March 8, 2023

Carol Cribbs
Deputy Chief Financial Officer
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Submitted via www.regulations.gov
DHS Docket ID: USCIS–2021–0010

Re: U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements

Dear Ms. Cribbs:

The American Immigration Lawyers Association ("AILA") and the American Immigration Council (Council) respectfully submits the following comments (collectively the "Comment") in connection with the above-referenced Department of Homeland Security ("DHS") and U.S. Citizenship and Immigration Services Notice of Proposed Rulemaking (NPRM) seeking to amend the USCIS Fee Schedule and make certain other changes to immigration benefit requirements, as published in the Federal Register on January 4, 2023.[1]

Established in 1946, AILA is a voluntary bar association of more than 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 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. Our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

[1] 88 FR 402 (January 4, 2023), hereinafter referenced as "NPRM.".

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council's legal department provides technical and strategic assistance to others litigating before the immigration courts and has a direct interest in ensuring that the immigration courts remain accessible to noncitizens

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Introduction

Inasmuch as our members are responsible for filing hundreds of thousands, if not millions, of applications and petitions with USCIS annually, we share USCIS' concerns about its current service levels and we recognize the essentiality of having sufficient financial resources to fund its core operations. As unequivocally noted in the agency's mission statement, *"USCIS upholds America's promise as a nation of welcome and possibility with fairness, integrity, and respect for*

all we serve." An essential element of that promise is the processing of immigration benefit requests in a transparent, consistent, predictable and timely manner and, while we acknowledge USCIS' recent efforts to streamline procedures and control processing backlogs, it is our shared experience that transparency in its decision-making process, consistency and predictability in adjudications and, most significantly for purpose of this comment, timeliness of adjudications are not common user experiences when our members submit benefit requests on behalf of their clients.

It would seem axiomatic that an agency reporting processing times of several years for many of the services it provides is failing to fulfill its promises to its stakeholders. We believe any request to increase fees for these unkept promises must incorporate significant process improvements and specific implementation timelines that fundamentally change the existing paradigm of slow and inefficient service. This is particularly the case when USCIS is proposing jaw-dropping increases of 100% or more for many services, particularly when corresponding processing times have increased significantly, without any policy or legal change. To request increased fees so that the agency can hire more workers to continue to process cases in a similar fashion is effectively institutionalizing the flawed model that has created the current crisis.

Hiring additional staff so that they can inefficiently adjudicate more applications and petitions is a "band-aid" solution to the agency's fundamental structural processing inefficiencies. This issue is best evidenced by USCIS's own data which documents significant increases in case adjudication times without commensurate changes in statutory or regulatory requirements. As an example, the increase in reported completion rates (the time USCIS says it takes to complete adjudication) from 2016/17 to 2022/23 for many of the more commonly filed benefit request are as follows:

Increase in Reported Completion Rates (From 2016/17 to 2022/23)[2]

- Form I-129: 107%
- Form I-130: 49%
- Form I-526: 218%
- Form I-539: 74%
- Form I-690: 128%
- Form I-751: 56%
- Form I-829: 188%
- Form I-956: 171%

Again, these increases occurred without corresponding statutory or regulatory changes sufficient to justify the level of extra work reflected in the completion rates.[3] While USCIS acknowledges that increases in in-person interview requirements as well as RFE rates have contributed to higher completion rates and processing backlogs in the past, these factors, *inter alia,* are being proactively addressed through USCIS efficiency efforts and should have much less relevance to future

[2] Immigration Examinations Fee Account, Fee Review Supporting Documentation (January 2023) at p.54.

[3] While it is possible, and even likely, that increased fraud detection efforts have contributed to the increase in completion rates, we contend that USCIS' involvement in investigation activities is inappropriate as a matter of law, as discussed *infra.*

completion rates or the proposed filing fees in this NPRM.[4] It should also be noted that many of the form types listed above are for case types with the most substantial and stunning proposed fee increases.[5] Absent any corresponding statutory change, regulatory changes or compelling explanation, the dramatic increases in the time to review/complete adjudication described in the NPRM are difficult for stakeholders to fully understand and justify.

Relatedly, it appears that the fees proposed in this NPRM have not accounted for either recently implemented or planned processing efficiencies.[6] In its recently released FYs 2023-2026 Strategic Plan, USCIS unequivocally commits to promoting "quality adjudications while reducing the time that individuals wait for decisions on their applications, petitions, and requests," reducing "the net pending caseload and processing times to a reasonable and sustainable level" and improving "the efficiency of casework processes." The USCIS Strategic Plan for the next several years demonstrates a commendable commitment to improving efficiency, yet the fruits of this effort are not acknowledged in the proposed fee increases. To propose significant fee increases based on admittedly inefficient legacy procedures, without incorporating existing and planned process improvements into its costing model, overestimates the current and future cost of benefit adjudications and undervalues the impact of those efficiency efforts on USCIS operations. If the agency is fully committed to implementing transformational changes to the manner in which USCIS provides its services, and we sincerely believe that to be the case, then its fee proposal must factor in those changes in a transparent manner.

In connection with USCIS efficiency efforts, in March 2020 AILA issued a Policy Brief entitled "Righting the Ship: The Current Status of USCIS Processing Delays and How the Agency Can Get Back on Course" providing recommendations for improving service at the agency. While we recognize that USCIS has taken significant steps in adopting many of our recommendations, particularly as it relates to interview waivers, interim evidence of employment authorization and electronic filing of benefit applications, much more can be done to make USCIS more efficient and thus reduce completion rates and corresponding filing fees. For example, while USCIS has reimplemented its policy of granting deference to prior adjudications in appropriate circumstances, stakeholder continue to receive often baffling requests for submission of either *ultra vires* or repetitive documentation. Many of these requests demonstrate a patent misunderstanding of the "preponderance of the evidence" burden of proof for adjudication of immigration benefit requests. Unnecessary Requests for Evidence (RFEs) not only artificially inflate completion rates but also attenuate already unconscionable processing backlogs. More aggressively addressing this issue

[4] NPRM at p. 455. The vague reference to a "growing complexity of case adjudications" in the NPRM is difficult to comprehend for the reasons set forth in this section of our comment.

[5] For example, in the NPRM the filing fee for a petition requesting L-1 classification will increase by 201%. It must also be noted that current processing times for L-1petitions are three to five times longer than mandated by section 214(c)(2)(C) of the INA and 8 CFR 214.(l)(7)(I) which provides, "[t]he director shall notify the petitioner of the approval of an individual or a blanket petition within 30 days after the date a completed petition has been filed." If USCIS does proceed with a significant fee increase for L-1 petitions, we would expect that it will begin adjudicating all L-1 petitions in compliance with the statute.

[6] For example, in its FY 22 Progress Report, USCIS specifically referenced the process improvements it has taken during the fiscal year, which include "strengthening its fiscal stability, and implementing adjudicatory efficiencies, policy measures and agency-wide backlog reduction efforts." None of these substantial and commendable improvements appear to be factored into the fees proposed in the NPRM.

alone will have a significant ROI impact on the agency's ability to adjudicate benefit requests more efficiently and economically. Similarly, enhancing electronic filing options so that they are more accessible and practical for both stakeholders *and their counsel* will provide myriad case processing efficiencies. In addition to recommendations for reducing processing delays, AILA has provided a comprehensive proposal containing numerous substantive and procedural enhancements for reducing barriers to immigration services and benefits that, if implemented, would enhance the efficiency of USCIS operations.[7]

AILA and the Council believe any proposed fee increases must expressly recognize USCIS' ongoing efforts to implement structural and procedural improvements to its operations. Reasonable estimates of the impact of these efficiencies on the cost of adjudication and the effect of these calculations on reducing the proposed fees must be a central component of the final rule.

NPRM Improvements as Compared to the 2020 Fee Rule

AILA and the Council commend USCIS for reinforcing its commitment to enhancing access to immigration benefits by addressing many of the barriers created by the 2020 fee rule.[8] The NPRM appropriately removes many of the objectionable features contained in the 2020 fee rule and reflects a considered policy judgment on the part of USCIS that those features of the 2020 fee rule are undesirable as a policy matter and are inconsistent with the goals of this Administration as well as federal immigration laws. That rule would have established fees and restrictions on fee waivers that would have resulted in fewer individuals accessing desired immigration benefits for which they would be eligible simply because they could not afford to apply. As noted in our comment to that now enjoined rule,

> The increased fees would price many of those customers out of the legal immigration system altogether. ... Affected individuals could no longer seek fee waivers, which the proposed rule would eliminate for those form types and many others. Altogether, this elevation of the "invisible wall" would leave numerous hard-working, law-abiding noncitizens on the other side, blocking their path to naturalization and other immigration benefits and prompting their families' long-term separation.

We support the NPRM's efforts to address the serious deficiencies of the 2020 rule that were litigated in *IRLC v. Wolf*.[3] Specifically, we acknowledge the NPRM's core principles of:

- Eliminating the proposed fee for asylum applications on Form I-589;
- Preserving existing fee waiver eligibility for low-income and vulnerable populations;[9]

[7] While USCIS has taken welcome steps to implement many of AILA's recommendations, further improvements, including enhancements to online filing options. reductions in unnecessary RFEs and creation of a trusted filer program, could increase efficiency and reduce costs.

[8] 84 FR 62280 (November 14, 2019) and 84 FR 67243 (December 9, 2019).

[9] While the reference to codifying the fee waiver process in the NPRM is welcome, it is only discussed in preamble and is not codified in regulatory language. AILA encourages USCIS to fulfill its commitment and codify the fee waivers into its regulations.

- Adding new fee exemptions for certain humanitarian programs and otherwise limiting humanitarian costs; and
- Limiting the fee increase for naturalization applicants.

It is also important to note the significant measures to respond specifically to issues raised in litigation on the 2020 fee rule, particularly as it relates to how the enjoined fees and fee waiver regulations would have caused harm to low-income immigrants. Specifically, the NPRM provides that, where DHS has determined the rule's approach would inequitably impact the ability of those who may be less able to afford the proposed fees to seek an immigration benefit for which they may be eligible, it has proposed either to maintain the pre-2020 fee rule regulations, fee waivers, and reduced fees that USCIS is following, or to add new fee exemptions to address accessibility and affordability. The NPRM also proposes to expand fee exemptions for certain vulnerable populations and to limit the fees for certain benefit requests in recognition that fees set based on its core calculation methodology would be onerous. All of these changes are welcome modifications of the 2020 fee rule.

Separately, we request that USCIS formally withdraw the 2020 fee rule.[10] The 2020 fee rule never went into effect because it has been subject to a preliminary injunction issued in ILRC v Wolf.[11] However, USCIS has never formally withdrawn the 2020 Fee Schedule, and there is no final judgment in the ILRC v. Wolf matter, which has been stayed pending the results of the current fee proposal.

Withdrawal of the 2020 Fee Schedule is critical. If this fee proposal is ever subject to judicial review in the future, and if for any reason a court were to find that some portion of this fee proposal is unlawful, the result should not be a return to the 2020 fee rule but rather, a return to the current status quo, which is the 2016 fee rule now in effect. Also, USCIS should state that its withdrawal of the 2020 Fee Schedule is severable from the remainder of the current proposal, so that any judicial invalidation of any portion of the current proposal would not endanger the lawful and appropriate decision to withdraw the 2020 Fee Schedule.

The Data Provided to Support the Activity Based Costing (ABC) Model is Insufficient to Assess its Validity.

With respect to the underlying data utilized to determine whether the fee structure and revenue estimates in the NPRM align with projected costs, we are unable to analyze USCIS's documentation of the fee review methodology and inputs as it does not provide a comprehensive understanding of the study's execution. USCIS mentions in their "Fee Rule IEFA Fee Review Supporting Documentation" (Appendix VI, page 34) that they evaluated the possibility of utilizing previous year obligations and workloads to establish projected values. However, they ultimately chose not to use actual cost values and instead relied on projections. Unfortunately, we were unable to identify information in the documentation provided that either explained with specificity how the projected values were determined or addressed potential observational errors that may have impacted cost projections.

[10] CIS No. 2627-18; DHS Docket No. USCIS-2019-0010, Aug. 3, 2020.
[11] Case No. 20-cv-05883-JSW (N.D. Cal., Sept. 29, 2020).

For example, the information provided with respect to USCIS's methodology lacks clarity on the fiscal year data used to establish these projections, and data from several different fiscal years was used to input data into the ABC model. While the completion rates were determined from data collected during three separate fiscal years (2019-2021), USCIS does not provide descriptive statistics to compare these fiscal years' data. Moreover, USCIS notes that they used pre-pandemic values for some but not all the data used to project completion rates, and the lack of clarity on these differences raises questions about the validity of the data used in the ABC model. Although USCIS has described the inputs utilized in the ABC model, it has done so without providing sufficient statistics or measures of error to evaluate the model's overall accuracy. As such, we are unable to comment on the underlying statistical validity of the ABC model used to establish the proposed fees in the NPRM.

The NPRM's Proposed Fee Increases will have a Significant Impact on Small Businesses.

The impact of the proposed fee increases on small businesses and other similar employers, that by their nature have fewer resources than traditional for-profit businesses, has not apparently been appropriately or realistically considered in the NPRM. In reaching its conclusion that there would be a less than 1% impact on the finances of most small and non-profit filers by virtue of the increases,[12] both for the underlying Forms I-129 and I-140 and including the additional $600 Asylum Fee, USCIS considered only the reported *gross income* of these entities as reported on Forms I-129 and I-140. USCIS then based its impact percentage calculation on that figure.[13] This is a misleading method of measuring the true impact of the fee increases as it does not consider the number most important to entrepreneurs and other small business owners, *net income*. It is from net income that these entities will be paying these increased filing fees costs and net income, by definition, is always smaller than gross income. The Service recognizes this concept as it considers only *net income* when evaluating an employer's ability to pay on a Form I-140 yet, when assessing the impact of the proposed filing fee increases on employers filing Form I-140, it has intentionally used the impact on *gross income* as a measure of "ability to pay."

It is important not to underestimate the overall impact of the proposed fee increases on small businesses, which typically have single-digit net income percentages and relatively small net revenues per employee.[14] Few employers may be able to absorb the additional business costs

[12] "For Form I–129, approximately 90 percent of the small entities in the sample experienced an economic impact of less than 1 percent of their reported revenue. For Form I– 140, approximately 98 percent of the small entities in the sample experienced an economic impact of less than 1 percent of their reported revenue." NPRM at p. 453.

[13] "To calculate the impact of this increase, DHS estimated the total costs associated with the proposed fee increase for each entity and divided that amount by the sales revenue of that entity." Department of Homeland Security, U.S. Citizenship and Immigration Services, Small Entity Analysis (SEA) for the U.S. Citizenship and Immigration Services Fee Schedule Proposed Rule, January 4, 2023, p. 12.

[14] For example, the data linked above, which was provided by BusinsssDIT, indicates that small businesses with 5-9 employees average $102,000 in net annual income (profit).

created by the proposed fees and the NPRM disregards several factors affecting smaller or less well capitalized employers:

1. Religious organizations, not-for-profit entities (including arts and cultural organizations), universities and school districts, especially publicly funded universities, tend to have critical positions to fill through immigration sponsorship yet have much more limited funding than traditional for-profit businesses. Not-for-profit and publicly funded organizations are constrained in their capability to increase funding or otherwise raise their fees. Thus, their net revenues tend to be significantly impacted by any increase in the cost of doing business;

2. Smaller businesses and organizations should be able to compete with large companies to attract top foreign national talent, especially in a highly competitive labor market, such as the one that currently exists. USCIS should consider some of the same practical accommodations to lessen the financial burden on these classes of entities that exist in other contexts. For example, Congress exempted certain employers from paying the ACWIA fee entirely and reduced the required amount for others. Lessening the filing fees for certain businesses or organizations will make it easier for these entities to compete at the same level as other employers;

3. Smaller employers, whether for profit or not for profit, will also be particularly challenged by these fees. The ability of small businesses and entrepreneurs to access affordable venture capital is becoming more and more limited, as the days of "free money" for anyone with a good business plan appear to be over. As a result, many small businesses are challenged to manage their net revenues more and more carefully. Anecdotally, AILA members report that many of their clients, especially smaller companies or start-ups, would prefer to hire U.S. workers and avoid the already significant expense of hiring foreign workers, but the workers are simply not available. Consequently, these employers often look to foreign workers to fill out their business and staffing needs. In the L-1 context, the foreign worker can be even more critical to the success of the small business if that worker is a key manager or executive or has specialized knowledge without which the business cannot thrive and grow. To saddle these employers with fee increases *in excess of 200%* will stifle innovation, cripple their ability to do business and limit their capacity to create jobs and expand the U.S. economy;

4. The mathematical analysis in the NPRM does not fully assess the cumulative impact of these increases on small businesses. For example, an H-1B first time small business petitioner with 30 employees currently pays $2,470 for an initial Form I-129 filing. Under the proposed fee rule, they will pay $3,595 ($1,125 increase). For an L-1 petition, an employer that currently pays $960 and will now pay $2,485 ($1,525 increase).[15] In addition, in order to receive a timely adjudication, many petitioners have to pay a $2,500 premium processing fee in order to ensure the worker will be able to start on time. For an R-1 Petition, a religious organization, which must be a bona fide non-profit organization,

[15] This figure does not include the $4,000 or $4,400 fee paid by dependent employers that may be temporarily reliant upon foreign workers during their start-up phase or for project specific reasons.

currently pays, $460. Under the proposed they will pay $1,615 ($1,155 increase). While AILA acknowledges that, like USCIS, it does not have detailed and specific data on the net income of small businesses that file Forms I-129 and Forms I-140,[16] anecdotal evidence reported by members suggests that to an employer with net revenues under $100,000 at the end of the year, these proposed fee increases are significant and could impede hiring and economic growth;

5. The analysis does not consider the impact of Matter of Simeio Solutions, LLC,[17] which obliges an employer to file an amended or new H-1B petition whenever there is a material change in the location of employment, such as when an employee moves out of the Metropolitan Statistical or Normal Commuting area either to a regular work site or home office. In our experience, many small businesses require an agile and mobile workforce to remain competitive in today's economy and it is not uncommon for these employers to assign H-1B workers to more than one location. In addition, the pandemic-induced changes to work environment may necessitate multiple Form I-129 filings for employees as they transition to hybrid work situations, further exacerbating the economic impact of the proposed fee increases; and

6. Finally, the analysis does not consider that fact that many small business employers usually offer, as a matter of business necessity, payment of all fees associated with maintaining valid immigration status for family members, including sponsorship fees for lawful permanent resident status. This is often provided as an incentive for the employee to accept employment with or remain with the employer. These fees are also slated to increase by over 100% and the cumulative impact on employers cannot simply be dismissed by the statement that these petitions are filed by individuals.

In summary, AILA and the Council request that USCIS re-calculate the impact of its proposed fees on small businesses and non-profit filers with these additional data points in mind. At minimum we would ask USCIS to use the more appropriate net income figures in making its calculations related to this fee rule.

Premium Processing Revenue Must Be Included in the Analysis of USCIS Funding Requirements and Net Premium Processing Revenue Should be Used to Mitigate the Dramatic Fee Increases in the NPRM.

As noted in the NPRM, USCIS can now use premium processing revenue in a manner similar to its IEFA fees to carry out a broader range of activities than previously authorized. Specifically, the USCIS Stopgap Stabilization Act permits USCIS to use premium processing revenue to:

(A) provide the services … to premium processing requestors;

[16] However, the more general data referenced in note 3, *infra* corroborates the narrow profit margins under which many small businesses operate.
[17] 26 I&N Dec. 542 (AAO 2015).

(B) make infrastructure improvements in adjudications processes and the provision of information and services to immigration and naturalization benefit requestors;
(C) respond to adjudication demands, including by reducing the number of pending immigration and naturalization benefit requests; and
(D) otherwise offset the cost of providing adjudication and naturalization services.[18] (Emphasis added.)

Despite the statutory authorization to do so, USCIS declined to factor premium processing net revenue into its budget calculations or this proposed fee rule, rationalizing that premium processing revenue is "not sufficient to appreciably affect non-premium fees" and offering that, if more information is available, it will "consider" including premium processing revenue and costs in the final rule. Because USCIS did not expressly provide data on its net premium processing revenue, it is difficult to analyze this conclusion with specificity but certain inferences can be made:

1. Premium processing generates substantial net revenue for USCIS. As USCIS noted in the accompanying FAQ to the NPRM, under the current fee schedule, premium processing yields approximately $970 million in revenue yearly. The FAQ further states that under the proposed increases, the yearly revenue from premium processing would be $1.2 billion. Moreover, USCIS announced after the publication of the NPRM its plan to further expand the availability of premium processing to more form types which began on January 30, 2023 and a further expansion has been announced for March and April 2023;

2. Premium processing net revenue is significant and could materially reduce the size of the proposed fee increases. While specific data was not made available, USCIS indicated in the NPRM that, during the first half of Fiscal Year 2020, it had "surplus premium funding of "about" $400 million."[19] Because those funds were segregated, and apparently continue to be segregated, it is reasonable to assume that this surplus remains, and has likely grown over the past three years; and

3. USCIS has acknowledged that, even excluding premium processing revenue, its financial position has "stabilized" as compared to its recent fiscal crisis. By September 2022, USCIS reported over $1 billion in cash reserves and has confirmed that it had "returned to firmer fiscal footing, with cash reserves well on their way to the designated target level... ."[20] Thus, while it may not yet have fully recovered from the negative financial impact of the COVID pandemic, USCIS is apparently generating significant net revenue from its existing fee structure. It is reasonable to assume that, absent a similar catastrophic event, this trend will continue and USCIS will not only be able to fully replenish its minimum carryover

[18] 8 USC 1356 (u)(4).
[19] NPRM at p.426.
[20] United States Citizenship and Immigration Services, Fiscal Year 2022 Progress Report (December 2022).

threshold but also fund significant backlog reduction efforts without a dramatic and unprecedented increase in filing fees.

These inferences suggest that the financial outlook for USCIS is improving and is certainly far less bleak than portrayed in the NPRM. The data also suggests that USCIS could fund much of its projected funding shortfall organically, without subjecting users to astronomical fee increases at a time when service levels are at historical lows. Accordingly, AILA and the Council believe that USCIS must use its premium processing net revenue to reduce proposed fee increases for those categories that would be most severely impacted by the NPRM.

USCIS Should Continue to Offer Premium Processing Service Based on Calendar Days.

In the NPRM, DHS proposes redefining the premium processing timeframe for all immigration benefit request types designated for premium processing to only include business days.[21] AILA and the Council strongly oppose this change. We believe that, in charging the premium processing fee per eligible benefit, USCIS must commit, first and foremost, to maintaining a premium-level of service in a predictable and consistent manner to all applications and petitions requesting this service. By changing the premium processing clock to business days from calendar days, USCIS is essentially charging more money for slower service, which is contrary to what the agency has pledged to do and congressional intent. While the establishment of the premium processing program contemplated that revenue earned may be used for staffing and infrastructure improvements and what USCIS calls "expanded purposes,"[22] AILA and the Council call on USCIS not to lose initial sight on the primary reason stakeholders elect to pay the fee in the first place is for faster service. The change would slow processing significantly; for premium processed applications that have a 15-day clock, this could add 7 additional days; whereas for premium processed applications that have a 45-day clock, this could add 22 more days. To this end, we call on USCIS to continue to adjudicate premium processing cases based on calendar days as it has for many years, not business days as proposed in the 2023 rule.

The Emergency Stopgap USCIS Stabilization Act[23], which authorized USCIS to establish and collect additional premium processing fees, and to use those additional funds for expanded purposes, was enacted in October 2020. At that time, USCIS increased the "standard" premium processing fee 42% to its current $2,500 amount.[24] While there is scant publicly available data on the actual cost of the premium processing program, the revenue generated should be more than sufficient to maintain the program at the current processing times while providing significant additional revenue to be used for more general case processing and backlog reduction purposes.[25]

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[21] NPRM at p.501.

[22] NPRM at p. 419.

[23] The legislation was included in the Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, signed into law on October 1, 2020.

[24] While USCIS is not proposing an increase to the current $2,500 premium processing fee in this rule, the agency has increased these fees dramatically since the implementation of this program in 2001, when the fee was $1,000.

[25] USCIS data (Table 23 of the Regulatory Impact Analysis) indicate that the five-year average (2016-20) of Form I-129/I-140 premium processing requests was 362,595. The USCIS FAQs for the NPRM further documents that

Before deciding how to repurpose the excess revenue earned from the premium processing program, USCIS must first honor its obligation to those who paid for this service. Moreover, in enacting this legislation, Congress did not change USCIS' use of calendar days for the premium processing clock, which it could have done if it believed that it would have better supported the agency.

It also must be noted that an overarching theme of the NPRM is that the proposed fee increases are urgently required in order to reduce backlogs and improve service. In raising many petition and application fees through this fee rule, USCIS highlights the following concern: "If DHS does not adjust USCIS fees it will not have the resources it needs to provide adequate service to applicants and petitioners…."[26] The obviously intended inference is that with additional fees, better service will follow. In this proposed change, USCIS is documenting that, less than three years after a substantial fee increase, it intends to materially and intentionally decrease the quality of the premium processing services it provides.

AILA and the Council share USCIS' desire to enhance efficiency of its adjudication functions through sound financial and operational decision making and we certainly share the desire to see transformative infrastructure changes that will reduce processing times through enhanced e-filing and other technology-based initiatives. However, we cannot countenance USCIS' promise to provide better service through the implementation of this fee rule, on the one hand, while simultaneously implementing an inferior, delayed premium processing service through its proposed business day processing model. This is especially troubling when USCIS has documented its ability to meet the calendar day deadline for expedited processing over many years. In its Regulatory Impact Analysis, USCIS data indicates that the five-year average percentage of premium processing requests that are completed without the need to issue a refund is 99.87%.[27] When viewed in this context, the proposal to change the calculation of premium processing days from calendar days to business days seems very much like a solution in search of a problem.

AILA and the Council call on USCIS to first commit to using whatever portion of the premium processing fee revenue is required to maintain the same level of premium processing service, namely its calendar day processing requirement, before it elects to repurpose any of that revenue. If USCIS determines that additional staff or resources are needed to continue to guarantee calendar day processing, the surplus revenue USCIS is forecasted to earn through this program, estimated to be in the hundreds of millions of dollars, should be allocated to the very program that brings in that revenue.

Why does a calendar day processing requirement matter?

Maintaining the calendar day processing deadline has an effect that is both practical and fair. It gives stakeholders, especially those in the business community where hiring needs are time-sensitive, an essential level of predictability that is not often available in USCIS processing. As USCIS continues to modernize and avail itself of efficiency initiatives such as electronically

premium processing currently yields approximately $970 million in revenue yearly and that under the proposed increases, the yearly revenue from premium processing would be $1.2 billion.

[26] NPRM at p. 402.

[27] See Table 23, note 5 supra. The reported five-year average percentage of Form I-907 refunds is 0.13%.

scanned filings upon receipt at its various lockbox acceptance facilities and service centers and, hopefully, expanded e-filings in the near future, it is difficult to understand why USCIS now needs to calculate premium processing in business days rather than calendar days. As previously noted, USCIS has proven that it is more than capable of meeting the calendar day processing deadline without the advantages of e-filing and other efficiency initiatives, including throughout the COVID-19 pandemic and the multitude of adjudication challenges during that time.

As stated in our comment on the most recent fee rule proposal to change the premium processing calculation to business days from calendar days, DHS fails to articulate its policy rationale or legal conclusion for determining that its prior interpretation of requiring completion on the basis of calendar days was incorrect. In fact, USCIS acknowledges, and then summarily dismisses, 8 CFR 1.2, which expressly defines the term "day' as,

> when computing the period of time for taking any action [in chapter I of title 8 of the CFR] including the taking of an appeal, [it] shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period computed falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

The rationale espoused in the NPRM does not provide the public with a sufficient factual basis to comment on the rationality of the proposal. Even if such change were legally justifiable, DHS is adopting an overly-broad definition of business days to include days "on which the Federal Government is open for business and does not include weekends, federally observed holidays, or the days on which Federal Government offices are closed, such as for weather related or other reasons. The closure may be nationwide or in the region where the adjudication of the benefit for which premium processing is sought will take place."[28] (Emphasis added).

The inclusion of regional or national closures for reasons such as weather emergencies creates uncertainty for businesses who are paying a premium for efficient and expedited processing, as the timeline for their adjudication could be extended without notice. A petitioner in Florida may not know that a blizzard in Vermont has disrupted the processing of their petition. DHS claims that one of the anticipated benefits of this change is improved consistency, but in fact, the proposed change accomplishes the exact opposite and will harm U.S. employers with less predictability. While AILA and the Council oppose this proposal in its entirety, at a minimum if DHS chooses to finalize a change to business days it should only exclude weekends and federal holidays to ensure consistency in adjudications across the country and predictability for stakeholders.

DHS further claims that this change will provide more time for USCIS to adjudicate cases and alleviate the likelihood that it will need to suspend premium processing in the future. However, the better approach would be to implement more efficient processes that facilitate faster processing. Rather than suspending premium processing and shifting the burden to the public, USCIS should review its own internal procedures and policies to ensure more efficient adjudication.

AILA and the Council object to DHS revising how the premium processing clock will be stopped

[28] NPRM at p.501.

and restarted as it fails to provide sufficient predictability and reliability for petitioners and relieves USCIS from the burden of efficiently and timely adjudicating cases by simply issuing requests for evidence. Through this proposal, the standards by which USCIS holds itself accountable have been significantly reduced. For example, to determine when USCIS will be required to refund a fee for failing to meet the deadline, it will be based on "notification of (but not necessarily receipt of) an approval, denial, or request for additional evidence. DHS fails to define what it means as "notification" as compared to "receipt." This is particularly important because frequently USCIS fails to issue notice to the attorney of record or sends notice to the wrong address, leaving the designated recipient in the dark, in turn significantly hampering a business' ability to plan for and meet its needs. AILA and the Council recommend that DHS define how notice will be provided and suggests that such notice be provided by electronic means to the individual named on the Form I-907. It is unclear whether USCIS will "continue to process the case" in an expedited manner once it fails to meet the premium processing deadline and is required to refund the fee, as is the agency's past practice. Petitioners should not be delayed and suffer additional costs and burdens due to USCIS's own inefficiencies.

Most importantly, AILA and the Council are gravely concerned that codifying in the regulations that the premium processing clock will stop and reset any time a RFE or Notice of Intent to Deny (NOID) is issued will only exacerbate the crisis-level case processing delays and generate more unnecessary, duplicative, and frivolous demands for evidence just so USCIS does not have to refund the premium processing fee. Without any mechanism to ensure that USCIS only issues requests for additional evidence when necessary, this proposal fails to hold USCIS accountable for fair and efficient adjudications. AILA members continue to report receiving unnecessary RFEs that either ask for evidence already provided or that asks for evidence beyond the burden of proof. By not maintaining strict deadlines within which USCIS must adjudicate premium processing cases or including a mechanism to ensure accountability on the part of USCIS, codifying this proposal allows adjudicators to issue RFEs or NOIDs and reduces incentives for USCIS to adjudicate in a timely and efficient manner by eliminating any possible repercussion for failing to timely adjudicate. Rather than restarting the clock with a new15-day period, AILA and the Council recommend that USCIS toll the 15-day clock, such that if an RFE is issued on Day 6, when the response is received by USCIS, it will have an additional 9 days to take final adjudicative action. This will promote efficiency and accountability in USCIS adjudications and give true effect to Congress' intent in legislating a premium processing fee.

The Proposal to Increase the H-1B Electronic Registration Fee by 2050% is Unjustified and Contrary to the Purpose of the Registration Regulation

The NPRM's most substantial fee increase by percentage is – by far -- the massive increase in the fee for an H-1B electronic lottery registration. This fee is currently $10 per registration, and DHS is proposing an increase to $215, an increase of 2050%. No other fee increase being proposed by DHS is anywhere close to this much on a percentage basis, and this is a percentage increase more than 10 times as high as almost any other proposed increase. DHS has provided no explanation whatsoever of the justification for such a massive fee increase, other than a vague reference to the "indirect costs of the H-1B registration program."[29]

[29] NPRM at p.501.

The H-1B electronic lottery registration was intended to be a simple, low-cost way to allow for employers to request the ability to seek H-1B status for a needed high-skilled temporary worker. It replaced the inefficient system that had previously existed in which employers would need to prepare an entire H-1B petition on behalf of the intended worker, assemble supporting documentation and prepare checks for all of the associated filing fees, and send those petitions *en masse* to arrive on April 1st of each year with the hope of being selected for processing. DHS would then conduct a lottery and mail back those petitions not selected for processing. This resulted in tremendous expense for the H-1B petitioners, which DHS estimated at somewhere between $47 million and $75 million for cases not selected in the lottery.[30] Moreover, this system actually cost the government a significant amount of money just to mail back the unselected petitions, which DHS estimated at around $1.6 million.[31]

The electronic H-1B registration program was designed to eliminate these unnecessary costs and stop the inefficient use of both government and petitioner resources. In implementing the Final Rule creating the electronic registration system, DHS explained:

> "Under this final rule, when registration is required, the opportunity cost of time associated with registration will be a cost to all petitioners (selected and unselected), but those whose registrations are not selected will be relieved from the opportunity cost associated with completing and mailing the entire H–1B cap-subject petitions. Therefore, DHS estimates the costs of this rule to selected petitioners for completing an H–1B cap-subject petition as the sum of new registration costs and current costs. DHS estimates that the costs of this final rule to unselected petitioners, when registration is required, will only result from the estimated opportunity costs associated with registration." [32]

DHS then continued to explain that the rule would benefit the government as well:

> "The government will also benefit from the registration requirement and process by no longer having to receive, handle, and return large numbers of petitions that are currently rejected because of excess demand (unselected petitions), except in those instances when the registration requirement is suspended. These activities will save DHS an estimated $1.6 million."[33]

Despite the clear intent of the electronic registration program as a cost-savings measure, the proposed fee rule instead converts the program into a massive and unjustifiable revenue generator for DHS. In the Final Rule implementing the electronic H-1B registration program, DHS confirmed that the cost of creating the electronic registration system would be around $1.5 million, and that it viewed that as a one-time cost.[34] In proposing the 2050% fee increase for electronic registration, DHS confirmed that there are no adjudication costs associated with running the H-1B registration lottery. DHS explains "USCIS does not adjudicate registrations received through the

[30] 84 FR 921 (Jan. 31, 2019).
[31] 84 FR 890 (Jan. 31, 2019)
[32] Id.
[33] Id.
[34] Id.

H–1B registration process because the process is automated."[35] DHS also confirmed that it spends no time at all on processing an individual H-1B registration in its chart listing number of hours spent on each completed adjudication.[36]

For Fiscal Year 2023, DHS received 483,927 H-1B registrations,[37] which at $10 per registration generated revenue of $4.8 million. The revenue from that year alone is more than three times the development costs of the H-1B registration system, so those costs have been fully recouped. Under the proposed 2050% increase to the existing $10 registration fee, 483,297 registrations would generate revenue of more than $104 million dollars – nearly $100 million more than DHS received from the FY 2023 registration process and nearly 100 times more than it needed to develop the system.

In implementing the current $10 registration fee, DHS stated "the purpose of the registration fee is to recover the costs of the registration system and process"[38] Nowhere in its current fee increase proposal does DHS explain how this additional $100 million in revenue will be used for costs of the registration system and process. Instead, DHS makes a vague reference to "indirect costs" of the program as the electronic registration program, explaining:

"USCIS lacks information on the direct cost of H–1B registration, but USCIS estimated the indirect costs of the H–1B registration program using the same methods as it did to calculate other fees."

"DHS bases the proposed fee on the activity costs for the following activities:

• Inform the Public
• Management and Oversight" [39]

Analysis of these activity costs in the IEFA Fee Review Supporting Documentation accompanying the NPRM for the H-1B registration fee is illuminating as it provides the following information: $57 of the $215 fee is for cost reallocation (presumably paying for other forms/services); and the remaining $158 is divided between Public Outreach ($28) and Management/Oversight ($129).[40] Inasmuch as the agency estimates 273,990 registration fee payments at the increased fee, it appears

[35] NPRM at p. 446.
[36] NPRM at p. 448.
[37] https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration process#:~:text=For%20FY%202023%2C%20we%20received,when%20and%20where%20to%20file.
[38] 84 FR 60309 (Nov. 8, 2019)
[39] NPRM at p. 501. "Management and Oversight involves activities in all offices that provide broad, high level operational support and leadership necessary to deliver on the USCIS mission and achieve its strategic goals." IEFA Fee Review Supporting Documentation at p. 11. This line item is apparently calculated based upon the number of completions (i.e. registrations) rather than an analysis of the actual costs of these services in a fully automated registration process.
[40] By way of comparison, the Management and Oversight cost of a Form I-130 petition, which presumably requires much more actual management and oversight effort on the part of USCIS, is $138, a mere $9 differential. IEFA Supporting Documentation at p. 41.

USCIS is alleging that it expects the projected cost to run this automated registration process with no adjudication related expenses is approximately $43 Million:

- Public Outreach: $28 x 273,990 = $7.6 million
- Management and Oversight: $129 x 273,990 = $35.3 million
- $7.6 Million + $35.3 million = $42.9 million.

Quite simply, this representation strains credulity for a fully automated process. This fee increase is in direct opposition to the justifications DHS lists in the Federal Register for the changes to the fee structure, especially given that DHS provides no details at all on the specific functions included in these "indirect costs" of the program. Moreover, DHS notes that it "has been directed by the President to reduce barriers and promote accessibility to the immigration benefits that it administers."[41] Increasing an immigration fee – any immigration fee -- by more than 2000% cannot possibly achieve this goal, and instead adds barriers for employers who need to hire a high-skilled worker through the H-1B program. While DHS states that a shift to an ability-to pay model means some users will pay higher fees than the costs associated with the benefit request[42] a 2050% increase far exceeds any reasonable limits of this fee shifting model.

While some commentors may favor the increase in the H-1B registration fee as a means of combatting perceived abuse of the program by companies entering more registrations than they need in order to increase selection odds, a fee increase is unlikely to address that concern. Increasing across the board user fees for any program is rarely an effective deterrent of alleged misuse of a program, and instead simply adds unnecessary burdens to legitimate use of the H-1B program. Moreover, the number of entries a company may make in a given year is not by itself any indicator of misuse of the program and instead is sometimes simply a reflection of the significant difficulty employers (both large and small) face in obtaining high-skilled talent in a time of historically low unemployment. Should DHS believe that the program is being misused in some fashion, there are other more effective and more equitable ways to address those concerns. DHS could, for instance, propose changes to the registration process itself to require that more detail be provided by employers for each entry. The agency could then utilize this information in its efforts to ensure that entries made by employers represent bona fide employment opportunities through normal enforcement activities. Doing so would be much more effective at addressing any concerns about perceived abuse of the H-1B registration program than simply applying a 2050% fee increase to all users across the board.

In proposing this fee increase, DHS makes what is undoubtedly the most breath-taking, yet totally accurate, understatement in the entire proposed rule when it states, "DHS understands that an increase from $10 to $215 may appear to be exorbitant at first glance." What is particularly egregious about the proposed 2050% increase to the H-1B registration fee is that this is one of the only "processing" fees that does not cover processing at all. As noted above, DHS has specifically confirmed that there are no costs associated with adjudicating an H-1B registration.[43] The system

[41] NPRM at p. 425.
[42] NPRM at p. 426.
[43] NPRM at p. 448.

is entirely automated. Moreover, from the 483,927 registrations submitted for FY2023, by statute only 85,000 of those registrations could ultimately be accorded an approved H-1B petition. This means that only 18% of those cases entered into the lottery ultimately could have received any benefit from it. The employers for the unselected registrations therefore spent over $3.9 million without any benefit. If the proposed fee increase had been in place, that number would have increased to almost $86 million.

In creating the electronic registration system, DHS described the money as the "opportunity cost" associated with seeking an H-1B. An opportunity cost of $10 with an 18% chance of return is likely a reasonable chance for an employer to take. By contrast, the unrealized "opportunity cost" for employers not selected in the lottery under the proposed fee increase will be a total of more than $85 million. DHS will simply keep this money in exchange for doing no processing at all.

The reality is that the proposed $215 fee for H-1B electronic registration is not a processing fee at all. It is a lottery ticket. With this massive increase, DHS will transform the H-1B electronic registration process from a cost-savings measure to an exceptionally expensive lottery program. Any employer seeking to hire an H-1B worker is forced to buy a $215 lottery ticket with odds of winning that would make it difficult to sell at that price even at a casino in Las Vegas. This does not "reduce barriers and promote accessibility." Instead, it creates a thinly veiled mechanism to generate massive amounts of revenue without providing any benefits in return to the vast majority of companies paying the increased fee. The proposed increase to the H-1B registration fee is unjustified and contrary to law and should be removed from the fee rule proposal.

The Proposed Fee Disparity for Online Filing is Unwarranted and Premature

AILA and the Council also oppose USCIS' efforts to use the NPRM to incentivize online filing.[44] Only limited types of filings may be completed online and there are significant issues with those that are available. The most commonly used forms requesting a benefit currently available for online filing are Form I-90, Form I-130, Form N-400, Form I-765 (in limited circumstances), Form I-539, Form I-589 and DACA and TPS applications. Our comments fall into three categories:

1. **Need for Counsel**: Applicants hire attorneys for any number of reasons, including their own lack of knowledge about the legal requirements for a filing, language barriers, a desire to have the job "done right", errors in prior *pro se* attempts and a desire to have someone more knowledgeable than themselves strategize and shepherd the case through the system. Given USCIS' generally unforgiving policy with respect to errors in a filing, which even if trivial or clearly typographical can result in a denial, many applicants choose to be represented by competent counsel to minimize the risk that just such an error may result in delay and/or denial of their application. Under the current online filing system, attorneys are unable to submit a Form G-28 with these filings and therefore only unrepresented applicants may leverage online filing. Applicants have an absolute right to be represented by an attorney of their choice and the current online filing system can impair proper access to counsel.

[44] While we are not commenting specifically on the inequity that the proposed fee disparity will create for those who may not have access to reliable internet service, we oppose this proposal on the ground that it will create an additional barrier to accessing immigration benefits for those applicants.

2. **Data Integrity**: While there is relatively little publicly available information at this point about the technological stress points in the current on-line filing system, AILA is aware of anecdotal reports from our members regarding data integrity issues with online filings, particularly as it relates to Form N-400. Members report appearing at interviews with clients only to find that the document the officer is looking at on their computer screen does not match the version the attorney knows to have been submitted. This ranges from some questions appearing not to have been answered when they were fully and accurately answered to numerical information being completely different and totally inaccurate in the adjudicator's version. One attorney reports of a client being asked by an officer why they said their client was 15'6" tall. The actual N-400 that was uploaded indicated a height of 5'6". While this example might seem trivial, it necessitates a more time-consuming and inefficient review of every item on the form, not to mention the fact that errors like this on more critical, eligibility related questions could have serious consequences. Members also report receiving RFEs for items that were submitted with the online filing but somehow never made it to the adjudicator. Because the process is relatively opaque to the user, once a person clicks "submit" there is no practical way to determine why this is happening, but if it happens with initial evidence, a denial could well follow. If the person is then precluded from re-filing, particularly due to a status expiration, USCIS will inevitably see far more *nunc pro tunc* filings which will require additional USCIS resources and which will most likely be filed on paper.

3. **Submission of Documents:** Many filings, particularly those involving fact intensive inquiries such as the Form I-589, require submission of significant amounts of documentation organized in a particular manner to ensure the adjudicator understands the relevance of each item. Uploading documents piecemeal may well work for civil status documents, but it will be far less likely to work for submission of hundreds of pages of Country Reports, Affidavits, News and Media Reports etc. that would be highly relevant in an asylum case. These documents also frequently require explanation and contextualization which may be theoretically possible but will require more, not less, time if the Adjudicator has to assemble and organize the filing instead of relying on Counsel to organize the filing in the most logical manner.

If USCIS intends to charge lower filing fees for electronic filings because it believes this yields greater efficiencies, it is our members' experience that this is only true for the simplest and most straightforward cases under the present system. Each of the issues identified above can cause additional work for the applicant, their counsel and USCIS. RFE rates will rise, as will the number of avoidable denials that will inevitably yield more Motions to Reopen and Appeals, and many cases will ultimately be re-filed as paper filings until the system is proven to work. In light of these concerns, AILA and the Council oppose on-line filing fee incentives until:

1. Attorneys can properly submit Forms G-28 on all electronic filings and be assured they will be recognized;
2. The majority of benefits applications can be filed online;
3. Documents can be uploaded in a manner that preserves the integrity of the presentation of the case, including any necessary information explaining the relevance of a document (e.g., in an Attorney Letter or Exhibit Index); and

4. The filing system can directly interface with the principal immigration forms and document management systems currently available in the market. At a minimum, we believe the system should follow a structure similar to that used by Department of Labor, which allows for maximal attorney participation in an on-line process.

Shifting the Costs of the Asylum Program Through Creation of a Surcharge on Certain Employment-Based Petitions Imposes Significant Burdens on the U.S. Economy..

AILA and the Council believe it is critical that the United States continue to honor its international obligations and decades-long commitment to welcoming refugees and asylees fleeing from persecution. A well-staffed and fully functioning process for accepting refugees and asylees demonstrates our values as a nation. At the same time, a fully functioning process for other applicants that is not cost-prohibitive for employment-based petitioners is also equally vital. USCIS needs to find ways to make adjudications cost-efficient or seek appropriations to offset costs.

As such, imposing a $600 surcharge on Form I-129 and Form I-140 petitioners is the wrong approach to funding this important national obligation. It is also an extraordinary and unparalleled overreach of authority by USCIS. As USCIS notes, "we have always spread costs of free services that USCIS provides across all other fee-paying requests in the past and we have never directly transferred the costs of one program to another."[45] While we recognize that Section 286(m) of the INA[46] provides a statutory basis to recover the costs of the asylum program by setting "adjudication and naturalization" fees at a level sufficient to recover the costs of the asylum program, never in the history of USCIS has there been a decision to impose a surcharge on a discreet group of filers to fund services to another discreet and distinct group of filers.

This distortion of the statute and the ability to pay concept, upon which USCIS primarily justifies this decision, will have a materially adverse and arguably discriminatory impact on petitioners that are already bearing the largest burden in the NPRM and that perceive USCIS as an agency

[45] NPRM at p. 453. The NPRM continues, "[t]o the extent not supported by appropriations, the cost of providing free or reduced services must be transferred to all other fee-paying applicants.''

[46] "Notwithstanding any other provisions of law, all adjudication fees as are designated by the Attorney General in regulations shall be deposited as offsetting receipts into a separate account entitled "Immigration Examinations Fee Account" in the Treasury of the United States, whether collected directly by the Attorney General or through clerks of courts: Provided, however, That all fees received by the Attorney General from applicants residing in the Virgin Islands of the United States, and in Guam, under this subsection shall be paid over to the treasury of the Virgin Islands and to the treasury of Guam: Provided further, **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, including the costs of similar services provided without charge to asylum applicants or other immigrants.** Such fees may also be set at a level that will recover any additional costs associated with the administration of the fees collected." Emphasis added.

suffering from unprecedented processing backlogs and overwhelming systemic inefficiencies. To ask these same stakeholders to incur significant additional costs for totally unrelated services without any commitment to address their specific concerns sends a message of disregard that will discourage businesses from developing or expanding operations in the United States.

The NPRM also creates a false Hobson's Choice by arguing that is necessary to impose this surcharge so that USCIS can limit fee increases on other filings. This is not, as implied, a simple, binary decision as USCIS could, in addition to requesting appropriated funds, use its net revenue from the premium processing program to subsidize much, if not all, of the $425 million estimated average cost of the asylum program.

AILA and the Council also oppose the imposition of this surcharge on the ground that it will have a potentially discriminatory impact on beneficiaries from countries with severely backlogged immigrant visa quotas. Because the proposed $600 surcharge will apply to all filings, including all "initial petitions, changes of status, and extensions of stay that use Form I– 129," USCIS must consider the disparate impact that the Asylum surcharge would have on individuals who are on the path to permanent residency but are required to maintain nonimmigrant status for decades because of the lack of immigrant visa availability. This could result in the employer of an Indian national on an H-1B visa having to pay the asylum surcharge fee multiple times more than for other foreign nationals creating further inequities for Indian foreign nationals. For example, an employer who has an Indian H-1B who began the EB-3 immigrant visa process in 2022, may have to file 6 or more H-1B petitions (based on an extremely conservative estimate of a 20-year wait for immigrant visa availability), paying $3,600 in additional fees; whereas the employer of a similarly situated H-1B from a "rest of the world" country may only have to pay the $600 fee once. To that end, AILA and the Council recommend that if USCIS maintains the Asylum surcharge, that it should only be assessed for the initial petition filed by an employer, similar to the Fraud and PL 114-113 fees.

Finally, while we are generally concerned about the disparate impact of the proposed $600 Asylum surcharge for Forms I-129 and I-140, we are also strongly opposed to the surcharge because it is not tied to the ability to pay model. If USCIS moves forward with these dramatic fee proposals, we believe the Service must take steps to reduce the impact by exempting non-profits from paying the fee and reducing the amount for other small business entities similar to how the ACWIA fee is currently assessed. These small steps would more realistically align the needs of USCIS with the financial resources of these entities. It would also more effectively implement the NPRM's stated intent to increase fairness in setting fees, truly following an "ability to pay" model as stated in the preambulatory materials.

AILA and the Council strongly support the concept of reducing barriers to immigration, but USCIS must do so in an equitable manner. We disagree with the false assumption that creating this surcharge is the only or best way to fund the asylum program while minimizing fee increases elsewhere. The NPRM's proposal to target this surcharge on a specific segment of the agency's stakeholder community is unwise and should be removed from the NPRM.

The Astronomical Increases in Fees for EB-5 Petitions are Unprecedented, Unwarranted, Premature and Predicated on Incorrect Data and Assumptions

If the justification proffered by USCIS for proposed EB-5 sector fee increases could be synthesized contextually into a single sentence, it would be "EB-5 investors should disregard the poor and deteriorating service levels, the inaccurate application of law and policy and the nonresponsive nature of the Investor Program Office and submit to the jaw-dropping fee increases because they can afford it." There is no more egregious disconnect within USCIS than the one that exists between the fees charged for EB-5 services and the quality of the service provided to EB-5 investors. While the recently enacted RIA necessitates a comprehensive review of the fees charged for EB-5 services, the fees proposed in the NPRM fail to fulfill this requirement and demonstrate a complete disregard for the needs of this important stakeholder community.

Initially, it must be noted that the idea that higher fees will lead to faster EB-5 related processing has no basis in historical or current performance in the EB-5 sector. DHS claims to need to increase fees due to "higher demand, increased processing times, and a need for more USCIS employees."[47] DHS' implication, therefore, is that with increased EB-5 related fees, processing times will fall given that the agency will have more financial resources at its disposal. While we understand the purported logic behind this assertion, it is simply unsupported by history, USCIS practice, and examination by its own Ombudsman. A review of the historical and current USCIS published processing times, as set forth by the agency's own statistics is as follows.

Process / Processing Time (mo.)	FY 16[48]	FY 17	FY 18	FY19	FY 20	FY21	FY22	FY23	Current processing times[49]
I-526	16.0	16.6	17.9	19.0	31.1	32.5	44.2	**48.8**	**58.5** (rest of world)
I-829	14.9	18.2	21.8	25.9	24.8	34.5	45.5	**49.1**	**61.5**
I-924	12.5	19.5	19.0	18.8	19.1	22.1	n/a	n/a	Blank

USCIS processing times with regard to EB-5 related filings have consistently increased year-over-year. DHS' last fee adjustments regarding EB-5 occurred on December 22, 2016. In the Final Rule (the "2016 Rule")[50] implementing those fee changes, DHS raised Form I-526 filing fees from $1500 to $3675 (245% increase), Form I-924 from $6,230 to $17,795 (286% increase) and Form I-924A from $0 to $3035. Form I-829 filing fees did not change from its base level of $3750.[51]

[47] NPRM at 402.
[48] Source for fiscal years: https://egov.uscis.gov/processing-times/historic-pt (median processing times published by USCIS).
[49] Data in this column taken from https://egov.uscis.gov/processing-times/ as of Feb. 22, 2023.
[50] 81 FR 73292 (Oct. 24, 2016)
[51] Id at 73294-95.

In response to comments, DHS acknowledged that "[s]everal commenters objected to the proposed increases, noting that these are some of the highest proposed fee increases, while the related benefit requests have some of the longest processing times."[52] DHS also acknowledged that lengthy Form I-526 processing times can cause severe issues for immigrant investors.[53]

In justifying the 245% Form I-526 filing fee increase, DHS explained[54] the following:

> USCIS has taken multiple steps towards reducing Form I–526 processing times. As previously mentioned, USCIS is in the process of hiring and training additional adjudications officers, economists, and support staff for these form types. Additionally, USCIS is working to revise the EB–5 regulations and is preparing revisions to the EB–5 Policy Manual. USCIS is also improving the forms and form instructions for the EB– 5 program. The EB–5 program fee increases will further these agency efforts with the goal of improving operational efficiencies while enhancing predictability and transparency in the adjudication process. USCIS understands that long delays in Form I– 526 adjudications negatively impact both immigrant investors and the projects awaiting the release of their investment funds from escrow. USCIS strives to process Form I–526 filings as soon as practicable.

The fee increases went into effect on December 22, 2016. Notwithstanding these additional fees, the above-mentioned chart demonstrates **marked *increases* in processing times** for both Form I-526 and Form I-924, despite having additional fees, while at the same time processing volume for these forms showed ***decreasing* demand** upon USCIS adjudicators.[55] The processing time statistics above demonstrate that Form I-526 FY23 median processing times are 305% longer compared to FY16. Median form I-924 processing times rose by 177% from FY16 to FY21. An increase in filing fees did not solve the problem of slow USCIS processing in 2016 and there is no reason to believe it will do so in 2023.

These statistics actually suggest that higher fees lead to slower processing. This is not an unfounded idea -- it was advanced nearly two decades ago by the USCIS Ombudsman. In his June 2006 report to Congress, former Ombudsman Prakash Khatri warned Congress that, because of the statutory requirement that USCIS be self-funded, the agency "often makes decisions that compromise operational efficiency to ensure revenue flow[.]"[56]

He explained his rationale[57] as follows:

> Currently, USCIS calculates its budget by multiplying current fees by projected application volume and then conforms the budget to those numbers. Thus, USCIS

[52] Id. at 73309.
[53] Id. at 73310.
[54] Id. at p. 73311.

[55] For example, the supporting documentation to the NPRM documents that the volume of Form I-526/E receipts fell from 12, 165 in FY 2017 to 4,378 in FY 2020. Immigration Examinations Fee Account, Fee Review Supporting Documentation at p. 58.
[56] Citizenship and Immigration Services Ombudsman, Annual Report to Congress June 2006, available at https://trac.syr.edu/immigration/library/P857.pdf
[57] Id. at 26 (emphasis added).

> develops the budget mostly without consideration for anticipated needs or costs, but rather from projected revenues. As USCIS backlogs increased and processing slowed over the past few years, the agency incorporated associated revenue projections into its annual budget calculation, *i.e.*, anticipated EAD applications from green card applicants and premium processing fees from nonimmigrant worker applications (Form I-129).
>
> Furthermore, USCIS must provide Congress with an estimate of the agency's revenue needs for a new fiscal year and Congress then assigns a cap over which USCIS cannot spend. If USCIS has an operational need to expend funds in excess of the cap, the agency must ask Congress' permission through a lengthy and complex "reprogramming" process. Moreover, as a fee-funded agency, USCIS receives appropriated money only for specified projects, as it did for the backlog reduction effort.

In 2007, the Ombudsman made a similar critique, arguing that "The lack of an adequate funding source and requirements to provide for unfunded mandates force USCIS leaders to make management decisions that can be inconsistent with efficiency in processing immigration benefits."[58] In this context, it does make sense that USCIS spends more time adjudicating EB-5 related benefit requests than ever before *because it must justify receiving higher fees on each related application*. Turning to the NPRM, the proposed fee increases are thus likely to cause additional adjudication delays. This is not conjecture – it is supported by USCIS' own data and statements.

For example, according to an August 18, 2022 affidavit signed by current IPO chief Elissa Emmel, a mere 26 employees are tasked to review and adjudicate Form I-526 petitions, although four of them split time between Form I-526 and Form I-941 applications.[59] This is down from 67 employees in 2018 and 56 employees in 2019. There is no clear explanation as to why the IPO has reduced staffing despite the 2016 fee increases and the current "worst-in-class" service.

Furthermore, USCIS claimed that, between the periods of July 1, 2021 through March 14, 2022, following the enactment of the RIA, the agency was unable to process any regional center related Forms I-526. In an April 29, 2022 USCIS listening session, IPO Chief Emmel stated that during the so-called lapse of the EB-5 regional center program, the office "shifted our resources to focus on benefit types that remained authorized by statute."[60] Indeed, with thousands of pending Forms I-526 sitting idly without adjudication, one would assume then that Form I-829 productivity would increase and processing times fall. However, the above chart and USCIS data reflects that processing times increased and productivity apparently did not increase in any meaningful way.[61]

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[58] Citizenship and Immigration Services Ombudsman, Annual Report to Congress June 2006, available at https://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf.

[59] See "Declaration of Alissa Emmel," Jain v. Renaud, 5:21-cv-03115-VKD, ECF Doc. No 56-1, (N.D. Cal Aug. 18, 2022).

[60] https://www.uscis.gov/sites/default/files/document/outreach-engagements/EB-5_Reform_and_Integrity_Act_of_2022_Listening_Session.pdf.

[61] "I-829 Petition Data by quarter" available at https://blog.lucidtext.com/processing-data/#jp-carousel-14938.

There is, therefore, no reasonable basis to believe the basic premise of DHS' proposed fee increases – that more financial resources available to USCIS will lead to increased efficiency and processing.

USCIS' Completion Rates ("touch time") for EB-5 Related Processes are Based on Questionable Data and are an Inaccurate Measure for Proposing Fees

AILA and the Council are concerned with the data purported to establish completion rates, or what is termed as "touch time," with respect to the EB-5 related processes in the NPRM. By way of background, we highlight the differences in completion rates between the 2016 Rule and the NPRM as stated below:

Process	I-526	I-829	I-924 / I-956
2016 NPRM[62]	6.5	5.5	40
2023 NPRM[63]	20.69	15.86	108.5
Percent increase	318%	288%	271%

While each of these processes has purportedly increased approximately three-fold in "touch time," it is far from clear how DHS came to these conclusions. Our concerns are as follows:

1. In response to litigation, a senior USCIS official has admitted under oath that the actual time an adjudicator takes to adjudicate a Form I-526 is not tracked.[64] Specifically, IPO chief of staff Jennifer Duncan indicated that Form I-526 adjudicators do not track adjudication hours and such tracking does not exist in any USCIS system. Instead, the "touch time" is made on "assumed metrics". The exact mechanizations of this "assumed metrics" are at best unclear. This admission calls into question the accuracy of not only the purported 20.69 hour figure cited above but also the completion rate figures for Forms I-829 and Forms I-924/I-956;

2. Even assuming that such data exists, it is incredibly difficult to rationalize the large increases in Form I-526 and Form I-829 completion rates from FY17 to FY23 given that there have been no substantive changes in EB-5 laws during that time. While it is true that the RIA places additional burdens on investors submitting these forms, the RIA "grandfathering" provisions protect pre-RIA investors from being subject to these requirements. Given that the laws are essentially unchanged with respect to these adjudications, there is no basis to conclude that a pre-RIA petition being adjudicated today takes significantly longer – much less 318% longer – than a petition adjudicated in mid-

[62] 81 FR 26925.
[63] NPRM at 448-449.
[64] See Nadhar v. Renaud, ECF Doc. No. 39-1 CV-21-00275-PHX-DLR (June 8, 2021)

2016. If anything, the "assumed metrics" discussed previously are driving these higher numbers and are more indicative of lower adjudicator productivity rather than increased complexity.[65]

3. USCIS has, to date, failed to provide any statistics on the adjudication of Form I-956 and it is unclear how many of these applications have been adjudicated to justify a completion rate of *over 100 hours*. While the RIA does place significant additional burdens upon Regional Centers, we question whether the agency has sufficient experience adjudicating these applications to accurately measure the "touch time," given their relatively new existence. Furthermore, while the RIA is more complex than the previous law, Forms I-956 are not nearly three times as complicated to complete or review as compared to Form I-924. As such, the completion rate for Form I-956 would appear unrelated to any factual or statistical data and we believe the agency must provide a more detailed justification of the existing completion rate figures or provide other information to corroborate its reported completion rates.

The NPRM's attempt to justify the exorbitant EB-5 fee increases based on its reported completion rates masks a patent lack of statistical information on adjudication times. There is also no process-based justification for the dramatic increase in listed completion rates over the past five years. Accordingly, AILA and the Council believe that USCIS should fulfill its RIA-based statutory mandate and conduct a comprehensive study of its EB-5 fee structure before implementing any new fees in this sector.

USCIS must conduct the RIA's statutorily required fee study before proposing increased fees for EB-5 services.

Section 6(b) of the RIA provides that,

> Notwithstanding section 286(m) of the Immigration and Nationality Act (8 U.S.C. 1356(m)), and except as provided under subsection (c), the Director, not later than 60 days after the completion of the study under subsection (a), shall set fees for services provided under sections 203(b)(5) and 216A of such Act (8 U.S.C. 1153(b)(5) and 1186b) at a level sufficient to ensure the full recovery **only** of the costs of providing such services….

Emphasis added.

Section 6(c) of the RIA further provides,

> Fees in excess of the fee levels described in subsection (b) may be charged only—

[65] To the extent that post-RIA investors may be inflating the "touch time", such adjudications should be nominal or nonexistent. In litigation, USCIS has maintained that Form I-526 adjudications are generally handled in a first-in, first-out approach and is following the Visa Availability Approach in segregating cases. Accordingly, if this is true, USCIS should have little to no current experience adjudicating post-RIA petitions (i.e. Form I-526E/I-526).

(1) in an amount that is **equal to the amount paid by all other classes of fee-paying applicants** for immigration-related benefits, to contribute to the coverage or reduction of the costs of processing or adjudicating classes of immigration benefit applications that Congress, or the Secretary of Homeland Security in the case of asylum applications, has authorized to be processed or adjudicated at no cost or at a reduced cost to the applicant; and

(2) in an amount that is not greater than 1 percent of the fee for filing a petition under section 203(b)(5) of the Immigration and Nationality Act, to make improvements to the information technology systems used by the Secretary of Homeland Security to process, adjudicate, and archive applications and petitions under such section, including the conversion to electronic format of documents filed by petitioners and applicants for benefits under such section.

Emphasis added.

Although USCIS has yet to comply with the statutorily mandated one year from enactment deadline for completing this fee study, it has noted in the FAQs to the NPRM that it is still "gathering the information necessary to evaluate the EB-5 fees to meet the additional fee guidelines and processing time requirements provided in the [RIA]." Despite this assertion, there is no evidence of the NPRM's adherence to the requirements of Section 6 of the RIA.[66] The NPRM effectively acknowledges that the proposed fees are not "equal to the amount paid by all other classes of fee-paying applicants for immigration-related benefits" to cover the costs of services provided at reduced or no cost.[67] Nor is there any indication that the proposed fees have been calculated to satisfy the processing time requirements listed in the statute.[68] Moreover, while the statute does not preclude DHS from raising fees in the interim, this is unwise. Section 6(f) of the RIA[69] conveys a clear sense of Congress that EB-5 filing fees should not be modified before the fee study is completed and corresponding regulations are promulgated.

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[66] ["D]espite the changes in the law and program, DHS has proposed fees in this rule based on the currently projected staffing needs to meet the adjudicative and administrative burden of the Immigrant Investor Program Office pending the fee study required by section 106(a) of the EB–5 Reform and Integrity Act of 2022." NPRM at P. 557.

[67] NPRM at p. 510.

[68] For example, in Section 6(b)(4) of the RIA, Congress instructed USCIS to set the Form I-526 fee to cover "the cost of completing adjudications, on average, not later than . . . 240 days after receiving a petition." As noted previously, the USCIS processing time for Forms I-526 is currently 58.6 months. The NPRM contains no information on how this backlog will be reduced, by when it will be reduced to reach the statutory processing target or how the requested fees will be sufficient to accomplish this goal.

[69] (f) RULE OF CONSTRUCTION REGARDING MODIFICATION OF FEES. Nothing in this section may be construed to require any modification of fees before the completion of—

(1) the fee study described in subsection (a); or

USCIS has acknowledged that it is collecting information necessary to conduct the statutorily mandated fee study. The more appropriate and legally compliant method to adjust EB-5 program filing fees is to publish a separate notice of proposed rulemaking after issuance of the fee study so that all interested parties may review the USCIS data and comment upon its adherence to the requirements of the RIA. As such, the EB-5 fees proposed in this NPRM are premature and should be deleted from the final rule.

The NPRM asks EB-5 related applicants to shoulder a disproportionate burden at a time when the EB-5 program suffers from heavy reputational damage.

In the NPRM, DHS partially justifies its sharp increases in EB-5 fees because of an "ability-to-pay principle".[70] DHS alleges that, in light of the capital required for EB-5 immigration, the proposed USCIS fees "are an insignificant amount." we find this rationale to be troubling for several reasons:

1. First and foremost, the presumed perception that all EB-5 investors are independently wealthy multi-millionaires is both inaccurate and offensive. Many are backlogged H-1B nonimmigrants who have mortgaged or liquidated nearly all of their assets in the U.S. to be able to fund their path out of the prohibitively long EB-2 and EB-3 queues. Other EB-5 applicants are students, given the requisite EB-5 capital from their parents. Many others have simply leveraged every penny to their name in order to find a better path to the United States. Painting their circumstances with such a broad brush is inappropriate.

2. Secondly, it is important to note that the EB-5 process under the current fee structure can itself be prohibitively costlier than necessary because of USCIS' processing inefficiencies. Generally speaking, the EB-5 capital must remain at risk and sustained in the new commercial enterprise throughout the immigration process.[71] Because of lengthy processing times, the EB-5 immigration process is longer now than it ever has been. This leads to extremely high opportunity costs as most EB-5 investors opt for low returns on their investment in exchange for the relatively high chances of (someday) receiving lawful permanent residency. However, with high inflation and years-long processing times, USCIS has created indirect costs that have made this program much more expensive than it was ever intended to be.

3. The astronomical fee increases proposed in the NPRM will only further harm the EB-5 program's already damaged reputation in the international investor market. It is important to review these proposed filing fee hikes amidst the current historical EB-5 context. As discussed above, USCIS took the position that Regional Center-related Forms I-526 and adjustments of status were required to be paused from July 1, 2021 through March 14, 2022

(2) regulations promulgated by the Secretary of Homeland Security, in accordance with subchapter II of chapter 5 and chapter 7 of title 5, United States Code (commonly known as the "Administrative Procedure Act"), **to carry out subsections (b) and (c).** Emphasis added.

[70] NPRM at 510.
[71] See 8 CFR 216.6.

upon enactment of the RIA. During this time, many investors and their families were filled with anxiety as to whether their benefit requests would be denied. Industry participation sharply fell and competing citizenship/residence by investment programs flourished. Following resumption of adjudications post-RIA, IPO productivity lagged and continues to lag. Mandamus lawsuits have flourished while USCIS' lawyers argue that 40+ month processing times are reasonable.[72] The EB-5 program has not yet recovered from this reputational damage. If promulgated, the NPRM's proposed EB-5 fees will only further exacerbate this serious problem. More significantly, the proposed fee increases may have the unintended effect of actually decreasing USCIS revenue, as rational investors abandon the U.S. and seek out less expensive and less hostile environments.

In summary, by increasing filing fees without any commitment to improving the speed and qualify of adjudications, USCIS risks reputational damage that may depress demand further, making the program ultimately unsustainable. Even worse, it risks being seen by new investors as a scam created to collect funds under false pretenses to fund other unrelated purposes.

Inasmuch as the median processing time for EB-5 petitions are among the highest of all USCIS forms, raising EB-5 filing fees without a specific and detailed commitment to more efficient processing is precisely the worst possible decision. DHS offers no promises, no expansion of premium processing, nothing in the NPRM to ensure EB-5 related processing issues will improve. For the reasons set forth above, AILA and the Council oppose the proposed EB-5 fee increases and believes they must be deferred until: a more factually accurate cost analysis is conducted pursuant to the statutory requirements of the RIA; and a specific and credible process improvement plan is developed for adjudication of all EB-5 related benefit requests.

The NPRMs Proposed Fee Increases for Applications for Adjustment of Status, Advance Parole and Employment Authorization and the Decoupling of those Applications for Fee Purposes will Create Insurmountable Barriers to Accessing Immigration Benefits.

Despite the fact that DHS has been "directed by the President to reduce barriers and promote accessibility to the Immigration benefits that it all administers," the NPRM will increase standard filing fees for adjustment of status applicants by 130%, effectively erecting an impenetrable financial wall that will delay or deter many applicants from applying for lawful permanent residence. This fee will also impede access to citizenship as applicants may postpone filing for lawful permanent residence which will necessarily delay eligibility for naturalization. The NPRM's proposed fee increases for adjustment of status applications, along with the unbundling of travel and employment authorization fees, will have a devastating financial impact upon many applicants who will lack the ability to pay the new fees. As a result, access to permanent residence and citizenship will be limited only to those middle and upper class families wealthy enough to pay a small fortune for issuance of their permanent resident cards.

[72] See, e.g., Bega v. Jaddou, Civil Action No. 22-02171 (BAH), 2022 WL 17403123, (D.D.C. Dec. 2, 2022).

Currently, the filing fee for an application for Adjustment of Status (Form I-485) is $1,225.00 for those over 14 years of age and $750 for those under 14 years of age. This filing fee includes Form I-485, Form I-765 Application for Employment Authorization Document (EAD) and Form I-131 Application for Advance Parole (AP). If a family of two adults and two children (one over 14 and one under 14) were to file their applications for adjustment of status at the present time, they would have to pay $3675 (3 x $1225) + $750. = $4425.00 in filing fees.[73] Even now, this can be a significant burden for a family in which only one parent is authorized to work, such as someone on religious worker status and working for a nonprofit.

The NPRM's proposed fee increase will more than double this amount.

For an applicant under 14 years old, the proposed fee would be $1540 ($790 increase). For an applicant over 14 years of age, the proposed fee for Form I-485, filed with both Form I-765, and Form I-131, would be $2820.00 ($1,595 increase). Thus, in the same scenario as above, the USCIS filing fees for a family of four, with three applicants over 14 years of age ($8460.00) and one child under 14 ($1,540.00) would total **$10,000.00**. When associated costs, such as legal fees and medical exam fees, are factored into this analysis, it is quickly apparent that becoming a lawful permanent resident would no longer be a realistic option for many.

In addition, the decoupling of the processing fees for Forms I-765 and I-131 from Form I-485 exacerbates the existing financial and emotional burden of the adjustment of status process on families. This is due to the fact that actual processing times[74]for most applications for adjustment of status continue to lengthen. AILA members report that Form I-485 applications are taking the following time frames to be processed:

- Denver – up to 25 months
- Los Angeles – up to 28.5 months
- Dallas – up to 32 months
- New York City – up to 35 months
- Brooklyn, NY – up to 54 months

Based upon actual processing times, many applicants for adjustment of status may have to file for multiple work permits and advance parole applications and the NPRM will thus add an additional $630.00 per year for advance parole and an additional $650 every two years for the EAD, per person.[75] Not only is this a significant financial burden for many applicants, but also there is the

[73] That does not include the costs of a medical exam which can be between $300-$500 per person, and this is not usually covered by health insurance.

[74] Posted processing times only reflect 80% estimate of total processing times Based on member experiences, actual processing times for applications can be significantly longer.

[75] While it is possible that a small segment of adjustment of status applicants who do not require separate employment and travel authorization (e.g., H-1B nonimmigrants) may pay less in filing fees under the proposed rule, the vast majority of applicants will pay substantially more.

added concern of paying for a benefit that, due to excessive processing times, is not issued before permanent residence is granted. This could result in applicants paying for a benefit they never receive.

In this context, decoupling of fees directly penalizes applicants for USCIS' lengthy processing delays and, while it may not be the intent of USCIS, decoupling creates the impression that revenue rather than efficiency is the end goal as more income is generated for the agency the longer an adjustment of status application is pending. The detrimental impact on families of the NPRM's proposed changes to adjustment of status filing fees is contrary to the goal of reducing barriers to immigration benefits and, for the reasons set forth above, we oppose the inclusion of these changes in the final rule.

USCIS Filing Fee Revenue Should Be Used Solely for Adjudications and Not Diverted to Pay for Investigation Functions More Appropriate for ICE and CBP

The Homeland Security Act of 2002 (HSA) limits the legal authority of USCIS to prescribed immigration-related functions.[76] Under the HSA, USCIS may only engage in the adjudication of requests for immigration benefits such as work and travel permission, lawful permanent residency and naturalization,[77] whereas the HSA authorizes other DHS agencies, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP), to engage in immigration-related investigation and enforcement activities.[78]In 2005, Congress authorized USCIS to establish the Fraud Detection and Nationals Security Directorate (FDNS) to work with ICE in developing anti-fraud initiatives and conducting law enforcement/background checks on immigration benefit applicants. While Congress gave USCIS limited investigative responsibilities, since that time the mission of FDNS has continued to expand, without corresponding Congressional authority.

[76] For a more thorough discussion of the legal basis for excluding investigation and enforcement activities from USCIS, See, Paparelli, USCIS Fraud Detection and National Security Directorate, Less Legitimate Than Inspector Clouseau, Without the Savoir Faire, AILA Law Journal, April 2019, Vol. 1, No. 1. pp. 57-69.

[77] HSA §451(b) ("Transfer of Functions from [INS] Commissioner") "transferred from the [INS] Commissioner to the Director of the Bureau of Citizenship and Immigration Services [now known as USCIS] the following functions . . . "(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 the [INS] immediately before the effective date specified in [the HSA]."

[78] HSA, §441, created two new DHS law enforcement agencies now known as U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP), and transferred to them the former INS authority over (1) The Border Patrol program. "(2) The detention and removal program. "(3) The intelligence program. "(4) **The investigations program**. "(5) The inspections program." (Emphasis added.)

Because of this expansion, the statutory revenue FDNS receives via the H-1B visa program account and the fraud detection account are insufficient to cover all FDNS costs. From FY 2016/2017 to FY 2021, the FDNS payroll increased 73.6%[79] and USCIS devoted an increasing share of its IEFA revenue to fund an escalating array of investigative activities more appropriate for ICE or CBP, literally at the expense of its core adjudication functions. AILA and the Council believe that the better approach, and the approach more consistent with the constraints imposed by the HSA, is to relocate the expanded investigations activities currently performed by USCIS to ICE and/or CBP and to reallocate the USCIS IEFA funds used by FDNS to adjudications activities more appropriate for its core statutory mission. In the context of this NPRM, this action would likely significantly decrease completion rates for most, if not all, form types and allow for an overall reduction of the proposed fee increases.

Conclusion

We appreciate the opportunity to comment on this NPRM and look forward to a continuing dialogue with DHS on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[79] NPRM at p. 428.