



May 29, 2020

Hon. Shelley Moore Capito, Chairwoman
Hon. Jon Tester, Ranking Member
U.S. Senate Appropriations
Subcommittee on Homeland Security
U.S. Senate
Washington, DC 20510

Hon. Lucille Roybal-Allard, Chairwoman
Hon. Chuck Fleischmann, Ranking Member
U.S. House Appropriations
Subcommittee on Homeland Security
U.S. House of Representatives
Washington, DC 20510

Re: USCIS Request for Emergency Funding

To the conferees:

Recent news reports indicate that the U.S. Citizenship and Immigration Services (USCIS) has requested approximately \$1.2 billion in supplemental funding from Congress to address a significant shortfall in resources that threatens the agency's day-to-day operations and the financial wellbeing of thousands of employees who face potential furloughs.¹ While we recognize the vital role that USCIS plays in administering our legal immigration system, as well as the tireless work of its career personnel, we nevertheless believe that the agency is experiencing funding challenges not only because of the impact of the 2019 novel coronavirus (COVID-19), but also in large part due to its own fiscal mismanagement, as well as the agency's adoption and implementation of various policies and processes that are negatively impacting its own revenue and efficiency.

The agency's request presents a unique opportunity for Congress to exercise its constitutional oversight authority in demanding a far greater level of fiscal responsibility for the agency. We firmly believe that Congress must condition any additional funding on increased transparency, accountability, and cost-savings measures like the ones described below. Without meaningful oversight measures, the fiscal mismanagement and inefficiencies within the agency are likely to continue, and we fear that the American taxpayer may be asked to provide additional bailouts to the agency in the future.

Congress must ensure USCIS transparency, fiscal responsibility, and efficiency

Data made available by the U.S. Department of Homeland Security (DHS) indicates that USCIS has significantly expanded its staff across the country, and therefore considerably increased its day-to-day expenses, at a time when its productivity has largely plateaued. Specifically, DHS data indicates that

¹ Michelle Hackman, "USCIS Seeks Surcharge to Immigration Applications," *The Wall Street Journal*, May 19, 2020, <https://www.wsj.com/articles/uscis-to-add-surcharge-to-immigration-applications-11589707800>.

USCIS's personnel grew by approximately 24 percent between 2015 and 2018.² During this same period, however, the total number of immigration petitions and applications that the agency processed only increased by approximately five percent.³ Moreover, the total volume of cases *filed* with USCIS actually fell from 8,530,722 in FY 2017 to 7,650,127 in FY 2019— a drop of more than 10 percent.⁴ Given that the agency is fee-funded, this disparate level of growth in personnel appears unjustified and unsustainable.

Perhaps most importantly, the growth in personnel does not appear to have resolved longstanding problems within the agency. Average case processing times – the time it takes the agency to adjudicate the various forms of petitions and applications that it receives, including applications for naturalization and permanent residency – surged by 46 percent between 2017 and 2019.⁵ The agency has therefore significantly increased its day-to-day costs at a time when its revenue from filing fees has decreased, while also taking significantly longer to meet its processing goals.

The agency is now asking American taxpayers for a bailout, while millions of people and employers continue paying considerable filing fees for a decreasing level of service, without any clear plan for improvement. News reports indicate that the agency is proposing to add a 10 percent surcharge on almost all applications and petitions to pay back the bailout, while at the same time racing towards finalizing a fee rule that would increase filing fees significantly, which could deter individuals from filing immigration benefit requests. As a condition for receiving congressional appropriations, Congress must impose common-sense reforms, as well as ensure that USCIS is transparent and responsible regarding its fiscal management.

To that end, Congress should appoint an independent auditor to conduct an immediate review of the agency's funding request by June 15, as well as a full audit of its budget and operations by June 30. Congress should direct USCIS to provide the following data which are also set forth in the bipartisan Case Backlog and Transparency Act of 2020 (H.R. 5971):

- Data showing case receipts for fiscal years 2018, 2019, 2020, broken down by form type.
- Data, by form type, showing the number of pending benefit applications, the net backlog, and the gross backlog at the end of each quarter for fiscal years 2018, 2019, 2020.
- Data showing the average processing time and processing time goals for each benefit application at the end of each quarter for fiscal years 2018, 2019, 2020.

² See U.S. Dept. of Homeland Security, FY 2015 Budget in Brief, U.S. Citizenship and Immigration Services, At a Glance, Page 133, <https://www.dhs.gov/sites/default/files/publications/FY15-BIB.pdf>; See also, U.S. Dept. of Homeland Security, FY 2018 Budget in Brief, U.S. Citizenship and Immigration Services, At a Glance, Page 67, <https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf>.

³ See U.S. Dept. of Homeland Security, FY 2017 Budget in Brief, U.S. Citizenship and Immigration Services, Page 70, https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf; See also, U.S. Dept. of Homeland Security, FY 2020 Budget in Brief, U.S. Citizenship and Immigration Services, Page 58, https://www.dhs.gov/sites/default/files/publications/fy_2020_dhs_bib.pdf.

All USCIS Application and Petition Form Types (Fiscal Year 2019, 4th Quarter, Jul. 1 – Sep. 30, 2019), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY19Q4.pdf.

⁵ American Immigration Lawyers Association, AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration, January 30, 2019, <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-uscis-processing-delays>.

- Data showing any transfers of funds between fee accounts and between Department components.
- Approval and denial rates for processed cases, disaggregated by immigration benefit type for each quarter for fiscal years 2018, 2019, 2020.

In addition, Congress should ask USCIS to provide the following information:

- What is the precise methodology that was used as the basis for the agency's projected shortfall of \$1.2 billion due to the COVID-19 pandemic?
- If the agency's shortfall is in fact due to the COVID-19 pandemic, why did USCIS issue a similar projected shortfall in November 2019 when it published its most recent proposed fee rule?
- If the agency was already anticipating a budget shortfall in 2019, why did it propose to transfer more than \$100 million of its funding to U.S. Immigration and Customs Enforcement in its November 2019 proposed fee rule?
- Can the agency provide a detailed accounting of the funds and resources that it has reallocated to other agencies?
- Given the increases in overall processing times and the agency's budgetary concerns, how has USCIS been able afford the diversion of hundreds of its staff to conduct enforcement work for ICE and CBP in the last year?
- Has the agency provided a detailed analysis of the factors that have contributed to its delays in case processing?
- How much money is the agency holding in its premium processing fee account and how are these funds currently obligated?
- Has the agency provided detailed data on filings by week and visa category to substantiate its claim of an overall decrease of 70 percent in filings?
- Has the agency provided detailed expenditure data for at least the last three years?
- Has the agency provided information on per-officer productivity and metrics?
- Has the agency provided detailed information on the recent growth of its Fraud Detection and National Security Directorate?

USCIS should adopt cost-efficient measures for adjudicating immigration applications and petitions

In recent years, USCIS has adopted a series of policies and practices that have created inefficiencies in its operations – increasing the agency’s overall cost of adjudicating immigration applications and petitions – while at the same time resulting in a reduction in the overall number of applications and petitions that the agency receives. Congress should not appropriate temporary funding until USCIS takes the following measures to reduce the cost of adjudicating immigration applications and petitions:

- **USCIS should eliminate its in-person interview requirement for routine cases.** In October 2017, USCIS began implementing its in-person interview requirement for all individuals seeking lawful permanent residency through their U.S. employer as well as certain relatives seeking family reunification with asylees and refugees.⁶ Under prior policy, USCIS officers had discretion to require such interviews on a case-by-case basis, where, for example, applications presented fraud or national security concerns. The new policy mandates those interviews indiscriminately, despite no meaningful evidence of this requirement’s utility. Unneeded, time-intensive interviews drain agency resources. USCIS should eliminate its in-person interview requirement for routine cases that present no fraud or national security concerns.
- **USCIS should reinstitute the agency’s 2004 “deference” policy.** In October 2017, USCIS rescinded longstanding guidance under which USCIS adjudicators deferred to prior approvals of temporary immigration benefits when processing requests to extend those benefits absent error or a material change in circumstances.⁷ Under the agency’s new guidance, USCIS personnel must now effectively re-adjudicate many previously approved petitions despite no change in the terms and conditions. This needless duplication of efforts squanders resources, drives delays, and creates inconsistency in adjudications. To more cost-effectively adjudicate petitions, USCIS should rescind its 2017 policy and reinstitute its 2004 deference policy.
- **USCIS should reuse biometrics and waive the biometrics requirement for certain groups.** USCIS should exercise its discretion pursuant to 8 CFR 103.2(b)(9) to limit when biometrics need to be captured. In order to save personnel and processing costs, USCIS should reuse all biometrics that have been captured within the past five years for any form type and waive the biometrics requirement for individuals under the age of 14 or above the age of 65, as well as for applicants who have been previously vetted, such as Form I-539 and naturalization applicants.

⁶ USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants, August 28, 2017, <https://www.uscis.gov/news/news-releases/uscis-expand-person-interview-requirements-certain-permanent-residency-applicants>.

⁷ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0151, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status, Oct. 23, 2017 <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23-Rescission-of-Deference-PM602-0151.pdf>.

- **USCIS should stop rejecting applications and petitions due to alleged incompleteness or blank spaces.** USCIS has recently begun implementing a policy in which the agency is rejecting, and in some cases denying, applications and petitions for alleged incompleteness for failure to complete certain sections of the form. This includes rejecting forms for failure to write “N/A” in boxes that are clearly inapplicable; for example, failing to write “N/A” in the “apartment number” box for an applicant who lives in a house. In some cases, USCIS has even rejected applications where an applicant or petitioner indicates “not applicable”, “na” or “none” instead of “N/A” in a particular section of the form. Requiring officers to review for non-material spaces and expend resources to return petitions and fees is an inefficient use of agency resources and creates an unnecessary barrier to accepting applications and petitions, especially for unrepresented applicants. USCIS should refrain from rejecting applications and petitions on this basis.
- **Issue RFEs and NOIDS more judiciously.** In recent years, USCIS has been issuing Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) at an unprecedented high rate, which wastes limited staff resources and increases the overall time it takes from USCIS to adjudicate applications and petitions. For example, for H-1B petitions, USCIS data reveals the percentage of completed cases with RFEs increased from 22.3 percent in FY2015 to 40.2 percent in FY2019.⁸ The RFE rate reached 60 percent during the first quarter of FY2019, and was 47.2 percent during the first quarter of FY2020.⁹ Frequently, RFEs and NOIDs are issued seeking evidence that has already been provided or that is unnecessary to establish eligibility. The agency should take steps to issue RFEs and NOIDs more judiciously to spare agency resources.
- **DHS should immediately suspend its public charge rule.** DHS recently implemented a convoluted and inefficient new framework that radically heightens the standard for determining whether an applicant for admission to the U.S. may become a “public charge.” As implemented, the DHS public charge rule penalizes people for even the modest use of an array of public benefits that they are legally permitted to use. The new framework forces USCIS adjudicators to engage in an analysis that is significantly more complex and time consuming than before.¹⁰ The public charge rule has created a significant operational burden that has fallen on USCIS, forcing adjudicators to spend considerably more time in processing individual applications. Moreover, given the public charge rule’s heightened standard, it is likely to reduce the overall number of applications and related fees that USCIS will receive. The rule has also led to considerable fear and confusion

⁸ National Foundation for American Policy, H-1B Approved Petitions and Denial Rates for FY 2019, February 2020, <https://nfap.com/wp-content/uploads/2020/02/H-1B-Denial-Rates-Analysis-of-FY-2019-Numbers.NFAP-Policy-Brief.February-2020-1.pdf>.

⁹ *Id.*

¹⁰ See Inadmissibility on Public Charge Grounds, 84 FR 41292, Aug. 14, 2019, <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds>

surrounding use of medical care, creating a chilling effect on use of public benefits.¹¹ This chilling effect has even led some immigrants to avoid hospitals during the COVID-19 pandemic.¹²

Congress must ensure that USCIS remains focused on its service-oriented statutory mission

- **Congress should prohibit the transfer of USCIS funds to other federal agencies.** In its recent budget requests and in its proposed fee rule, USCIS has sought to transfer over \$100 million from the agency's fee account to U.S. Immigration and Customs Enforcement (ICE), to be used for enforcement purposes. In light of agency's own fiscal woes, Congress must ensure that USCIS is prohibited from transferring any funds from the fee account to ICE, through binding language restricting USCIS transfer authority.
- **Congress must ensure USCIS remains service oriented.** Congress must also ensure that USCIS refocuses on the adjudicatory mission Congress gave the agency upon the creation of DHS.¹³ USCIS is not primarily a "vetting agency." It is an agency designed to adjudicate immigration benefits, and it must focus its resources on that purpose rather than on immigration enforcement. Despite this clear purpose, USCIS has in recent years spent extensive resources on a large expansion of its fraud directorate, required duplicative in-person interviews which increased adjudicatory costs, and spent considerable resources assisting denaturalization efforts run by the Department of Justice.

USCIS should adopt measures to generate new revenue

- **USCIS should expand its premium processing service.** USCIS generates substantial revenue from its premium processing service, which allows for certain petitions to be processed within 15-calendar days for an additional filing fee of \$1,440. As of the end of FY2019, USCIS had \$648 million in its premium processing account.¹⁴ However, USCIS has suspended premium processing a number of times over the past few years, including most recently in March 2020, when USCIS announced a temporary suspension of premium processing services for all Form I-129, Petition for Nonimmigrant Worker, and Form I-140, Petition for Immigrant Worker. While we applaud the agency's May 29, 2020 announcement¹⁵ that it will begin phasing in premium processing starting

¹¹ Urban Institute, Hamutal Bernstein, et al., *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019* (May 18, 2020), <https://www.urban.org/research/publication/amid-confusion-over-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-2019>.

¹² Amir Khafagy, *Some Immigrants Avoid New York Hospitals Because of the Public Charge Rule*, Documented NY, May 21, 2020, <https://documentedny.com/2020/05/21/some-immigrants-avoid-new-york-hospitals-because-of-the-public-charge-rule/>

¹³ See Section 451(b), Homeland Security Act of 2002, Public Law 107-296 (Nov. 25, 2002), transferring five specific functions from INS to the newly created Bureau of Citizenship and Immigration Services: "(1) Adjudications of immigrant visa petitions; (2) Adjudications of naturalization petitions; (3) Adjudications of asylum and refugee applications; (4) Adjudications performed at service centers; (5) All other adjudications performed by [INS] immediately before the effective date..."

¹⁴ Department of Homeland Security, U.S. Citizenship and Immigration Services, Budget Overview, Fiscal Year 2021 Congressional Justification.

https://www.dhs.gov/sites/default/files/publications/united_states_citizenship_and_immigration_services.pdf

¹⁵ U.S. Citizenship and Immigration Services, *USCIS Resumes Premium Processing for Certain Petitions*, May 29, 2020, <https://www.uscis.gov/news/alerts/uscis-resumes-premium-processing-certain-petitions>.

June 1 for Form I-140 and Form I-129, in order to increase its revenue, USCIS should expand premium processing services to other form types used for the benefit of "business customers"¹⁶, such as Form I-539, Application to Extend/Change Nonimmigrant Status Form I-485, Application to Register Permanent Residence or Adjust Status, and Form I-765, Application for Employment Authorization. USCIS should be permitted to use the funds temporarily in its premium processing account for general expenses, including payroll needs.

- **USCIS should adopt measures that would increase the filing of applications and petitions.** The immigration filing system is particularly cumbersome as it is primarily paper based. During the pandemic, these difficulties have been further exacerbated, making it more difficult for individuals to be able to file applications and petitions, which likely contributed to USCIS's significant decrease in receipts for April 2020. In order to increase filings of applications and petitions, USCIS should adopt the following measures:
 - **Allow for digital signatures:** Although USCIS had provided stakeholders with some signature flexibility when filing applications and petitions with USCIS¹⁷, due to "stay at home" orders and social distancing protocols, stakeholders may not have the appropriate equipment at home that allows them to print, copy or scan signed documents. USCIS should therefore allow for digital signatures and clarify its guidance that signatures 'handwritten' through electronic means, such as by using a finger to trace the signature through applications such as Adobe Fill & Sign or CamScanner, are acceptable.
 - **Allow for electronic payment for all application types:** The requirement that all petitions and applications submitted to a USCIS Service Center must include a physical check for payment of the filing fee is proving to be problematic for many petitioners and representatives who are working from home in light of the COVID-19 pandemic. USCIS should allow all applicants and petitioners, regardless of whether they are filing at a USCIS Lockbox or a Service Center, to make electronic payment from a bank account, credit card, or debit card.
 - **USCIS should improve its customer-facing tools and resources:** USCIS should improve its customer-facing resources and tools, such as the Information Services Modernization Program (InfoMod) and the USCIS Contact Center, to ensure that applicants have timely and accurate information regarding filing applications and petitions with USCIS, including any policy and procedural changes.
 - **USCIS should increase its engagement with the stakeholder community:** USCIS should engage more regularly with the stakeholder community to clarify agency policy and to provide guidance on how to file applications and petitions when agency policy or process changes take place.

¹⁶ See 8 U.S.C. 1356, INA 286(u).

¹⁷ USCIS Announces Flexibility in Submitting Required Signatures During COVID-19 National Emergency, May 1, 2020, <https://www.uscis.gov/news/alerts/uscis-announces-flexibility-submitting-required-signatures-during-covid-19-national-emergency>.

- **Recapture unused green cards:** Congress can also promote revenue generation at USCIS through the recapture of unused immigrant visas, including at least 176,000 unused immigrant visas, which could be recaptured through legislation.¹⁸ This measure would prompt an immediate surge of revenue-generating visa petitions and adjustment of status filings, which could generate hundreds of millions of dollars of revenue. Congress has utilized visa recapture in the past in the appropriations process.¹⁹ Emergency appropriations for USCIS that include visa recapture represent a unique opportunity to simultaneously cut immigrant visa backlogs and ensure revenue generation.

USCIS should implement policies to address challenges created by the COVID-19 pandemic

The COVID-19 pandemic has significantly impacted day-to-day operations within USCIS. While the pandemic has almost certainly had a negative impact on the agency's budget by reducing the revenue that USCIS receives through filing fees, it has also created significant challenges for the stakeholders that USCIS is supposed to serve.

Many of USCIS's stakeholders have experienced challenges in obtaining or maintaining lawful status in the United States during the pandemic. While the agency has taken incremental steps to address some of the processing issues created by the pandemic, it has failed to implement the policy changes necessary to allow stakeholders to seek or maintain lawful status in the U.S. during the extended period of social distancing that was mandated in most parts of the U.S. Many of USCIS's stakeholders have or will experience hardship due to these disruptions and USCIS's failure to respond in a meaningful and timely manner. Therefore, we urge Congress to compel USCIS to adopt and implement the following measures in exchange for emergency funding:

- USCIS should suspend all deadlines and extend all nonimmigrant statuses for at least 90 days beyond the duration of the COVID-19 national emergency and avoid denying applications or petitions where individuals do not attend interviews, appointments, or naturalization oath ceremonies during the pandemic.
- USCIS should waive in-person interviews when legally authorized and permit naturalization oaths to be taken through video.
- USCIS should also excuse any late filings of extension or change of status requests for up to 90 days after the end of the national emergency and provide an automatic grant of deferred action for the duration of the national emergency for individuals whose status has expired and cannot be extended or changed.

We urge you to consider these factors as you debate USCIS's emergency appropriations request. We firmly believe that any additional funding that may be provided to the agency must be conditioned on meaningful accountability, transparency, and improvements in productivity. USCIS should be required to

¹⁸ Jeremy L. Neufeld, *Congress Can Tap Unused Visas To Bring Nurses and Physicians To Help Fight COVID-19*, Niskanen Center, April 29, 2020, <https://www.niskanencenter.org/emergency-nurses-unused-visas/>.

¹⁹ See Sec. 502 of the Emergency Defense Supplemental bill of 2005, H.R. 1268.

work to pull itself up by its own bootstraps by identifying alternative sources of revenue and ways that it will improve its own operations for the sake of the American taxpayer.

Sincerely,

American Immigration Council

American Immigration Lawyers Association

cc:

The Honorable Jerrold Nadler, Chair, Committee on the Judiciary, U.S. House of Representatives

The Honorable Jim Jordan, Ranking Member, Committee on the Judiciary, U.S. House of Representatives

The Honorable Lindsay Graham, Chair, Committee on the Judiciary, U.S. Senate

The Honorable Dianne Feinstein, Ranking Member, Committee on the Judiciary, U.S. Senate

The Honorable Ron Johnson, Chair, Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Gary Peters, Ranking Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Bennie G. Thompson, Chair, The Honorable Bennie Thompson, Chair, Committee on Homeland Security, U.S. House of Representatives

The Honorable Mike Rogers, Ranking Member, Committee on Homeland Security, U.S. House of Representatives