AMERICAN IMMIGRATION LAWYERS ASSOCIATION

July 5, 2016

Samantha Deshommes
Acting Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529-2020

Submitted via: www.regulations.gov
DHS Docket No.: USCIS-2016-0001

Re: Proposed Rule: U.S. Citizenship and Immigration Services Fee Schedule

Dear Acting Chief Deshommes:

Founded in 1946, AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality 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. We appreciate the opportunity to comment on the revised U.S. Citizenship and Immigration Services (USCIS) Fee Schedule, published in the Federal Register on May 4, 2016,[1] and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Commit to Concrete Adjudication Benchmarks and Customer Service Goals

If the new fees are implemented as proposed, USCIS filing fees would increase by an average of 21 percent across the board. This follows a 66 percent fee increase in 2007, and a 10 percent increase in 2010. Unfortunately, at the same time USCIS is proposing a new round of sharp fee increases, processing times across a variety of product lines are unprecedented. Excessive adjudication times are reported in numerous categories of benefits, such as applications for employment authorization (Form I-765); temporary visas for artists, entertainers, and athletes (Form I-129); young adults renewing their DACA benefits (Form I-821D); extension of status petitions for specialty occupation (H-1B) workers (Form I-129); petitions for victims of crimes (Form I-918), and some adjustment of status applications (Form I-485). Compounding frustrations, customers are often unable obtain a meaningful response when inquiring about the status of a long-pending case, and the lack of accurate published processing time data creates

[1] 81 Fed. Reg. 26904 (May 4, 2016).

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additional obstacles. When a customer is able to get through to USCIS, they are often simply told that USCIS is aware that the case is outside of normal processing times, but are given no further information about the case, and importantly, no estimate as to when the case will be completed.

Adjudication backlogs have serious, far-reaching repercussions on the lives of individuals and for U.S. businesses. As a result of these delays, applicants and beneficiaries have lost jobs, been forced to delay educational programs, and missed important family and business events abroad due to their inability to travel. Many have not been able to renew their driver's licenses, making it difficult to get to work and provide for their families. Businesses have lost valuable employees and contract opportunities and have had to expend considerable resources to hire and train replacements.

At the same time, we continue to see many of the same problems with the quality, efficiency, and consistency of USCIS adjudications that we highlighted in our comments on the 2010 proposed fee schedule.[2] Unnecessary and burdensome requests for evidence (RFEs) continue to create additional work for all parties, draining agency resources, and increasing the costs of adjudication with little or no added benefit.

While we are pleased to see that USCIS hopes to make processing times more transparent, it must do more than merely "evaluat[e] the feasibility" of an improved system.[3] USCIS must commit to measurably improving processing times and providing better, more reliable customer service systems within a specific timeframe. And while AILA welcomes USCIS's plan to hire an additional 1,171 adjudicators,[4] it must also institute procedures to ensure that new adjudicators provide efficient and high quality adjudications within reasonable timeframes, and are properly trained on the "preponderance of the evidence" standard so that we can avoid triggering a wave of unnecessary RFEs across affected product lines.

As a companion to raising fees, USCIS must commit to and be held accountable for meeting tangible adjudication benchmarks and processing goals and customers must be able to rely on a higher level of service from USCIS. USCIS should publish these benchmarks and goals in the Federal Register and report regularly on its progress. Doing so will improve transparency, provide the public with a better understanding of the agency's efforts and the challenges it faces, and restore public confidence in the adjudications process.

Retain Current System for Payments

USCIS proposes to eliminate the three current rules requiring cases to be held while deficient payments are corrected: 8 CFR §103.2(b)(7)(ii) [setting forth basic rules for deficient filing fees]; 8 CFR §103.7(a)(2) [setting forth receipt rules for uncollected fees]; and 8 CFR §103.17(b)(1) [setting forth basic rules for deficient biometric fees]. Under proposed 8 CFR §103.7(a)(7)(ii)(D), "If a financial instrument used to pay a fee is returned as unpayable, the filing will be rejected and a charge will be imposed …." We ask USCIS to reconsider this change

[2] AILA Comments, "Proposed Rule, "U.S. Citizenship and Immigration Services Fee Schedule," submitted July 26, 2010.
[3] 81 Fed. Reg. at 26910.
[4] *Id* at 26910-11.

and retain the current rules for deficient payments to avoid potentially severe adverse consequences to applicants and beneficiaries.

Some payment problems are due to circumstances outside the attorney, applicant, or petitioner's control. For example, problems with the Automated Clearing House (ACH) system for electronically transferring funds, mistakes made by the lockbox contractor, or a temporary disruption to a bank's network could result in a system error or an inadvertent "NSF" finding. The harsh consequences that can accompany an incorrect finding of deficient funds can be devastating, given the strict and often unforgiving deadlines that are attached to many immigration benefits. For example, it may not be possible to simply refile an I-140 petition where the underlying labor certification application is about to expire, an application where a derivative is about to age out, an adjustment of status application where the priority date is scheduled to retrogress, or an extension of status where the applicant's current status will expire imminently. The current procedure is a safeguard that is necessary to prevent these and other unnecessarily harsh consequences and should be retained.

Rejection of Benefit Requests

Under current 8 CFR §103.2(a)(7)(i), "[a] benefit request which is not signed and submitted with the correct fee(s) will be rejected. A benefit request that is not executed may be rejected." However, proposed 8 CFR §103.2(a)(7)(ii) would call for rejection of a benefit request if it is not, signed, executed, submitted with the correct fee, and "[f]iled in compliance with the regulations governing the filing of the specific application, petition, form, or request." Under 8 CFR §103.2(a)(1), "form instructions are incorporated into the regulations …."

Though our members, we have observed countless applications and petitions that have been erroneously rejected or rejected for very minor issues that could have been easily resolved through a Request for Evidence (RFE). As noted above, the consequences of rejection can be harsh and are often unforgiving. Furthermore, given that that the USCIS form instructions are incorporated into the regulations, and such instructions are becoming increasingly lengthy and convoluted with every form revision under the Paperwork Reduction Act (PRA), the proposed regulation could easily permit rejection of benefits requests for even the smallest typographical error, thus throwing the door open to abusive rejections with harsh consequences. We ask USCIS to retain the current language which permits the rejection of benefits requests that lack a signature, are not properly executed, and do not include the correct filing fee.

Prioritize a Feasibility Study to Expand Premium Processing

As explained in the Federal Register notice, through the Premium Processing program, USCIS collects fees far in excess of what is required to adjudicate the underlying benefits request, and such fees are earmarked for infrastructure improvements in the adjudications and customer service processes, including the Office of Transformation Coordination.[5] For many years, numerous stakeholders and stakeholder groups, including AILA, have called for the expansion of Premium Processing to additional product lines. Nonetheless, despite previous announcements to

[5] *Id*. at 26911.

the contrary,[6] USCIS states that it will not, at this time, extend Premium Processing to additional benefits requests, explaining that "considerable resources" would be required to study the feasibility of an expansion.[7] Though we emphasize that Premium Processing should not be required in order to receive a decision in a case in a reasonable time frame, given the high demand for the expansion of Premium Processing to other product lines, and the continuing unpredictability of "regular" processing times, USCIS should prioritize a feasibility study and consider utilizing a portion of the funds already collected through the existing Premium Processing service to conduct the study.

Stop Collecting Unnecessary Filing Fees through Unannounced Policy Changes

Recently, we have noted what appear to be changes in policy which have the effect of forcing customers to pay fees that weren't previously required, or file supplementary applications with a primary benefits request that require the payment of an additional fee. As is, practices such as this can impose significant hardships on applicants. With the implementation of the proposed fee increases, the impact will be even greater. For example,

- *Asylees Applying for Adjustment*: USCIS has recently started denying Forms I-765 under the "(c)(9)" category that are filed by asylees and refugees who have applied for adjustment of status. Generally, adjustment applicants can receive an EAD and advance parole as an ancillary benefit of their concurrently filed adjustment application, without having to pay those filing fees separately. Recently, USCIS changed its policy to require asylees and refugees to pay the EAD fee, ostensibly because asylees and refugees adjust under §209, not §245. However, the Form I-485 instructions do not distinguish between application types and thus, asylees have long received EADs and advance parole when filing for adjustment without having to pay a separate fee.

- *Requiring Naturalization Applicants to File I-90 to get Stamp to Travel*: A person whose permanent resident card is valid for 6 or more months at the time of filing for naturalization does not need to file a Form I-90. If the permanent resident card expired while the application for naturalization was pending, the applicant could go to the local USCIS office with proof of a pending N-400 and the expired card, and get a stamp in their passport as temporary proof of permanent residence. Recently, local offices are informing individuals that they must file an I-90 ($365 now; $455 proposed) and present a receipt notice in order to be given a stamp, even though, based on current processing times, it is highly likely that the N-400 will be approved well before the Form I-90, rendering the filing of the I-90 completely unnecessary.

USCIS should commit to rolling back these policy changes, which were made without notice to stakeholders, in order to allow applicants to access vital benefits, such as travel authorization, and work authorization, without the payment of unnecessary fees.

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[6] Nearly four years ago, USCIS announced that it would implement premium processing for EB-1 multinational manager and executive I-140s. *See* http://www.dhs.gov/news/2011/08/02/secretary-napolitano-announces-initiatives-promote-startup-enterprises-and-spur-job.

[7] 81 Fed. Reg. at 26921.

Proposed Fee Revisions

We understand and appreciate the fact that the calculation of USCIS fees, and determining when and how to adjust the fee schedule, requires delicate balance. We also support USCIS's efforts to ensure that it has the resources required to fairly adjudicate benefits in a timely manner. With this in mind, we are pleased to see USCIS continuing to utilize the "Low Volume Reallocation" model to allocate fees from one benefit type to another, in order to reduce the burden on individuals requesting certain benefit types. However, many of the proposed fee increases appear to be excessive; either singled out for a proportional fee increase much higher than the 21 percent average or increased far beyond what would appear to be necessary to reasonably cover the costs associated with adjudication. Moreover, we are concerned that the ever-increasing complexity of forms and instructions, coupled with the corresponding fee increase, will have the effect of pricing smaller employer petitioners and individual applicants out of the immigration system.

Tiered Naturalization Fee Structure

USCIS proposes to create a three-tiered fee structure for the N-400, Application for Naturalization as follows:

- **Standard Fee**: $725 ($640, plus $85 for biometrics); up from the current fee of $680 ($595, plus $85 for biometrics).
- **Reduced Fee**: $405 ($320, plus $85 for biometrics) for individuals with household incomes greater than 150% and not more than 200% of the Federal Poverty Guidelines.
- **No Fee**: For individuals who meet the requirements of INA §328 or §329 with respect to military service, or who apply for and receive a full fee waiver.

AILA applauds USCIS's decision to offer a reduced fee for naturalization applicants with limited incomes and to continue to charge no fee to military applicants and applicants with approved fee waivers. This tiered structure will encourage individuals to apply for naturalization and makes citizenship more attainable for new Americans. Though much remains to be seen, we urge USCIS to make the reduced fee application process as efficient as possible, and to streamline Form I-942, Request for Reduced Fee, which appears unnecessarily long and cumbersome at seven pages.

Reconsider Proposed Fees for Forms N-600, N-600K and N-565

The Child Citizenship Act of 2000 (CCA) was enacted to facilitate the acquisition of citizenship for foreign born children of U.S. citizens through adoption or birth. Currently, for children who immigrate to the U.S. through the IR3 and IH3 categories, a certificate of citizenship is automatically issued by USCIS free of charge. However, other children, such as those who have immigrated or will be immigrating to the U.S. through other visa categories, must file Form N-600, Application for Certificate of Citizenship to obtain the certificate, and pay an already substantial filing fee of $550 (for a child through adoption) or $600 (for a child through birth).

While a certificate of citizenship is not required, due to the complexity of the international adoption process and citizenship laws, a child's citizenship can easily be called into question and challenged unless the child has a USCIS-issued document that proves the child is a U.S. citizen and the date citizenship was accorded. A certificate of citizenship may help facilitate or be required to apply for benefits involving social security, state driver's licenses, military service, financial aid for college, etc. Though one would think a U.S. passport is sufficient, that is not always the case. A certificate of citizenship makes the child's life less complicated and provides added security. Increasing the fee to $1,170 will deter already reluctant families and negatively impact thousands of adopted children.

The same fee increase is proposed for Form N-600K, the application that U.S. citizen families who adopt and are living abroad must submit to obtain a certificate of citizenship for their children. Many of these families work for NGOs or international organizations, making the proposed fee increase particularly burdensome. The proposed increase will make the N-600K process even more costly as these families must already incur the expense of traveling to the U.S. for the N-600K interview.

USCIS also proposes a 61 percent fee increase for Form N-565, Application for Replacement Naturalization/Citizenship Document from $355 to $555. Filing this form often becomes necessary when the certificate of citizenship which was mailed to the family after the child arrived in the U.S. erroneously lists the child's birth name instead of the adoptive name. Though a slight fee increase may be warranted, the 61 percent increase will lead to the same results as listed above—children without documentation who are, in fact, U.S. citizens.

In addition, we note that USCIS has already reviewed and approved the entry of the child through the extensive I-600 or I-800 process. Thus, the fee increase is not supported by the amount of work involved in adjudicating the remaining facts to make the citizenship determination. International adoption is emotionally and financially challenging. USCIS should do everything possible to encourage parents to make sure that children who are U.S. citizens have proof of their citizenship to protect and safeguard them in the future.

As a result, we suggest a nominal fee increase for the N-600, N-600K and N-565, which are in line with other fee increases for other forms. Alternatively, USCIS could consider expanding the tiered fee structure for the N-400 to the N-600, N-600K, and N-565. We also suggest that the discounted fee for the N-600 and N-600K be continued for adopted children.

Fees That Appear Excessive Given the Minimal Analysis Required (Form I-131, Form I-90, Form I-824, Form I-102)

Some fee increases appear to be excessive, particularly considering that little substantive analysis or investigation is required to adjudicate the petition or application. For example, the current fee for Form I-131, Application for Travel Document is $360. USCIS is proposing to increase this by 60 percent, to $575. An application for a travel document does not involve the adjudication of an underlying benefit, and in the case of a refugee travel document or reentry permit, refugee/asylee status or permanent resident status has already been granted. And, yet, with the proposed increase, the fees for these forms will approach the fees for

adjudicating the underlying status. The same can be said for an Application to Replace Permanent Resident Card (Form I-90): while the I-90 fee is currently $365, USCIS is proposing a 25% fee increase to bring it to $455, even though the individual has already been granted permanent residence and they are simply seeking a replacement card.

Similarly, USCIS is proposing to increase the fee for Form I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, to $445, up from the current fee of $330. This form is used to request a duplicate I-94 card, yet in many cases, this information is available for free through the CBP website or a FOIA request, or the information could readily be looked by up an immigration services officer during an adjustment of status interview. Form I-824 is most often used to request a duplicate approval notice or to move an approved petition or application from one office to another, and yet the proposed fee for this form approaches the fee for adjudicating the underlying benefit. This is particularly troublesome given the fact that stakeholders are often forced to file an I-824 when a notice has been "lost" in the mail or in transmission to the National Visa Center, due to no fault of their own.

The Validity of Employment Authorization and Travel Documents Should Be Extended (Form I-765 and Form I-131)

We have previously expressed concerns regarding the fee structure for Form I-131, Application for Travel Document (in particular, as it is used to apply for advance parole) and Form I-765, Application for Employment Authorization, as well as the timing and duration of these benefits relative to the cost of filing. While the proposed fee increase for Form I-765 is not substantial, it should not be raised at all until employment authorization documents (EADs) can be timely processed as a matter of course. In addition, given the extensive backlog of Forms I-765,[8] USCIS should expand the issuance of multiple-year EADs to additional categories of cases. This would reduce USCIS costs in terms of the frequency of adjudications and resource consumption, provide beneficiaries with greater stability and predictability, and reduce the frequency and likelihood of unintentional gaps in employment authorization. Similarly, USCIS should expand the use of multiple-year advance parole documents, and extend the validity of refugee travel documents, which are currently valid for only one year under 8 CFR §223.3(a)(2), to at least two years.

Additionally, AILA recommends significantly reducing the fee (proposed $575, up from $360) for Form I-131. As noted above, in many cases, Form I-131 involves a request for a travel document associated with a status that has already been granted, and should not require the dedication of significant time or resources to adjudicate. Indeed, the proposed rule lists the completion rate for Form I-131 as .21.[9] We are concerned that the increased fee could deter many individuals and families who need to travel abroad from submitting Form I-131. Travel documents are critical to allow individuals to visit ailing relatives in their home countries, take advantage of educational opportunities abroad, and attend business events vital to the success of a U.S. company or project. We urge USCIS to maintain the current

[8] *CIS Ombudsman 2016 Annual Report*, page 62, *available at* https://www.dhs.gov/publication/cis-ombudsman-2016-annual-report.
[9] 81 Fed. Reg. at 26925.

Form I-131 fee, or alternatively reduce the proposed fee to make this important benefit more attainable.

Confirm that No Fee is Required for Application by Refugee for Waiver of Grounds of Excludability (Form I-602)

In Table 9, USCIS includes Form I-602, Application by Refugee for Waiver of Grounds of Excludability, along with several other waiver forms, and lists the current fee as $585, and the proposed fee as $930.[10] However, currently, there is no fee associated with the filing of Form I-602. USCIS goes on to state that it no longer believes it is necessary to limit fee increases to the weighted average for Form I-602,[11] but then later notes that "USCIS does not charge a fee for the following: … Application By Refugee For Waiver of Grounds of Excludability, Form I–602…."[12] We urge USCIS to confirm that there continues to be no filing fee for Form I-602, and to continue allowing adjudicators to grant a waiver as part of the refugee or asylee adjustment process without requiring a formal I-602 application.[13]

EB-5-Related Fees and Adjudications

USCIS is proposing the following fee increases with respect to EB-5-related filings:

Form	Current Fee	Proposed Fee
I-526	$1,500	$3,675
I-829	$3,750	$3,750
I-924	$6,230	$17,795
I-924A	$0	$3,035

We recognize the need for USCIS to collect fees in EB-5 matters, as there are obvious costs associated with processing these cases. However, we urge USCIS to carefully review these fees and consider the feasibility of any downward adjustments for the three forms that carry the most dramatic fee increases in the proposal. In particular, we note that the I-526 fee would increase by 145 percent, yet the Supplementary Information includes little explanation to justify the increase.

Moreover, we were pleased to note that USCIS "is committed to strengthening and improving the overall administration of the EB-5 program" including staffing enhancements and "additional IT investments to make case processing more efficient."[14] However, USCIS must also commit to taking immediate steps to address a number of problems that continue to plague the EB-5 program, including lengthy processing times, prior to, or at least in conjunction with the implementation of the dramatic proposed fee increases. Without critical program improvements, we are concerned that the new fees will have a chilling effect on EB-5 filings, and potentially significant ramifications for the survival of the program.

[10] *Id*. at 26927.
[11] *Id*. at 26916.
[12] *Id*. at 26925.
[13] AFM Ch. 41.6(b)(1).
[14] 81 Fed. Reg. at 26918, n.61.

Electronic Filing

USCIS should expedite the reintroduction of electronic filing of EB-5-related petitions and applications through an improved, user-friendly version of the Electronic Immigration System (ELIS). This will help lower costs by reducing the amount of USCIS resources needed to complete the clerical work associated with these massive paper filings and the number of hours required to process EB-5-related benefits. Minimizing costs through electronic filing will help diminish the need for steep filing fees such as those proposed by USCIS.

Create a Cooperative Environment for EB-5 Adjudications

We urge USCIS to enact policies allowing examiners and regional centers to communicate more effectively during the review process. The current practice prohibits direct dialog between parties in favor of the traditional process of mailing multiple Requests for Evidence (RFEs) when additional information or explanation is required. The traditional process is inefficient, results in unnecessary processing delays, and wastes the resources of all parties. Allowing and encouraging a constructive dialog between the parties will significantly reduce processing times, and facilitate a more efficient review process by identifying and resolving defects and questions expeditiously.

Create a Collaborative Environment with Stakeholders in Establishing Policy and Guidance

Though we appreciate USCIS's efforts in holding periodic EB-5 stakeholder engagements, more meaningful collaboration is necessary to ensure that reasonable policy interpretations are implemented in this highly complex program. Additionally, we note that no new EB-5 policy guidelines have been released since May 2013, including the final version of the draft guidance that was issued in August 2015. If the additional fees are implemented as proposed, USCIS must commit to providing meaningful opportunities for stakeholder input 5 to 6 times per year, introducing new policies following stakeholder input, correcting ineffective policies as identified, and addressing training issues.

Allow Premium Processing of all EB-5 Petitions and Applications

Premium Processing should be available for all EB-5 petitions and applications, particularly given the constantly changing market conditions that impact EB-5 projects. Though 8 CFR §216.6(c)(1) requires USCIS to adjudicate I-829 petitions within 90 days of the date of filing, unfortunately, current USCIS processing times exceed this deadline. Premium Processing would help alleviate this backlog, and stave off future backlogs.

Form I-924, Application for Regional Center Designation under the Immigrant Investor Program

USCIS proposes to increase the filing fee for Form I-924, Application for Regional Center Designation under the Immigrant Investor Program, from $6,230 to $17,795. If adopted, this would be by far the highest USCIS filing fee and would almost triple (286%) the current fee. Though we acknowledge the need for charging fees for regional center designation, we are

concerned the additional costs for regional center applications and annual certifications (I-924A) could have a chilling effect on the EB-5 industry and could ultimately divert a significant portion of funds that would otherwise be invested in the United States to other countries.

Along with the fifth preference immigrant visa backlogs and the uncertainty surrounding reauthorization of the regional center program, long processing times for USCIS adjudications have the potential to undermine the EB-5 program. Without better processing times for Form I-924, which currently clock in at 9.5 months, the significant fee increases could easily dissuade potential investors. The proposed fee increases could be justified if processing of Form I-924 took no more than 3 months.

Moreover, because different types of I-924 filings consume various amounts of time and resources, the fee structure for Form I-924 should reflect this reality. An I-924 can be based on a hypothetical project, an actual project, or an exemplar Form I-526, and the requisite documents for each type of filing are substantially different. For example, if the I-924 is based on a hypothetical project, a *Matter of Ho* – compliant comprehensive business plan and offering documents are not required and USCIS would not have to expend time and resources reviewing those documents. USCIS should reconsider the proposed flat $17,795 fee for the Form I-924, and consider a "tiered" approach depending on the type of I-924 filing: hypothetical project, actual project, or exemplar I-526.

Lastly, we note that USCIS receipt notices for the Form I-924 exemplar do not identify the new commercial enterprise to which the receipt notice pertains. When a regional center or law firm has filed more than one Form I-924 exemplar application on the same date, it is impossible to determine to which Form I-924 the receipt notice corresponds. USCIS should begin identifying this information on the receipt notice immediately.

We thank USCIS for providing this opportunity to comment on the proposed changes to the fee schedule and look forward to a continuing dialogue on these matters.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION