



New York County Lawyers' Association
14 Vesey Street
New York, NY 10007
(212) 267-6646 • Fax: (212) 406-9252
www.nycla.org

Comments on Notice of Proposed Rulemaking DHS Docket No. USCIS 2006-0044

These Comments were approved by the Executive Committee of the New York County Lawyers' Association at its meeting on March 27, 2007.

The New York County Lawyers' Association (NYCLA) submits these comments on the proposed regulations providing for "Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule," published in the Federal Register, February 1, 2007, page 4888.

Introduction

The United States Citizenship and Immigration Services (USCIS) should be congratulated on seeking to develop a management system based on metrics and planning that attempts to look forward to satisfy the projected needs and improvements that will be required to create quality services. Unfortunately, a number of problems with the funding of benefits-related immigration processing have become apparent since the incorporation of the legacy Immigration and Naturalization Service (INS) into the Department of Homeland Security (DHS) and the breakup of its component agencies into separate entities: USCIS, US Immigration and Customs Enforcement (ICE) and US Customs and Border Protection (CPB). Most of these problems, such as backlogs, under-staffing and inconsistent and erroneous adjudications, can be traced back to one source: a lack of sufficient funding.

In the past, both the legacy INS and USCIS justified fee increases with the promise of improved service, reduced backlogs and greater efficiency. Since Fiscal Year 1989, fees for most petitions have been raised six times. As an example of the type of "fee inflation" that has taken place over the years, in 1989 the fee for the I-485 "Application to Adjust Status to Permanent Resident" was \$60; the current fee is now \$325, and USCIS seeks to raise it to \$905 (albeit with some renewal fees that are now separate included in the fee increase.) Notwithstanding the repeated statements by both the legacy INS and USCIS that improvements in benefits processing would be realized as a direct result of these fee increases, these improvements have yet to be realized.

Problems with the Current System

Extensive backlogs in certain benefit categories have resulted in applicants being required to apply repeatedly for temporary ancillary benefits, such as work authorization cards and advance

parole authorization. In addition, long processing times in the adjudication of I-129 petitions for H-1B and L-1 non-immigrant status have resulted in many petitioners for these benefits paying an additional \$1,000 for Premium Processing as a matter of course. In Fiscal Year 2005, USCIS received \$139 million in Premium Processing fees, as opposed to \$69 million in regular processing fees. Premium Processed cases represented 80 percent of the total new employment and change-of-status cases filed in that period. (Annual Report to Congress June 2006, Citizenship and Immigration Services Ombudsman at page 48-49.) However, the cost of providing Premium Processing services is less than regular processing because “fewer repeated steps exist and fewer people handle the application.” (Id.)

Although the fees charged for these services are more than the actual amount needed to recover their cost, the USCIS has come to depend on the revenue derived from these funds to support its other activities. “As long as program costs are mostly unfunded and the agency is expected to recover its costs almost entirely from fees, USCIS will be confronted by the conflicting goals of improving efficiency for all its clients versus redirecting revenue to provide for all its unfunded mandates. USCIS needs a new funding mechanism to help it out of this dilemma.” (Annual Report to Congress June 2006, supra, at page 45.)

NYCLA strongly believes that correcting the USCIS’S current funding problems through the institution of such an ambitious modernization and process-improvement program as described in the proposed regulations should not be accomplished solely on the backs of individual petitioners based on user fees.

NYCLA agrees with USCIS Ombudsman Prakash Khatri that the solution is the establishment of a trust fund for USCIS to be funded by both regular appropriated funds and filing fees, which will provide USCIS with funding sufficient to support its benefits programs. (Remarks of USCIS Ombudsman Prakash Khatri at New York County Lawyers’ Association, February 13, 2007.)

Proposed Solutions

Regardless of how the process is funded, USCIS should be held accountable for executing its plans for improving service and efficiency. At a minimum, the following steps should be implemented:

- Establish firm processing deadlines for all petitions/applications. Six months/180 days is a realistic period in which all petitions and/or applications can and should be adjudicated. This time can be tolled for good cause, such as a Request for Further Evidence (RFE) to be supplied by the parties; however, it should not be tolled for more than the time it takes for the parties to respond to the RFE. Good cause may include many things, but should specifically not include delays caused by any action or processing required to be taken by the government, such as obtaining missing security clearances, files, etc.
- Require automatic fee refunds when petitions/applications are not adjudicated within the specified period. If the USCIS wants a 21st-century operation, then it must also be willing to accept its own responsibility in creating such an operation.
- Create and enforce “automatic approval” adjudication deadlines. Since an application or petition would still need to be adjudicated, simply refunding the filing fee is not a

sufficient action. If the USCIS fails to meet the designated maximum processing time for adjudication, then the application or petition should be approved automatically.

- Require that personnel records of USCIS employees reflect failure to meet mandated standards for adjudications and service. These records should be maintained not just for front-line adjudicators but for supervisory personnel as well.
- Mandate a freeze on further fee increases until and unless an independent performance audit of the USCIS demonstrates that adjudicatory deadlines have been “substantially met” for no less than five consecutive years following any fee increases instituted this year.
- In keeping with the legislation that created the office, the USCIS Ombudsman should appoint a Deputy Ombudsman for each USCIS District and Service Center. Furthermore, each Deputy Ombudsman should have the authority to overrule a denial issued by or in the name of a District or Service Center Director upon good cause shown.

Conclusion

In closing, it should be recognized that the immigration benefits adjudicated and granted by USCIS do not benefit just the individual submitting the application or the beneficiary of the request. The United States as a whole benefits from the entry of new enthusiastic participants in the American dream. These new residents - many of whom will become U.S. citizens - will work in U.S. companies, establish businesses, buy homes, have families and support the American economy by patronizing businesses and paying taxes. To recognize the importance of the function served by USCIS is to recognize the need for a source of stable funding that allows it to function at the highest levels of customer support and efficiency possible for a government agency.

Eugene J. Glicksman, Esq.
Gilbert C. Ferrer, Esq.
Co-Chairs, Committee on Immigration and Nationality Law

Sub-Committee Members:
Henry Diaz, Esq.
Winnifred Noel-Charles, Esq.
Ching Yeng Sim, Esq.
Margaret T. Smyth, Student Honorary Co-Chair