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U.S. Department of State
600 19th St. NW, Washington, DC 20006

Submitted via <https://regulations.gov>
Docket ID No. DOS-2021-0019
RIN: 1400-AF33

Re: Schedule of Fees for Consular Services—Nonimmigrant and Special Visa Fees

Dear Ms. Cruz:

The American Immigration Lawyers Association (AILA) submits the following in response to the above-referenced request for comments on Schedule of Fees for Consular Services—Nonimmigrant and Special Visa Fees¹ (86 FR 74018, 12/29/21), which raises several nonimmigrant visa application processing fees, the fee for the Border Crossing Card for Mexican citizens age 15 and over, and J-1 waivers for the two-year home-country physical presence requirement.

Established in 1946, AILA is a voluntary bar association of nearly 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws, including on issues relating to consular processing.

I. Introduction

AILA appreciates the opportunity to comment on the proposed rule. As attorneys who represent countless visa applicants who are users of DOS's visa application services, we are in a unique position to comment on the proposed increases in nonimmigrant (NIV) and special user fees. We understand that DOS typically sets consular fees at an amount calculated to achieve full recovery of the costs to the U.S. government of providing the service unless an exception applies.² We assume that the cost of providing these services at consular posts abroad has increased as a result

¹ 86 Fed. Reg. 74018 (Dec. 29, 2021).

² U.S.C. 1351 (noting that NIV reciprocity fees should be set in amounts corresponding to the total charges levied against nationals of the United States by foreign countries).

of inflation, labor cost, and other factors in the activity-based cost analysis since DOS last altered user fees among various nonimmigrant visa applicants between 2012³ and 2014⁴. As we understand, DOS bases its analysis on surveys over a 10-year model with projections into the future demands for visa categories. The proposed fee increases above the current levels range from \$85 to \$390 representing increases of between 53 and 137 percent for certain nonimmigrant visa services and a significant increase of 325 percent for J-1 waivers of the two-year residency requirement.

It is expected that with any increase in fees to recover actual costs, a corresponding level of regular, predictable, and consistent service is delivered. With the availability of technology, the DOS should be using all innovative and available services to reduce the costs, including reusing captured biometric identifiers for security clearance, using video conference platforms in lieu of in-person interviews as appropriate, secure electronic visa issuance, and other tested delivery methods. We are concerned that this proposed schedule of fee increases will not correspond to a direct increase in the quality and level of services across visa types and a reduction in the immigrant visa backlog presently estimated to be at NVC, which currently sits at 436,666 cases.⁵ In addition, NIV issuance statistics available on the DOS website show that issuance rates remain well-behind pre-pandemic numbers.⁶

II. Comments

In June 2021, AILA published a policy brief entitled *Reopening America: How the Department of State Can Reduce Delays and Eliminate Backlogs and Inefficiencies to Create a Welcoming America*. This brief provided recommendations of services and options available to DOS to increase the quality and quantity of both immigrant and nonimmigrant visa services to reduce the current backlog.⁷ AILA continues to urge DOS to implement the recommendations made in our brief. An increase in service fees would follow a commensurate expectation of more efficient processing, and incorporating the recommended processes and procedures discussed in our brief and below would improve immigrant and nonimmigrant visa processing.

DOS should also balance any potential increase in fees, with the authority to seek direct congressional appropriations for maintaining these services at a consistent and predictable level during regular and extraordinary times. As the U.S. Citizenship and Immigration Services (USCIS), an immigration agency that is similarly fee-funded and plagued with backlogs, has done, DOS must explore the option of congressional appropriations to eradicate its significant backlog.⁸

³ 77 Fed. Reg. 57012 (Sep. 17, 2012)

⁴ 79 Fed. Reg. 51247 (Aug. 28, 2014)

⁵ See National Visa Center (NVC) Immigrant Visa Backlog Report, “Number of eligible IV applicants still pending the scheduling of an interview after February 2022 appointment scheduling was completed”, (Accessed on Feb. 28, 2022), <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visas-backlog.html>

⁶ See Monthly Nonimmigrant Visa Issuance Statistics, (Accessed on Feb. 28, 2022) <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html>

⁷ *Reopening America: How the Department of State Can Reduce Delays and Eliminate Backlogs and Inefficiencies to Create a Welcoming America* (June 29, 2021), <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-reopening-america>

⁸ See U.S. Citizenship and Immigration Services Budget Overview Document for Fiscal Year 2022, https://www.uscis.gov/sites/default/files/document/reports/USCIS_FY_2022_Budget_Overview.pdf

We would ask DOS to consider an expansive yet realistic view concerning the present and future needs of the mission of Visa Services when analyzing the full cost recovery of services. DOS's assessment states that the cost of providing consular services has changed significantly since the last adjustment of fees, and these circumstances justify the implementation of new fees through the rulemaking process. While the complete metrics of the ABC cost assessment are beyond the immediate purview of these comments, these metrics should include the suggestions as set forth below that were also included in AILA's policy brief. These suggestions contain appropriate metrics to include in analyzing the allocation of funds received via fee increases and offer opportunity for cost savings. These identified services are well within the purview of the Executive Authority to implement.⁹

A. Resume stateside processing of visa renewals.

Under 22 CFR Section 41.111(b), the Deputy Assistant for Visa Services at DOS has the authority to renew nonimmigrant visas from within the U.S. This was routinely done for the C, E, H, I, L, O, and P visa categories until July 16, 2004.¹⁰ In September 2002, DOS suspended the A-3, G-5, and NATO-7 categories.¹¹ The reason for this suspension was a new law requiring the capture of biometrics identifiers for all nonimmigrant visa applicants.¹² Presently, all nonimmigrant visa holders in the U.S. have had their biometrics identifiers captured during the initial consular visa application process for the category. These previously captured biometric identifiers have now been used repeatedly by DHS and USCIS for security background clearances with a waiver of in-person appearance. This is clear evidence that in-person appearance is not an absolute requirement. Remote processing for certain nonimmigrant visa applications will save time for both the post and applicants. In addition, DOS could work with both DHS and USCIS through a Memorandum of Understanding (MOU) or similar to use their biometric facilities as required on a case-by-case basis, similar to how USCIS uses DOS facilities overseas.

As discussed above, the visa backlog of *documentarily qualified* immigrant visa applications now sits at 436,666.¹³ In addition, close to two years on from the beginning of pandemic-related restrictions, the issuance of nonimmigrant visas continues to trail well-behind pre-pandemic numbers.¹⁴ Reissuing U.S. nonimmigrant visas stateside for the C, E, H, I, L, and O visas as well as the A-3, G-5, and NATO-7 categories would be a tremendous step in allowing consular officers at posts to focus on reducing the backlog and other key priorities, instead of assigning scarce

⁹ See Executive Order (E.O.) 12866 (Sep. 30, 1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>

¹⁰ 69 Fed. Reg. 35121 (June 23, 2004).

¹¹ *Id.*

¹² Section 303 of the Enhanced Border Security and Visa Entry Reform Act (Pub. L. 107-173, 116 Stat. 543) requires that U.S. visas issued after October 26, 2004, include biometric identifiers.

¹³ See National Visa Center (NVC) Immigrant Visa Backlog Report, "Number of eligible IV applicants still pending the scheduling of an interview after February 2022 appointment scheduling was completed", (Accessed on Feb. 28, 2022), <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visas-backlog.html>

¹⁴ See Monthly Nonimmigrant Visa Issuance Statistics, (Accessed on Feb. 28, 2022) <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html>

consular resources at post to reissuing the same classes of nonimmigrant visas included above. Currently, wait times at consulates overseas for nonimmigrant visa processing can take months, for example an applicant must wait at least 60 days for an appointment in Chennai or London and 99 days in Guadalajara,¹⁵ which keeps businesses in limbo and families separated. Reinstating stateside visa renewals, even temporarily, would be an extremely effective and efficient use of consular resources and will reduce backlogs of immigrant and nonimmigrant levels.

B. Revise regulations to allow virtual immigrant and nonimmigrant visa interviews.

One of the costliest processes at consular posts is the in-person interview in terms of labor, materials, support, and time. AILA recommends that DOS consider, as part of the increase in user fees for the DS-160 application, an authorization to permit virtual interviews for initial nonimmigrant visa applicants. This will aid in reducing costs and the backlog of nonimmigrant and immigrant visa applications. This authorization to reduce cost will allow consular staff worldwide to interview applicants in a cost-effective manner, without sacrificing integrity. Consular officers will be able to see the applicant and compare it to the passport picture. Biometric identifiers in the passport and those biometrics taken by DOS prior to the interview would address identity and security concerns.

C. Leverage U.S.-based consular officers to adjudicate visa applications.

In addition to in-country foreign service officers (FSOs), new FSOs, deputized civil servants, and retirees could be trained as supplemental personnel to engage in remote visa interviews and handle other aspects of the visa issuance process from within the United States. This would reduce appointment wait times and avoid space constraints at consular posts abroad. This is an inexpensive and faster way to eliminate the backlog, as the lack of space to physically distance applicants and personnel at consular posts cannot be quickly addressed due to facility constraints.

Considering the total cost of services, it is relevant that non-petition-based NIVs constitute a significant majority of the overall NIV applications.¹⁶ Appointments for tourist visas remain largely unavailable for many posts, and for those posts granting interviews wait times are at unprecedented levels. For example, Ciudad Juarez (CDJ) has a posted time of 711 calendar days. The unavailability of this service affects the economy of the United States, exacerbates complications to the applicants seeking the service, and results in lost revenue for DOS at the same time. This phenomenon reflects a need to broaden the field of resources used by DOS for some of these more routine non-petition-based NIVs. Leveraging US-based consular officers and other supplemental personnel should be utilized to address this unprecedented need.

¹⁵ See Visa Appointment Wait Times, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/wait-times.html>.

¹⁶ 86 Fed. Reg. 74018 (Dec. 29, 2021).

D. Balancing NIV and IV Adjudications

While immigrant visa issuance has been nearing pre-pandemic levels in recent months, the numbers still reflect a large backlog.¹⁷ There continues to be a need to address the priority of immigrant visa issuance, which may result in resources being drawn away from NIV sections. However, implementing the metrics mentioned above would allow nonimmigrant visa sections to resume at full efficiency without interfering with this priority. AILA recommends filling long-standing vacancies in DOS and DHS to restore proper management and operations at both agencies. In addition to staffing leadership positions, it will be necessary to increase staffing at consular posts and, to a lesser extent, at the Visa Office. AILA recommends that DOS utilize proven historical methods to quickly increase consular staffing, including deputizing staff to act as consular officers and calling back experienced former consular officers and other DOS officials. The agency should also consider proposals that would utilize foreign service family members already abroad in order to fill positions at posts. DOS should also recruit recent graduates and consider offering over time and forgiving student debt.

III. Conclusion

Throughout the COVID-19 global pandemic, DOS's visa backlog has exploded. Limited staffing along with in-country COVID-19 protocols have only exacerbated visa processing delays. The pandemic has changed how we operate and resulting in a more flexible, nimble, and virtual world. The impact and effects of the pandemic are far-reaching. They will continue to impact the agency's operations moving forward unless DOS transforms itself in a cost-efficient way by considering additional policies that can help reestablish the United States as a welcoming nation as we come out of the COVID-19 pandemic.

AILA urges the agency to ensure that any increase in funds as a result of increased fees is utilized to implement solutions like those discussed in our brief and above that will reduce the backlog and effectuate an overall improvement of services. Doing so will help streamline consular processing, free up capacity for consulates to prioritize immigrant visa processing, create a nimble department, and effectuate the mission of Visa Services as a healthy and sustainable arm of DOS.

AILA appreciates the opportunity to provide feedback to DOS concerning the proposed increase for the processing of certain applications and looks forward to further opportunities to engage with DOS on this and other topics.

Please feel free to reach out with any concerns or questions to AILA Director of Government Relations Sharvari Dalal-Dheini at SDalal-Dheini@aila.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

¹⁷ See Monthly Immigrant Visa Issuance Statistics, (Accessed on Feb. 28, 2022) <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/immigrant-visa-statistics/monthly-immigrant-visa-issuances.html>