste and inefficiency.

The proposed regulations specify that $43 million is budgeted for the National Customer Service Center contract. The shift to providing customer information through the contractor-staffed National Customer Service Center began in earnest in June 2003 and replaced the previous system in which INS information officers staffed telephone lines and answered customers' questions. National Customer Service Center contractors receive minimal training and answer customers using "canned" scripts. The Government Accountability Office published a report dated June 2005[20] criticizing the USCIS in its evaluation of contractor performance, and we question whether the proposed budgeted cost of $43 million is an effective expenditure of funds to provide information to the public. AILA does not understand why USCIS customers should be asked to pay for private contractors whose only function appears to be to provide non-responsive information in a pleasant fashion.

The USCIS trend of outsourcing its communications functions is of serious concern to AILA. This outsourcing demonstrates a commitment only to construct a façade of better customer communication, while meaningful communication continues to decline.

AILA supports the agency's efforts to provide basic information through the internet, and applauds the agency's interest in customer feedback on its online communications initiatives. However, even these worthwhile endeavors have been the subject of wasteful ineffectiveness. On November 1, 2006, USCIS rolled out a "new and improved" website, intended to serve as a "one stop shop" for all U.S. immigration and citizenship information. We do not understand why USCIS determined to spend its limited resources to redesign the website, when the old website contained a wealth of resource information, was well designed and easy to navigate, and was very customer-friendly. However, since the roll-out of the new website, numerous broken links, missing information, and other problems have been discovered and reported to the USCIS webmaster. Many AILA members have also noted that the new website is much more difficult to navigate than the old website, and that various information that had been included in the old website is no longer available, or at least no longer able to be found. The proposed regulations do not indicate how much of the IEFA account already has been expended on the website redesign or how much of the $228 million will be allocated to fix problems on the website. We strongly urge that this information be disclosed to the public.

[20] U.S. Government Accountability Office, "Immigration Services. Better Contracting Practices Needed at Call Centers" (GAO-05-526, June 2005).

USCIS must not increase costs for biometrics and security clearances without corresponding plans to improve processing.

AILA is also very concerned about the proposed increase in the biometric fee from $70 to $80. Currently, security clearances are not being completed in a timely manner for a number of I-485 and N-400 cases, and there is no indication that USCIS intends to take steps to resolve the situation.

The "Capture Biometrics" costs are budgeted at $174 million, or close to 9% of the total processing activity costs. This amount includes operational costs for the Application Support Centers of $74 million for outside contractors and $12.5 million for USCIS employees as managers, as well as $63 million paid to the FBI to conduct fingerprint and name checks.[21] In addition, USCIS is requesting an additional $12.4 million to pay increased costs to the FBI for background checks, to cover the projected increases in N-400 and I-485 filings[22], to expand biometrics to I-131 (refugee travel and re-entry documents) and I-751s, and to enhance FBI name check services.

Currently, biometric fees are paid separately from regular filing fees and are assessed at $70. Of this $70, our understanding is that approximately $20 to $30 is actually paid to the FBI per case to conduct fingerprint and name checks.[23] USCIS is proposing to increase this amount to $80, a 14% increase, and the only explanation provided is that the projected biometric workload volume will decrease and that enhanced name check services will be provided by the FBI. USCIS provides no details as to what FBI name check enhancements are being contemplated or how this will increase the costs for biometric processing and security clearances. Without further details, USCIS has not provided satisfactory explanations sufficient to justify such a fee increase.

Further, in return for this fee increase, USCIS has not proposed any improvement in services or processing times. Significant numbers of I-485 and N-400 cases have been languishing for years while awaiting security clearances. In the past, the policy was to request expedites from the FBI on these cases if a mandamus lawsuit was filed in federal

---

[21] Using USCIS' projections, $63 million will be paid to the FBI to conduct approximately 2.196 million background checks, which can be extrapolated as a cost of approximately $28.69 each. There is no indication as to how the remaining $51.31 of the proposed $80.00 biometrics fee is to be expended, other than the Application Support Center operational costs, which can be estimated to cost $39.39 per case ($86.5 million for 2.196 million background checks).

[22] The proposed regulations are inconsistent as to which form types are projected to increase and which are projected to decrease in volume. In Section IV.E.3, USCIS states that N-400 and I-90 filings are projected to increase and I-485 filings are expected to decrease. However, later at Section V.A., USCIS states that N-400 and I-485 filings are expected to increase, while I-90 filings are projected to decrease. We are not clear as to which information is correct.

[23] *See* Note 21, *supra.* According to an Office of the Inspector General Report, "A Review of USCIS' Alien Security Checks" (OIG-06-06, Nov. 2005), FBI fingerprint checks cost approx. $16.79 in FY2004 ($31.9 million for 1.9 million checks) and FBI name checks cost $4.00 each in FY2004 ($6.0 million for 1.5 million names). OIG Report at 3.

court, but these expedites require USCIS to pay additional fees to the FBI.[24] However, recently, USCIS announced a new policy that it will no longer request expedites from the FBI where the only reason to expedite is that a mandamus action has been filed.[25] This means that the backlog on obtaining security clearances on these cases will continue to increase, unjustifiably preventing larger and larger numbers of individuals from obtaining lawful permanent residence or U.S. citizenship. It also will increase overall costs for USCIS in the form of costs for defending these suits and paying EAJA fees.

Further, we are deeply concerned about the national security implications of these delays. These adjustment and naturalization applicants are currently in the U.S., but no actual determination has been made as to whether they pose a threat to our country. Given that many of these background checks have not been processed for several years, there is a real danger when those individuals who indeed are a threat are able to remain in the U.S. For the sake of our national security, every effort should be made to expedite security clearances on all filings, so that appropriate action may be taken against any individuals who pose a threat to the U.S. and so that individuals who pose no threat may receive the benefits for which they have applied.

Biometric fees should not be increased unless the USCIS develops reasonable and specific procedures to reduce the wait time for security clearances on I-485 and N-400 applications that have been pending for more than six months. In addition, AILA strongly urges the Administration to request appropriations from Congress to fund the security clearance structure and improve processing times for obtaining background checks. This is a matter of the national interest that should funded by all Americans, who will benefit from a more efficient system to identify and move against potential terrorists and criminals.

An increase in fees is inappropriate without a corresponding commitment to quality and service.

In response to past fee increase proposals, USCIS (and INS before it) was consistently told by the public that it should not increase fees until it has decreased its backlog. In June 2004, to much fanfare, USCIS announced an effort to "eliminate" its backlog by the end of fiscal year 2006 by reducing its backlog to six months' wait.[26] And sure enough, in September 2006, as fiscal year 2006 was ending, USCIS declared itself almost there.[27] Now, as one justification for this proposed increase, USCIS indicates in its proposal that it has reduced processing times to six months. However, there are several problems with these assertions.

---

[24] "USCIS may pay the FBI double to 'expedite' up to a few hundred FBI name checks per month." OIG Report at 24.

[25] USCIS Update dated February 20, 2007, available on USCIS website at http://www.uscis.gov/files/pressrelease/ExpediteNameChk022007.pdf.

[26] In fact, six months is hardly an "elimination" of the backlog. Nevertheless, six months would have been a significant improvement over the state of affairs in June 2004.

[27] USCIS, at that time, changed how it counted its backlog, and announced that it had reduced its backlog of 3.8 million cases to 140,000. See USCIS News Release, "USCIS Announces Elimination of Naturalization Backlog," Sept. 15, 2006.

To its credit, and with the assistance of Congressionally appropriated funds, USCIS did make significant inroads with respect to its backlog. But did it eliminate—even by the rather broad terms by which the agency defined elimination—the backlog? Hardly.

Instead of including applications and petitions on file and awaiting adjudication, it decided to drop from its count any filing that was not "ready to adjudicate." While this is a fair exclusion for those adjustment of status applications that cannot currently be adjudicated because the visa numbers retrogressed, it is highly misleading to exclude others, such as those applications delayed due to security checks or Requests for Evidence. These are all applications that still need to be adjudicated and, if the system were working properly, would be ripe for adjudication in a relatively short time frame.

Further, an examination of USCIS' current processing times shows that processing times are not in fact the claimed six months or less for a number of key applications. In other cases, even if USCIS is at six months, this represents an increase over prior processing times or is only a partial representation of actual processing. For example:

1. I-129F – The CSC reports that K-1 applications are taking six months; however this is actually an increase in processing over relatively recent history when K-1s were adjudicated in four months or less.
2. I-751 - The CSC reports that I-751 applications are taking six months but this does not take into account the six-month or more wait that I-751 applicants face once the service center forwards the applications to the local office for interview. Both of these times are well beyond the statutorily mandated 90-day processing time.
3. I-129 for all types of H-1B petitions – NSC and TSC report a nine month processing time even for extensions. Since these service centers have not been responsible for these types of filings since May 2006, they have not worked on reducing the cases that remain in this category.
4. 1-131 – NSC and TSC report times in excess of four months and, again, while that is less than six months, it represents an increase in processing times over the recent past for a straightforward ancillary benefit.
5. I-140 – NSC reports processing times ranging from seven to nine months while VSC reports ten months on those I-140s remaining with it. NSC processing times are greater than TSC while VSC again appears not to be working its backlog.
6. Asylee adjustments – NSC reports three years while TSC reports four years.
7. Employment-based I-485s – NSC reports eight months while VSC reports nine months on those remaining at VSC. NSC processing times are greater than TSC, and VSC again appears not to be working its backlog.

As should be evident, these processing times do not actually reflect the claimed processing improvements when compared to backlogs under prior fee structures. These data also appear to be inconsistent with the agency's posted Q&A Responses to the proposed fee increase that state that these fee increases will perform as promised this time because "tomorrow's customers are not being asked to pay higher fees to allow us to

process yesterday's backlogged cases." Given the lack of progress on a number of different applications and existing backlogs, this statement does not appear to be entirely accurate. It also seems inconsistent with the claim in the same set of Q&As that the fee increase was purposefully delayed until service levels improved to the six-month goals set forth by the White House.

In addition, these processing statistics make clear that how efficiently someone's application is processed has a lot to do with which service center adjudicates the application. Given these concerns, any additional funds should go first to adjudications of files in the queue and not enforcement activities that properly belong in ICE.

USCIS' goals for improving processing are remarkably un-ambitious.

USCIS has indicated that, with the fee increase, it hopes to increase efficiency by 20% by the end of fiscal year 2009. When measured against the proportion and immediate effect of the fee increase, this is a very small margin of improvement in a fairly lengthy frame of time. When measured in terms of actual days that a given processing time will be shortened, the improvement is negligible. Assuming a best case scenario of six months for processing every petition, 20% means that an I-140 that currently takes 180 days may be reduced to 146 days two and one-half years from now. Assuming actual I-140 processing times at NSC of 8 months, something that currently takes about 240 days may take 192 days. This latter scenario means processing for that benefit will not even meet the currently stated six-month processing goal.

Some fees are increasing three- or four-fold, or on average 96%, as Representative Zoe Lofgren, Chair of the House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, has stated. Such minimal efficiency improvements do not appear to justify the dramatic increases in fees.

Calculation of Costs.

USCIS has not provided sufficient explanation for its calculations of processing costs.

In its proposed rulemaking, USCIS states that it has utilized a "new cost model" which will allow "more complete funding of existing services" based on "specific cost allocation methods." While AILA applauds USCIS' efforts to use better data to project its costs, we are concerned that some of the data utilized do not appear to make sense, and we find that USCIS has not provided an adequate explanation on how it has calculated the proposed new fees. This, in turn, calls into question whether USCIS has yet to accurately calculate its overall actual adjudication costs.

In determining the projected costs of processing applications, USCIS begins with an assumption that the volume of filings for Forms I-129, I-130, I-131, I-140, I-539, I-687, I-765, and I-90 will decrease by 391,824 and that the volume of I-485 and N-400 filings will increase by 11,049. However, USCIS provides no trend data to enable us to

determine if these assumptions are justified. Indeed, our members' own observations of trends in their practices would indicate different conclusions. If USCIS' assumptions are not correct, then all of its calculations of processing costs will also be incorrect.

Further, USCIS purports to calculate processing activity costs from the various forms' "completion rates," defined in the regulation as the level of effort expended to adjudicate an application. However, the completion rate data presented in Table 9 make no sense. First, many form types include completion rates at the local offices, service centers and the National Benefits Center. It is not clear if the completion times in various offices are intended to be added up to provide a total completion rate for a form type, or if the completion times in different offices are intended to stand independently. Or stated another way, does this mean that, for example, an I-130 family-based immigrant petition takes an average of .86 hours to process at a local office, .35 hours at a service center, AND .65 hours at the National Benefits Center, for a grand total of 1.86 hours? Or does this mean that when I-130s are processed by a particular office, they can take an average of .86 hours in a local office, .35 at a service center, OR .65 hours at the National Benefits Center?

Second, Table 9 lists processing times for forms in locations that do not process those form types. For instance, local offices do not process I-129s (.09 hours listed), I-129Fs (4.98 hours listed), I-140s (2.00 hours listed) or I-539s (1.32 hours listed), but local office completion rates are listed for those form types. Similarly, N-470s are filed and processed at local offices; why is 1.91 listed as a completion rate for service centers? N-400s are filed at service centers, but no completion rate data is provided for service center processing. Additionally, given that local offices no longer process I-140s, it is simply not credible that local offices spend an average of 2 hours processing I-140s, when service centers only spend 52 minutes on I-140s.

At Section X, USCIS discusses a threefold increase in the level of effort to adjudicate I-140s, I-129Fs, I-485s, waiver applications, N-400s, I-751s and I-817s, claiming that most of the increases are "associated with the additional time devoted to the expansion of background checks." However, no additional background checks are conducted on I-140s or I-129Fs, other than the standard IBIS checks that are conducted on all form types.[28] No reasonable explanation is provided to justify the threefold increase in level of effort for I-140s, I-129Fs or I-751s, and applicants should not be forced to pay increased fees due to USCIS inefficiencies in processing these application types. It is time that USCIS took a reasoned approach to when, where and how it conducts background checks, lest it complete its current journey toward complete immobilization.

Additionally, USCIS is proposing to increase I-765 applications for employment authorization from $180 to $340, a whopping 89% increase. These fees are somehow determined based on the completion rate data for I-765s, which lists .31 hours for I-765s in local offices, .19 in service centers, and .16 in the National Benefits Center. Effective August 2006, USCIS implemented a new policy to no longer issue interim work

[28] We do not understand why there would even be an IBIS check on I-140s, as they do not, in and of themselves, convey a benefit and thus are not deniable for inadmissibility.

authorization cards at local offices, [29] which means that the completion rate of .31 hours in the local offices should be eliminated and the processing costs for I-765s should be significantly reduced. In light of this significant change in policy, the processing activity unit costs and filing fees for I-765s should be re-calculated and reduced.

Further, USCIS does not provide any reasonable explanation as to how the completion rate data provided in Table 9 is then utilized to determine the "Make Determination" Processing Activity Unit Costs By Application/Petition in Table 10. The only explanation provided is that the "Make Determination" processing activity unit cost generally follows the premise that the more complex the application/petition is to adjudicate, the higher the unit costs. However, the data for "Make Determination" costs do not appear to correspond in any logical manner with the completion rate data.

For instance, why are the "Make Determination" costs for I-360 calculated at $2,268, a figure much higher than other form types, when the effort levels are not significantly higher than for other form types? As another example, why are I-765 "Make Determination" costs ($83) significantly higher than I-90 costs ($34), while I-765 completion rates (.31/.19/.16)[30] are much lower than I-90 completion rates (.93/.50/NA)? Why are I-102 ($104) and I-129 ($104) "Make Determination" costs the same, when their completion rates are very different (.61/.30/.39 as compared to .09/.40/NA)?

From the information provided, we are not persuaded that USCIS has adequately justified its need to increase filing fees to the extent proposed. The completion rate data makes no sense in light of which offices process particular application types, and USCIS has not provided a reasonable explanation as to how it has calculated "Make Determination" costs from the completion rate data. USCIS is not justified in raising the filing fees at this time, unless it provides more accurate data and more complete explanations as to how it has calculated processing costs and has proven that it indeed understands its own overall costs of adjudicating applications and petitions.

Fee increases do not correspond to projected IEFA cost increases.

According to the data provided by USCIS, the total IEFA budget is anticipated to increase by 32% (from $1.76 billion to $2.329 billion) from fy2007 to fy2008/2009, including adjustments for inflation and additional resource requirements. However, the weighted average application fee increase is 96%, or at best, 66% taking into consideration the consolidation of interim benefits into I-485 applications. Even though USCIS states that these fee increases are based on a "new cost model," we find it extremely hard to fathom how a 32% budget increase could result in a 66% or greater fee increase.

[29] Memorandum from Michael Aytes, Assoc. Dir. for Domestic Operations, "Elimination of Form I-688B, Employment Authorization Card," (Aug. 16, 2006).
[30] Completion rates listed for local office/service center/National Benefits Center.

In its proposed rulemaking, USCIS has not proposed any enhanced service levels. USCIS Director Gonzalez testified before the House Judiciary Committee on February 14, 2007, that the proposed fee increase reflects USCIS' "commitment to a projected 4% increase in productivity for adjustment of status cases, and a 2% increase in productivity for all other products." In other words, USCIS is committing to provide a 2-4% increase in productivity in exchange for a 66% or greater increase in fees. That is utterly unacceptable.

Changes in Fee Waivers.

USCIS needs to retain the possibility of waivers in more categories.

All of USCIS' proposed filing fees are based on an assumption that fee waiver requests will hold steady from fy2006 levels. USCIS acknowledges that "the higher fees proposed in this rule would likely mean more customers will apply for fee waivers" and that the adjudication of a fee waiver request has a significant associated cost. The solution that USCIS proposes to address this problem is to preclude fee waiver requests from being filed for most form types, on the grounds that a need-based waiver request contradicts the basic benefit/service being requested. USCIS proposes to permit fee waiver requests only for Forms I-90, I-751, I-765, I-817, N-300, N-336, N-400, N-470, N-565, N-600, N-600K and I-290B.

However, USCIS has not taken into account that there are other form types, or categories within form types, for which fee waivers would be extremely appropriate and not inconsistent with the benefit requested. These include: I-131 applications for re-entry permits or refugee travel documents, I-485 applications for asylees or VAWA beneficiaries (for whom petition fees are proposed to be automatically waived but, curiously, all prospect of waiving the much higher adjustment of status fee is proposed to be eliminated), and Special Immigrant Juvenile petitions. USCIS should expand the list of forms eligible for fee waivers to include these types of applications.

Inclusion of Interim Benefits with I-485 Adjustment Applications.

In its proposed regulations, USCIS intends to increase the I-485 adjustment application fee from $325 to $905 ($805 for children under age 14). Included in this fee increase will be interim benefits for employment authorization and advance parole. However, nowhere in the regulations does USCIS make clear how it intends to process these interim benefits. Indeed, USCIS states that "this proposed rule anticipates (*but is not dependent on*) consolidating the Form I-131 and Form I-765 into the Form I-485." (emphasis added). If the I-131 and I-765 forms are not consolidated into the I-485, then USCIS will have greatly underestimated its costs for processing I-131s and I-765s, and it is unclear where additional resources will be obtained to cover these costs.

If USCIS is able to consolidate the I-131 and I-765 into the I-485, many questions remain unanswered as to how this will be accomplished. Will employment authorization and

advance parole be granted incident to status, and somehow issued to applicants with the I-485 receipt notice? Will employment authorization cards with anti-counterfeiting measures still be issued? Will the I-485 receipt notice contain language permitting adjustment applicants to work and/or travel? What length of time will be granted for the ancillary employment authorization and advance parole? Will they be issued for Duration of Status, for a specific period of time based on anticipated processing times, or using some other formula? How will USCIS address situations in which the I-485 application is delayed for years pending security clearances – how will adjustment applicants continue to maintain their employment authorization and/or ability to travel? How will USCIS address the continued need for I-131s and I-765s to be filed by individuals with already-pending I-485 adjustment applications? Will they need to continue to file annual applications, or will they be issued documents similar to those issued for new adjustment applicants? The costs to USCIS could vary significantly depending on the procedures chosen by USCIS to consolidate interim benefits into I-485s, and we are greatly concerned that USCIS has not taken this into consideration.

Additionally, USCIS makes the assumption that all I-485 applicants wish to obtain interim benefits. However, this is not the case for many groups of individuals. For instance, children under the age of 16 generally do not request employment authorization and have no need for such a benefit. Similarly, individuals currently holding valid H-1B or L-1 status frequently do not need employment authorization or advance parole, as they are permitted to work and travel using their existing nonimmigrant status. Additionally, USCIS persists in taking the position that individuals who have applied under 245(i) and/or are subject to unlawful presence bars cannot travel on advance parole without triggering the bars. USCIS is effectively forcing all of these individuals to pay increased fees for interim benefits that they do not want and cannot use.

USCIS' projections for I-485 applications assume a workload increase from 606,425 to 613,400 applications. However, due to the significant price for filing adjustment applications, many I-485 applicants with "clean" cases or applicants who do not require interim benefits may opt to process their applications for permanent residence through U.S. consulates overseas due to cost concerns. Currently, the Department of State immigrant visa application fee is $335, which is significantly lower than the proposed I-485 fee of $905 ($805 for child under age 14) and biometric fee of $80. For a typical family of four (two adults and two children under age 14), this would add up to a total difference of $2240 ($3580 for adjustment as compared to $1340 for consular processing). This would result in USCIS being left to adjudicate a larger percentage of complicated or problematic cases than anticipated, which could significantly distort any cost projections for this case type.

Regulatory Reviews.

USCIS failed to properly evaluate the impact of the regulation on small businesses.

We are concerned that USCIS failed to properly evaluate the effect of the increased fees on small entities under both the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. As a preliminary matter, the statistical sample, just over two-tenths of one percent of applicants, may be too small to give an accurate picture of the impact given the immense variety one sees in businesses classified as "small." Second, even assuming the sample is statistically sufficient, we are concerned that USCIS did not consider that many of these employers, as an inducement to the employee to take up the employment, pay the fees associated with the adjustment of status. USCIS failed to consider that these employers therefore would be impacted by the extremely dramatic increase in the cost of filing a Form I-485 both in raw financial terms and in terms of being able to attract and retain the best qualified workers.

Conclusion.

The fee proposal is flawed in many respects, oversteps USCIS' authority regarding what operations are funded by fees, and creates a social impact that could prove damaging to the interests of the United States. We urge USCIS to seek appropriated funding for non-adjudicatory functions, to improve its efficiency and service, and to provide a more reasoned explanation as to how it calculated its costs. The proposal needs to be radically overhauled before it is made final.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION