



April 2, 2007

Director
Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue NW, 3rd Floor
Washington, DC 20529

RE: DHS Docket No. USCIS-2206-0044
Adjustment of the Immigration and Naturalization Benefit
Application and Petition Fee Schedule
Federal Register 72:21, February 1, 2007, p. 4888ff

Ladies and Gentlemen:

This letter provides comments on the above referenced proposed rule on behalf of the National Council of Agricultural Employers.

Summary of Comments

This rulemaking proposes an increase in the fee for adjudication of Form I-129 from \$190 to \$320, a 68.4 percent increase. The USCIS establishes a single, uniform fee for each form and petition which it adjudicates. However, the uses for Form I-129 are very varied, and involve vastly different levels of complexity. Almost all Form I-129 petitions for new admissions of H-2A aliens are multiple unnamed beneficiary petitions which are extremely simple and involve very little adjudication time. Most of the cost to adjudicate Form I-129 results from the activity of “making determinations”, and varies greatly among applications of Form I-129. By allocating costs uniformly across all applications of Form I-129, H-2A employers are compelled to subsidize the other, more complicated applications of this form. I-129 petitions for H-2A workers are filed by small agricultural employers with limited resources. We believe it is unfair to require these employers to share the cost of complicated I-129 adjudications filed by large businesses for named beneficiaries. A separate, lower fee should be charged for Form I-129 when it is filed for multiple unnamed H-2A beneficiaries that reflects the substantially lower cost of adjudicating these petitions.

Background

The Department of Homeland Security (hereafter “DHS”) is required by law to charge fees for the provision of immigration benefits that cover the cost of providing those benefits. The

DHS is required to conduct periodic audits to determine the cost of providing each benefit for the purpose of adjusting fees to cover costs. The present rulemaking results from such an audit.

The methodology for fee-setting explained in the *Federal Register* notice analyzed costs and set a fee for each specific DHS form, but did not include an analysis of the costs associated with different uses of specific forms. In most cases, DHS forms have only one specific use, and all cases are of rather uniform complexity within a form category. However, the Form I-129 Petition for Nonimmigrant Worker is the exception to this general rule. Form I-129 is used to petition for all of the following categories of non-immigrant workers: H-1B, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-1S, P-2, P-2S, P-3, P-3S, Q-1 and for extensions of stay or changes of status for E-1, E-2, H-1B1s, TNs, R-1 and Free Trade Nonimmigrant workers. As explained in more detail below, these cases vary greatly in their complexity, and in the time required to adjudicate them.

Interest of the National Council of Agricultural Employers in the Proposed Rule

The National Council of Agricultural Employers (hereafter “NCAE”) represents agricultural employers and agricultural employer associations in the United States. NCAE’s members employ and pay approximately 75 percent of all of the agricultural labor in the United States.

It is well documented that the hired agricultural work force in the United States is predominately foreign born, and at the current time is predominately fraudulently documented. [See, for example, U.S. Department of Labor Office of the Assistant Secretary for Policy, Office of Programmatic Policy, Research Report No. 9 *A Demographic and Employment Profile of United States Farm Workers*, March 2005.] However, with the national and DHS priorities on immigration control and border security, agricultural employers are having to resort in increasing numbers to the H-2A temporary worker program to obtain an assured supply of legal labor. In FY 2006 more than 6500 agricultural employers received certification to employ H-2A aliens on 3895 labor certification applications. Unofficially, we understand that in FY 2007 H-2A applications are up about 20 percent over the corresponding period in FY 2006. Even at the current rate, less than 2 percent of the hired agricultural work force are H-2A workers. With more than 50 percent of the workforce known to be unauthorized (although working with fraudulent documents), the potential for a very large expansion in H-2A applications and petitions, even in the short term, is very possible.

Each H-2A labor certification application requires the filing of at least one Form I-129 petition. Even at current low levels of H-2A usage, the proposed fee increase will impose an additional cost of more than \$500,000 on agricultural employers, most of whom are small employers. It is worth noting that in FY 2006 the 3985 H-2A applications were approved for a total of only 59,112 workers, or an average of 15 workers per application. The DHS’s proposed fee increase will impose a significant economic burden on these small businesses, as well as the additional small agricultural businesses that will likely be forced into the program over the next few years.

Analysis

As noted in the background section of these comments, the uses of Form I-129 vary widely, and the complexity of the cases for which this form is used vary equally widely. By regulation, H-2A petitions are the only category of petitions for which Form I-129 is used that can be filed for multiple unnamed beneficiaries, except in emergent circumstances. Because the specific beneficiaries of H-2A petitions are almost never known until the aliens present themselves to the consulate to apply for visas, almost all H-2A petitions for new admissions of H-2A workers are multiple unnamed beneficiary petitions. This circumstance is unique to H-2A petitions.

In a multiple unnamed beneficiary H-2A petition, the issues requiring adjudication are extremely limited. The adjudication process consists of comparing information on the petition with the corresponding information on the labor certification, which usually accompanies the petition, specifically the applicant's name and address, and the number of workers and dates of employment requested. In addition, the adjudicator must check a database to determine that the employer is not under debarment for previous program violations (something which must be done with all petitioners). However there is little or nothing else to adjudicate. In particular, there is no information about aliens that needs to be checked. Furthermore, the determination as to whether the employment is agricultural, and is temporary or seasonal, has already been adjudicated by the U.S. Department of Labor and therefore requires little or no additional adjudication by the DHS analyst.

This is in marked contrast to other I-129 petitions. Most Form I-129 petitions involved named beneficiaries, and can, and often do, include many beneficiaries on the same petition. Each named beneficiary must be checked against security databases. The credentials and qualifications of each beneficiary must be reviewed and evaluated against the requirements for the visa category. Educational transcripts, publications, letters of recommendation, and other documents must be reviewed and evaluated. It is worth noting that under the present fee structure, the same fee is applicable to adjudicating a petition for an alien seeking a national interest waiver, an alien of distinguished merit or ability or a Nobel laureate, and a petition for 100 named H-1B aliens, as for evaluating a petition for 10 unnamed apple pickers.

Page 4908 of the DHS's *Federal Register* notice presents a table of unit costs of processing activities for DHS applications and petitions. The unit costs for the activities involved in I-129 petitions are as follows:

Inform the public	\$	48
Intake		18
Conduct IBIS check		10
Review records		45
Make determination		104
Fraud prevention and detection		19
Issue document		0
Total	\$	244

In this tabulation, “making determination” accounts for 43 percent of the total cost. The IBIS check, reviewing records and making determination collectively account for 65 percent of total costs. In an H-2A multiple unnamed beneficiary petition, there are no names to perform an IBIS check on, no records to review, and only limited, and uncomplicated issues to make a determination about (comparing data on the application with the corresponding data on the accompanying labor certification). Therefore, we believe that the unit activity costs associated with an H-2A multiple unnamed beneficiary petition could be one half or less of those for a typical Form I-129 petition.

Recommendation

We strongly recommend that the DHS establish a separate fee for multiple unnamed beneficiary petitions for H-2A workers using form I-129, reflecting the limited scope of the adjudication activities related to such petitions. We believe it is unfair, and has an adverse impact on small agricultural businesses, to make them essentially subsidize the petition adjudication costs of other I-129 filers, most of whom are large businesses presenting complicated cases.

We recognize that H-2A petitions for extensions of stay and/or change of status do involve named beneficiaries and require most of the same steps in adjudication as other I-129 petitions. We have no objection to charging the same fee for such petitions as for other I-129 petitions.

We appreciate the opportunity to comment on this rulemaking and your consideration of our views.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Sharon M. Hughes". The signature is fluid and cursive, with the first name "Sharon" being the most prominent part.

Sharon M. Hughes CAE
Executive Vice President