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Director, Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
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Director, Regulatory Management Division:

As an attorney practicing in the field of immigration law for nine years, much of that time in non-profit settings, I have considerable experience with the immigration process. I am concerned by the Service's proposal to radically increase its fees.

Questionable Calculations

The premises underlying the calculations shown in the Activity-Based Costing analysis in the proposed rulemaking appear to be flawed. Table 9 lists processing times for forms in locations that have no jurisdiction to process those form types. For instance, local offices no longer have jurisdiction to process Forms I-129 (.09 hours listed), I-129F (4.98 hours listed), I-140 (2.00 hours listed), I-539 (1.32 hours listed) and I-829 (4.45 hours listed), but local office completion rates are listed for those form types. Conversely, Forms N-470 are filed and processed at local offices, but 1.91 hours is listed as a completion rate for Service Centers.

At Section X, the Service discusses a threefold increase in completion rates for a number of application types, claiming that most of the increases are "associated with the additional time devoted to the expansion of background checks." This makes no sense. Are checks being run on both the I-140s and I-485s when they are filed concurrently? From a cost and efficiency standpoint, why is the Service conducting background checks on non-concurrently filed I-140 petitions? What can the Service do with that information, since the I-140 confers no benefit until an adjustment of status or immigrant visa application is filed? Is it turned over to law enforcement? If that is the case, why is that check not being funded as a law enforcement activity since, again, there is no immigration-related reason to run a check on an I-140?

Indeed, my understanding is that many of these background checks are IBIS checks. It has been more than five years since IBIS checks were introduced across the board to filings. Surely the Service has found a more efficient means to conduct them now than it used in the initial, post 9/11, process? If so, a threefold increase in completion rates for I-140s, I-129Fs or I-751s hardly seems accurate. If not, is it not well past time that the Service found a more efficient way to handle these checks?

In addition, the data for "Make Determination" costs do not appear to correspond in any logical manner with the Completion Rate data. For instance, why are the "Make Determination" costs for I-360s calculated at $2,268 when the Completion Rates are not significantly higher than for other form types? As another example, why are I-765 "Make Determination" costs significantly higher than I-90 costs, while I-765 completion rates are much lower than I-90 completion rates? Why are I-102 and I-129 "Make Determination" costs the same when their completion rates are very different (as would be expected for these vastly different adjudication jobs)?

Also, there is some question as to whether the Service is fully accounting for its other revenues. It dismisses as a "smaller, specific" account the monies received through the anti-fraud fee. However, the agency's 2006 budget request estimated annual revenues from this fee at $44 million. The proposal requests from the Immigration Examination Fee Account (IFEA) a sum of more than $31 million to fund the Fraud Detection and National Security Division without mentioning the monies from the anti-fraud fee. Where has that money gone?

Fee Waivers

The Service announces in the rulemaking its intention to waive fees on a blanket basis for VAWA I-360 petitions. While, at first blush, this seems to be an admirable and compassionate move, further examination shows it to be a cruel hoax. Even as the Service proposes to waive these fees, it proposes to eliminate any possibility of fee waiver for adjustment of status applications. Thus, while waiving a $375 fee, the proposal would foreclose all possibility of waiver of the higher, $905 fee (plus $805/905 per person for any children involved) for this most vulnerable group of applicants. Having represented well over 500 VAWA applicants in nine years, I am confident it would be better to leave the VAWA fee waiver as discretionary and leave in place the possibility of waiver for the adjustment application. Otherwise, relief will become out of the reach of most of the people VAWA was enacted to protect.

Combining the EAD and Advance Parole Fees with the Adjustment Fee

The Service proposes to include in the adjustment of status fee increase the fees for employment authorization and advance parole applications. However, not all I-485 applicants wish to obtain these ancillary benefits. For instance, many minor children do not request employment authorization and have no need for such a benefit. Similarly, individuals currently holding valid H-1B or L-1 status frequently do not need employment authorization or advance parole, as they are permitted to work and travel using their existing nonimmigrant status. Additionally, the Service appears to continue to take the position that individuals who have applied under section 245(i) and/or are subject to unlawful presence bars cannot travel without triggering the bars. Thus, these people would not want advance parole. It is neither fair nor sensible to require people who will not be using a benefit to pay for it.

Activities Belonging under Appropriated Funds

Despite what seems to be the Service's impression to the contrary, the statute does not require that it fund all its operations via fees. Under

INA section 286(m), "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."

The authorizing statute limits the fee-funding scope to "providing adjudication and naturalization services" and administering the fees. It does not authorize fees to cover other activities. Many of the costs anticipated by this fee regulation do not belong in the fee account. The Service has chosen to expand its mission beyond adjudication and naturalization and enter into the realm of law enforcement. When the Department of Homeland Security was established, Congress consciously and deliberately separated the Department's adjudicative arm (USCIS) from its enforcement arm (what has become ICE and CBP). The intent was to keep the functions separate. Even if the agency has strayed from that intent in its operations, at a minimum the funding should be kept separate.

The Service should seek appropriated funds at a level sufficient to pay for the additional services and processes that, in turn, benefit everyone. For example, increased payments to the FBI for fingerprint, name, and security checks which benefit national security; processing of Freedom of Information Act requests, for which every other government agency receives appropriated funds; agency administration with nine headquarters offices and field locations worldwide; and information technology enhancements, should not be borne by applicants alone. In addition, funding for Internal Security and Investigative Operations for the investigation of misconduct of Federal and contract employees should not benefit from user fees.

Impact of the Fee Increases

The fee increases will effectively impose a means test on the ability of immigrants to attain U.S. citizenship, which is contrary to our national values. The United States is built on the principal of equality and inherent value of each individual, both native born and immigrant. We need immigrants to sustain our economic system and invest in the American dream, and we should not be erecting monetary barriers to their achieving U.S. residency and citizenship.

Fee Increases Not Justified by Service Levels

The immigration process continues to be plagued by inconsistent and inefficient adjudication. These problems result in part from the agency's inability to issue regulations on substantive issues that would provide adjudicators with clear guidance. Indeed, since its inception, USCIS has been unable to produce more than one or two regulations that were not related to revenues or required by judicial order, despite a multitude of laws that scream out for regulatory implementation. With this kind of failure at the policy level, how can one expect fair and consistent adjudication at the field level?

Filing an application or petition at the Service is a gamble, with offices and adjudicators all following their own rules. There is no consistency in adjudication or transparency of standards or results. These factors cause significant inefficiency in the agency's adjudication process, resulting in costs that are unnecessarily high. No amount of technical innovation and no increased amount of revenue will overcome an

unwillingness to adjudicate on a level playing field. There should be no fee increase until the Service is able to articulate a detailed and concrete plan which demonstrates a real commitment to the elimination of inconsistent and hostile adjudication. Such a plan should not only include rulemaking and training, but tracking of adjudications and a system of accountability.

Also, significant numbers of I-485 and N-400 cases have been awaiting security clearances for years. The backlog on obtaining these clearances continues to increase, preventing larger and larger numbers of people from obtaining lawful permanent residence or U.S. citizenship. And, recently, the Service announced that it no longer will expedite clearances when mandamus actions are filed on these long-stalled applications. This, in turn, will increase overall costs for the Service in the form of costs for defending these suits (including paying EAJA fees).

In sum, the Service has failed to justify these fee increases and the whole proposal should be withdrawn and reconsidered.

Sincerely,

Jennifer Doerrie