

Congress of the United States
Washington, DC 20510

March 13, 2023

Samantha Deshommes, Chief
Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

**Re: DHS Docket No. USCIS-2021-0010, RIN: 1615-AC68, Comments in
Response to Notice of Proposed Rulemaking: U.S. Citizenship and Immigration
Services Fee Schedule and Changes to Certain Other Immigration Benefit Request
Requirements**

Dear Ms. Deshommes:

We submit this comment regarding the Department of Homeland Security (DHS) proposed rule, “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” published in the Federal Register on January 4, 2023.

Because U.S. Citizenship and Immigration Services (USCIS) is primarily funded by fees, the biennial review process provides an important opportunity for Congress to view an accounting of costs and operations using Immigration Examinations Fee Account (IEFA) funds.¹ As Chairs of the Senate Committee on the Judiciary and Subcommittee on Immigration, Citizenship, & Border Safety in the Senate and Ranking Members of the House Committee on the Judiciary and Subcommittee on Immigration Integrity, Security, and Enforcement, we have an interest in ensuring that USCIS has the necessary resources to efficiently and fairly adjudicate immigration benefits applications and sets fees in a manner that ensures equitable access to our immigration system.

Congress established the IEFA in 1988 to allow the then-Immigration and Naturalization Service (INS) to retain and use such fees to cover the costs of providing services, rather than remitting fees to the Treasury, as is the case with most other federal fees.² Sections 286(m) and 286(n) of the Immigration and Nationality Act (INA), which establish the IEFA, generally authorize USCIS to set fees “at a level that will ensure the recovery of the full costs of providing [adjudication and naturalization services],” as well as “any costs associated with the

¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-70, IMMIGRATION APPLICATION FEES: COSTING METHODOLOGY IMPROVEMENTS WOULD PROVIDE MORE RELIABLE BASIS FOR SETTING FEES 7-9 (2009)
<https://www.gao.gov/products/gao-09-70>.

² Pub. L. No. 100-459, §209 (Oct. 1, 1988) (codified as amended in sections 286(m) and (n) of the Immigration and Nationality Act (INA), 8 U.S.C. 1356(m) and (n)); *see also* Pub. L. No. 101-515, 210(d)(1) and (2) (Nov. 5, 1990) (further amending INA §§ 286(m) and (n), 8 U.S.C. §§ 1356(m) and (n)).

administration of the fees collected.”³ In establishing the IEFA, Congress expected that USCIS would “identify . . . to the Congress collections to and expenses from the Account.”⁴ Under the Chief Financial Officers Act, USCIS must review—on a biennial basis—fees collected for the provision of agency services and recommend changes to “reflect costs incurred by it in providing those services.”⁵

According to the proposed rule, USCIS’s recent comprehensive biennial fee review determined that its costs have increased considerably since the previous fee adjustment due to expanded humanitarian programs, higher demand for USCIS’s services, increased processing times, and a need for more USCIS employees. We write to offer views on the proposed rule as well as recommendations in furtherance of IEFA’s goals.

A. Fee Exemptions for Humanitarian Immigration Benefits

Congress has long recognized that vulnerable newcomers such as refugees often face initial challenges in achieving economic self-sufficiency in the United States. As then-Senator Ted Kennedy noted in 1979, “American ideals” and “fundamental American values” demand a compassionate immigration system.⁶ We were thus pleased to see that the proposed rule includes fee exemptions for work authorization and travel document applications for persons admitted or paroled as refugees. The proposal also rightly includes expanded fee exemptions for certain humanitarian benefits, including for all forms associated with applications and petitions for victims of trafficking, crimes, domestic violence, and orphaned or abandoned children.⁷ Congress has long recognized the importance of giving survivors of human trafficking, serious crimes, and child abuse, neglect, and abandonment an opportunity to cooperate with law enforcement and retain immigration status in the United States.

With the enactment of the Violence Against Women Act (VAWA) in 1994, for example, Congress provided noncitizens who have been abused by a U.S. citizen or lawful permanent resident (LPR) relative with the ability to independently petition for immigrant classification without the abuser’s knowledge, which is known as the VAWA self-petition process.⁸ The Victims of Violence Protection Act of 2000 created the T nonimmigrant status for victims of severe forms of trafficking in persons as well as the U nonimmigrant status for victims of serious crimes who have suffered mental or physical abuse and are helpful to law enforcement in those crimes’ investigation or prosecution.⁹ These immigration protections provide a path to safety, stability, and integration. We strongly support the inclusion of expanded fee exemptions for these populations in the proposed rulemaking, and we urge you to retain these exemptions in the final rule.

³ INA § 286(m), 8 U.S.C. § 1356(m).

⁴ H.R. REPT. NO. 100-979 at 38 (1988).

⁵ 31 U.S.C. § 902(a)(8).

⁶ 125 Cong. Rec. 23232 (1979) (floor Statement of Sen. Edward Kennedy introducing Refugee Act in Senate).

⁷ U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 88 Fed. Reg. 402, 460 (Mar. 6, 2023).

⁸ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (1994).

⁹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (2000).

B. Supporting Aspiring Citizens

DHS's proposed fee increase of \$35 on Form N-400, Application for Naturalization, is intended to be a level below what is required to recover the estimated full cost of providing naturalization services. This approach is consistent with our national interest. Becoming a citizen is the ultimate representation of an individual's commitment to our nation, and naturalized citizens demonstrate this commitment through high levels of civic participation and patriotism.¹⁰ In addition to making our country stronger and more dynamic, studies show that immigrants earn more in wages *after* naturalization and thus contribute to economic growth through increased consumer spending.¹¹

We are pleased that immigrant naturalizations are on the rise after dropping during the height of the COVID-19 pandemic.¹² Currently, an estimated 9.2 million LPRs are eligible to become naturalized U.S. citizens. This population increased by about 37,000 between 2021 and 2022.¹³ We strongly support the proposed rule's minimal fee increase for Form N-400 and efforts by USCIS to remove unnecessary barriers and bureaucracy in the naturalization process consistent with Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans.

C. Reduce Fees for American Family Reunification

Form I-601A allows certain close relatives of U.S. citizens and LPRs to apply for a provisional unlawful presence waiver to return to the United States and reunite with their families quickly.¹⁴ This process was developed to shorten the time that families are separated while a relative obtains a visa to become a lawful permanent resident of the United States. Consistent with current law, these applicants must demonstrate that their U.S. citizen or LPR relative would experience extreme hardship if they are refused admission to the United States. The proposed rule would increase the fee for Form I-601A from its current fee of \$630 to \$1,105, an increase of approximately 75 percent.¹⁵

¹⁰ Alex Nowrasteh & Andrew C. Forrester, *Immigrants Recognize American Greatness: Immigrants and Their Descendants Are Patriotic and Trust America's Governing Institutions*, CATO INST. (Feb. 4, 2019), <https://www.cato.org/publications/immigration-research-policy-brief/immigrants-recognize-american-greatness-immigrants>.

¹¹ Ran Abramitzky & Leah Boustan, *Just Like the Children of European Immigrants 100 Years Ago, the Kids of Recent Immigrants are Moving up the Ladder, Too*, PRINCETON U. DEP'T ECON. (Oct. 10, 2019), <https://economics.princeton.edu/working-papers/intergenerational-mobility-of-immigrants-over-two-centuries>.

¹² Jeffrey S. Passel & D'Vera Cohn, *After Declining Early in the COVID-19 Outbreak, Immigrant Naturalizations in the U.S. are Rising Again*, PEW RSCH. CTR. (Dec. 1, 2022), <https://www.pewresearch.org/fact-tank/2022/12/01/after-declining-early-in-the-covid-19-outbreak-immigrant-naturalizations-in-the-u-s-are-rising-again>.

¹³ Bryan Baker & Sarah Miller, *Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2022*, DEP'T HOMELAND SEC. OFF. IMMIGR. STATS. (Sep. 2022), https://www.dhs.gov/sites/default/files/2022-10/2022_0920_plyc lawful permanent resident population estimate 2022_0.pdf.

¹⁴ *Provision of Unlawful Presence Waivers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 5, 2018), <https://www.uscis.gov/family/family-of-us-citizens/provisional-unlawful-presence-waivers>.

¹⁵ 88 Fed. Reg. at 451.

This steep fee increase will have a detrimental impact on many American families. Close relatives of U.S. citizens and LPRs have a pathway to citizenship.¹⁶ However, many must wait for years to obtain a green card as result of laws passed in 1996 which prevent them from returning to the United States for three or ten years, if they have been unlawfully present for more than six months or one year, respectively.¹⁷ While designed to reduce unlawful migration, it is clear after nearly thirty years that these provisions did not have their intended effect. Since the passage of these laws, the number of undocumented immigrants in the United States has sharply risen, as those with American family members fear leaving the United States and being separated from their families.¹⁸ Today, roughly 10.6 million U.S. citizens live with an undocumented immigrant, and an estimated 1.7 million U.S. citizens have a spouse who is undocumented. More than half of these couples have been married for ten years or longer.¹⁹

We recognize that legislative reforms are long overdue. Many families with at least one undocumented member (mixed-status families) face a lack of economic opportunity, and, as a result, lower income thresholds than families with a secure immigration status. A recent study found that adults in mixed-status families were more likely than adults in other families to report material hardship in 2021.²⁰ The economic precarity of living in such families may have negative repercussions on children’s health and well-being, and their education and economic prospects as adults.²¹ In the absence of legislation, the I-601A process is essential to allowing mixed-status families who face extreme hardship to remain together. Although an adjustment in fee may be appropriate, we urge DHS to reconsider and significantly reduce the proposed 75 percent increase in the fee for this application.

D. USCIS Should Incorporate Backlog Reducing and Premium Processing Into its Fee Schedule

Congress has expressed its sense that the processing of most immigration benefit applications “should be completed not later than 180 days after the initial filing of the application” and that petitions for nonimmigrant visas “should be processed not later than 30 days after the filing of the petition.”²² Unfortunately, USCIS is currently experiencing record-high processing delays and case backlogs. Congress has repeatedly expressed serious concerns with current backlogs and processing delays at USCIS. Members of both the House and Senate have sent bipartisan letters of inquiry to USCIS on the matter.²³ Although case backlogs and

¹⁶ See, 8 U.S.C. § 1151; INA § 201.

¹⁷ 8 U.S.C. § 1182(a)(9), INA § 212(a)(9); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Pub. L. No. 104-208 (2007).

¹⁸ *Explainer: The Need to Reform or End the 3- and 10-year Bars*, NAT’L IMMIGR. F. (Nov. 5, 2021), <https://immigrationforum.org/article/explainer-the-need-to-reform-or-end-the-3-and-10-year-bars>.

¹⁹ *Immigration Reform can keep millions of mixed-status families together*, FWD.US, (Sept. 9, 2021), <https://www.fwd.us/news/mixed-status-families/> <https://www.fwd.us/news/mixed-status-families>.

²⁰ Diana Guespe, Paola Echave & Dulce Gonzalez, *Mixed Status Families Disproportionately Experienced Material Hardships in 2021*, URB. INST., (Feb. 2023), <https://www.urban.org/sites/default/files/2023-02/MixedStatus%20Immigrant%20Families%20Disproportionately%20Experienced%20Material%20Hardships%20in%202021.pdf>.

²¹ *Id.*

²² See American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106–313, § 202 (2000).

²³ See Bipartisan Letter to USCIS from 32 Senators (May 23, 2019)

https://www.uscis.gov/sites/default/files/files/nativedocuments/Processing_Delays_-_Senator_Tillis.pdf, and Letter

processing delays have ebbed and flowed since the creation of USCIS, its backlog of pending cases has grown more than fourfold from Fiscal Year (FY) 2010 to FY 2022—from two million in the second quarter of 2010 to 8.8 million in the third quarter of 2022.²⁴ We are disappointed that the proposed rule does not appear to include a dedicated strategy for resourcing the reduction of USCIS’s unprecedented backlogs, other than the option to use premium processing funds for such a reduction.

We recognize that USCIS faces challenges in rebuilding the agency in the aftermath of the prior administration’s efforts to reduce processing infrastructure and that costs have increased since DHS last adjusted its fee schedule in 2016. In recognition of these challenges, Congress appropriated \$389.5 million to USCIS in FY 2022 for application processing, backlog reduction, and the refugee program, along with E-Verify.²⁵ Similarly, in FY 2023, Congress appropriated \$245 million to USCIS for operations and support.²⁶

The proposed rule does not appear to account for the FY 2023 appropriations, but states that of the FY 2022 appropriated amount, USCIS will use \$275 million to reduce its backlog and delays; support refugee admissions up to a ceiling of 125,000; and invest in enterprise infrastructure improvements, such as case file management and video interviewing capabilities.²⁷ Appropriated funding will be focused on reducing current backlogs, and, as a result, the FY 2022-2023 fee review budget that forms the basis for the changes proposed in this rule *excludes all appropriated funding*. According to the proposed rule, if USCIS does not increase revenue to meet the costs of timely adjudicating all incoming receipts, USCIS will not be able to keep up with demand and new backlogs will accumulate.²⁸ For at least the last decade, however, the agency has not had the capacity to quickly address backlogs, and processing times continue to increase for nearly every benefit category. It is therefore essential that USCIS not rely solely on yearly appropriations for backlog reduction and incorporate improved processing times and backlog reduction into the fee schedule.

The Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman) recommended several mechanisms to achieve these goals in a June 2022 report, including requesting annual appropriations or resuming authority to adjust fees annually based on staffing requirements.²⁹ Similarly, in September 2021, the Government Accountability Office (GAO) published a report with findings and recommendations for USCIS to identify the resources

to USCIS from 86 Members of Congress (Apr. 5, 2019)

https://www.uscis.gov/sites/default/files/files/nativedocuments/Processing_Delays_-_Representative_Garcia.pdf.

²⁴ David J. Bier, *USCIS’S Backlogs Hit 8.8 Million*, CATO INST., fig.2 (Nov. 7, 2022, 1:36 PM),

<https://www.cato.org/blog/usciss-immigration-backlogs-hit-88-million>; U.S. Citizenship and Immigration Services, *Number of Service-wide Forms By Quarter*, 2007–2022.

²⁵ Consolidated Appropriations Act, 2022, Pub. L. 117-103 (Mar. 15, 2022).

²⁶ Consolidated Appropriations Act, 2023, Pub. L. 117-328 (Dec. 20, 2022).

²⁷ 88 Fed. Reg. at 415; Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. No. 117-43; Consolidated Appropriations Act, 2022, Title IV, Pub. L. No. 117-103 (2022).

²⁸ 88 Fed. Reg. at 428, FN 68.

²⁹ *CIS Ombudsman Recommendation: Addressing the Challenges of the Current USCIS Fee-Setting Structure*, OFF. CITIZENSHIP & IMMIGR. SERVS. OMBUDSMAN, (June 15, 2022), https://www.dhs.gov/sites/default/files/2022-06/CIS%20OMBUDSMAN_2022_FEE_FOR_SERVICE_RECOMMENDATION_FINAL.pdf.

necessary to address its pending caseload.³⁰ Both the CIS Ombudsman and GAO have expressed concerns that USCIS’s Staffing Allocation Models do not adequately factor in staffing-related factors that impact its productivity. We urge you to incorporate these recommendations into your financial planning to ensure that USCIS is able to efficiently process new filings, as well as more efficiently process those filings for which USCIS has already collected fees, but has failed to timely adjudicate.

E. “Asylum Program Fee” for Employment-Based Petitions and Applications

USCIS is authorized to set fees “at a level that will ensure recovery of the full costs of... services provided without charge to asylum applicants or other immigrants.”³¹ Consistent with this authority, the proposed rulemaking sets fees for certain programs, such as the EB-5 “investor visa” petition and related applications, at a level that is necessary to allow for recovery of costs of humanitarian programs. Further, in the absence of congressional action, we recognize that increased fees may be necessary to fund humanitarian programs and implement new border programs, including the asylum officer rule.³²

We appreciate that the rule proposes to set different fees for Form I-129, Petition for a Nonimmigrant Worker, based on the nonimmigrant classification and type of beneficiary listed on the petition to better reflect the costs associated with processing the benefit requests for the various categories of nonimmigrant worker. We are concerned, however, that the flat \$600 Asylum Program Fee on all Forms I-129 and Forms I-140, Immigrant Petition for Alien Worker, does *not* appear to account for differences between petitioners who use these forms.

At the same time, we are deeply concerned that USCIS is not issuing newly arrived migrants with long enough periods of parole to seek work authorization, particularly when applications for work authorization face significant delays. We are also concerned that imposing a flat fee tied solely to asylum seekers suggests that such individuals are the sole factor in USCIS’s challenges in processing employment-based applications, rather than challenges that USCIS faces as a result of Trump-era policies, increased volumes of applications, delays in staffing and staff retention, legislative inaction, and longstanding backlogs.

In addition, we believe that USCIS should consider other funds in addressing asylum processing. For example, Congress recently expanded USCIS’s authority to use premium processing fees for the adjudication of immigration and naturalization benefits requests.³³ Consistent with this legislation, USCIS recently expanded premium processing to certain EB-1 and EB-2 Form I-140 petitions and certain F-1 students seeking optional practical training extensions.³⁴ The proposed rule notes that DHS did not yet have sufficient premium processing

³⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO 21-529, U.S. CITIZENSHIP & IMMIGRATION SERVICES: ACTIONS NEEDED TO ADDRESS PENDING CASELOAD (2021).

³¹ INA § 286(m), 8 U.S.C. § 1356(m) (emphasis added).

³² 88 Fed. Reg. at 452.

³³ Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. 116-159, Div. D, Title I, “Emergency Stopgap USCIS Stabilization Act”.

³⁴ See *USCIS Announces Final Phase of Premium Processing Expansion for EB-1 and EB-2 Form I-140 Petitions and Future Expansion for F-1 Students Seeking OPT and Certain Student Exchange Visitors* (Jan. 12, 2023),

revenue to consider such revenues in setting fees.³⁵ Given these concerns, we urge you to take a more balanced approach to accommodate the costs of humanitarian processing, including by (1) considering projections for premium processing revenues in setting fees, and (2) expanding opportunities for work authorization for migrants and asylum seekers on parole in the United States.

F. Conclusion

The USCIS biennial review and corresponding fee adjustment are essential to improving efficiency and transparency in our immigration system. We welcome the opportunity to comment on this rule, and strongly support your proposal to set fees based on ability to pay, supporting aspiring citizens, and increase fee exemptions for the most vulnerable applicants and petitioners.

Sincerely,

Senator Richard J. Durbin

Senator Alex Padilla

Representative Jerrold Nadler

Representative Pramila Jayapal

<https://www.uscis.gov/newsroom/alerts/uscis-announces-final-phase-of-premium-processing-expansion-for-eb-1-and-eb-2-form-i-140-petitions>.

³⁵ 88 Fed. Reg. at 419.