Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 936 7329
http://www.microsoft.com/

Microsoft

March 30, 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-2006-0044
RIN No. 1615-AB53
Comments to USCIS Proposed rulemaking
(Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule)

Dear Director:

Microsoft Corporation ("Microsoft"), the world leader in software, services, and solutions that help people and businesses realize their full potential, is pleased to submit its comments to the proposed rule published in the February 1, 2007 *Federal Register* by United States Citizenship and Immigration Services ("USCIS"), a unit of the Department of Homeland Security ("DHS").

Microsoft produces software in over 40 languages and maintains operations in more than 80 countries. Our company employs approximately 57,000 individuals worldwide, including about 36,000 U.S. workers, primarily at its corporate headquarters in Redmond, Washington. Since its founding in 1975, Microsoft has created thousands of jobs in the United States and American workers have filled most of these jobs. Our success and growth over the years are attributable not only to the talents of Microsoft's U.S. workers, but also to the relatively small percentage of foreign employees sponsored for employment-based permanent residence. In the coming fiscal year, we will continue our growth, with plans to hire more than 3,500 employees in the United States.

As you will see, the views expressed in this letter are broader than merely the parochial interest of a single corporation, and in many instances, offer concerns about particular sections of the

proposed rule which probably will have little, if any, application to our company. We nonetheless offer our views because Microsoft believes that, in fulfilling its role as a responsible corporate citizen, the company is duty-bound to comment on proposed regulatory changes that would significantly affect the administration of our nation's immigration laws and access by many to our immigration system.

At the outset, Microsoft commends DHS for taking steps to assure that the USCIS will meet its public responsibilities by engaging in advance planning, and in identifying sources of necessary funding. An essential element of the agency's public duties requires dramatic improvement in the processing of immigration applications and petitions and to provide better services to its customers. We agree with the implicit premise that, while USCIS has made progress in certain important respects, it remains a very long way from reaching the level of efficiency, and professionalism that the nation's employers and individual users of the immigration system expect and deserve. Microsoft therefore fully supports the premise that, in order to reach the level of services envisioned in its name, USCIS needs substantial additional resources.

Summary of Objections to the Proposed Rule

Microsoft cannot, however, support this flawed proposed rule. We have significant concerns with several of the rule's key proposals. In our view, the proposed rule:

1. Illegally imposes all, rather than merely a fair share, of its general operational and development costs on individuals and entities seeking immigration benefits;
2. Reflects no statutory or regulatory mandate to secure funding from user fees but instead a conscious agency decision to refrain from seeking adequate appropriations from Congress for purely governmental functions that protect and benefit the entire nation;
3. Fails to withstand any careful cost-benefit analysis or provide any binding commitments to improve service;
4. Provides no factually supported or rational basis for stakeholders to conclude that the exorbitant increases proposed will likely result in appreciably improved service levels;
5. Masks the cost of the USCIS' longstanding and regrettable mismanagement of operations, founded on unnecessary and unduly strict interpretations of eligibility criteria and processes required to confer requested immigration benefits; and
6. Reflects almost no consideration of how the agency's exertion of unilateral power by increasing fees unconscionably will harm legitimate and deserving stakeholders who simply cannot afford to pay the proposed fee increases, or qualify under the vastly restricted eligibility standards for fee waivers.

Introduction

Among Microsoft's objections to the proposed rule, first and foremost, is our firmly held belief that there is no reason in law, policy or sound management principles to warrant the skyrocketing increases in fees. Nowhere can we find justification to conclude that USCIS must or should impose virtually all of its operational and development costs on only one segment of the stakeholders in the immigration system, namely, the individuals and entities that submit petitions

and applications for immigration benefits. Instead, as is common throughout executive agency practice, including the other immigration agencies, USCIS should devise a careful estimate of what these costs will be and then submit this estimate to Congress for an appropriation sufficient to cover all generalized costs of operations and of its purely governmental functions and responsibilities.

As confirmed in the March 27, 2007 testimony of the USCIS Director, Emilio T. Gonzalez, to the House Appropriations Committee, Subcommittee on Homeland Security, the agency's FY 2008 budget of $2.57 billion is ***99% fee funded***, with only $30 million derived from appropriations. This allocation is nothing more than a preferred choice by the Executive Branch, which has not asked Congress for an appropriation for these purposes. History reveals a long and decisive record establishing that USCIS cannot properly fund its performance by passing on costs to customers, no matter how frequent or steep its fee increases. The Administration should instead make a budget request to Congress.

Second, there is strong reason to believe that the astronomical increases that have been proposed will not yield corresponding, or even adequate, improvements for the benefit of customers. DHS and the former Immigration and Naturalization Service ("INS") have raised application fees repeatedly and significantly over the past ten years. Unfortunately, stakeholders have not enjoyed a proportionate improvement in technology, customer service, and overall system effectiveness. Nowhere in the rule does USCIS pledge to payors any binding commitment that these dramatic fee increases will lead to better results. Many of the significant new investments that this rule proposes to pay with the increased fee levels do not appear to be directly tied to providing improved services to the customers of DHS. Instead, many of the functions that USCIS is proposing to fund -- particularly those targeted for additional security and anti-fraud personnel -- are properly placed in other (enforcement) components of DHS. These components have appropriation-based funding, as they should, to accomplish these very functions.

Compounding this problem, although the details are not clear from the proposed rule, is the disproportionate allocation of the fee increase earmarked to pay for ill-conceived background and security check processes that USCIS (out of synch with the other DHS agencies with immigration responsibilities) has imposed on its petition and application processes. To be sure, Microsoft fully supports the principle that our immigration system must protect national security. Yet today's USCIS security-clearance policies are creating massive, unmanaged backlogs in entirely legitimate situations.

Little in the proposed rule suggests any refined and critical analysis of which background checks should be performed; which petitions and applications should be subjected to clearance; what policies are in place for addressing "hits"; and what personnel and other resources are appropriately devoted to carrying out these policies and procedures. It is indefensible that USCIS would impose the costs of these ill-advised and minimally helpful processes and policies on the users of the immigration system – as well as the skyrocketing costs of litigating the exponentially rising number of challenges, and the attorney-fee awards when judges quite commonly and rightly agree that the background-check policies are unsustainable in individual cases. Clearly, the imposition on the agency's individual stakeholders of unwarranted and

excessive clearance costs does nothing but reward the agency for its own mismanagement and deficient policies.

Microsoft also believes that the magnitude of the fee increases proposed will have a negative impact on our immigration system, economy, and society. Should these proposed fee increases go into effect, many legally eligible individuals and their families will be unable to afford the costs of applying for immigration benefits, including citizenship. While we understand that additional funding from an appropriate source to provide immigration services is necessary, there is no evidence in the proposed rule that the agency has analyzed in any meaningful way the harms that will result from imposing all of the additional burden on individual immigrants and petitioners.

Microsoft therefore urges DHS and the Administration to consider more carefully the wisdom of raising a significant portion of the necessary additional resources through appropriations. The ability of immigrants to obtain lawful immigration status and become more fully integrated into our society is something that clearly benefits the country overall, well beyond the benefits that accrue to individual applicants and beneficiaries. This is true where the aspiring immigrant is a Ph.D. whose work promises to bring massive intellectual resources to our knowledge-based economy, and it is also true where the aspiring immigrant is the hard-working, law-abiding and tax-paying relative of a U.S. citizen.

Finally, the adverse impact of the fee increases will be exacerbated by the agency's additional proposal strictly limiting the possibility of obtaining fee waivers to a few particular application types. Under the proposed rule, many widely-used immigration applications would no longer be eligible for consideration for a fee waiver. The agency's justification for this particular proposal is fundamentally flawed and we urge DHS to abandon this proposal given the potential for serious harm it may cause for those individuals who will be unable to apply for immigration benefits without such a waiver.

Microsoft supports the need of USCIS for additional funding adequate to bring it up to an acceptable level of performance. This funding, though, or a major proportion of it, must come as an appropriation from Congress. The inordinate increases proposed in the proposed rule are not an appropriate way to meet this need. Microsoft's objections are spelled out in more detail in the pages that follow.

I. Because the Proposed Fee Increases Imposed on Users Are Wholly Disproportionate to the Benefits Conferred, DHS Should Seek Appropriations for All or a Major Portion of Required Additional Funding.

Microsoft is extremely concerned with the magnitude of the fee increases that USCIS has proposed. The magnitude of the proposed fee increases is truly breathtaking. On average DHS is proposing almost a doubling of fees beyond amounts that were last increased less than two years ago. More particularly, it would raise fees overall by approximately 86% above the levels that were set by the most recent increase. Several widely used application forms, such as the I-

485 application to adjust status, will see far greater increases, many approximately tripling. DHS is proposing to increase the fee for the I-485 application form by 178%, from $325 to $905.

There is not the slightest legal requirement that USCIS obtain all of its funding through application fees. While Microsoft fully supports the agency's need for additional funding to modernize its systems and improve customer service, we urge DHS and the Administration to reconsider this proposed rulemaking and instead seek appropriations for the additional funds that the agency requires. Appropriated funds would allow USCIS to limit the increase in application fees and could alleviate many of the burdens that the current proposal, if finalized, would impose. A better balance between appropriated and fee-based funding would also help the agency by providing it with a more reliable revenue stream and greater flexibility to respond to variations in application flows.

Appropriations are fully justified because immigration and the efficient processing of immigration benefits provide many economic benefits and otherwise contribute to the betterment of our nation. The level of application fees proposed in the proposed rule will negate a number of those benefits, even ignoring the substantial burdens imposed on individual applicants. DHS should have conducted a thorough analysis of the costs and benefits of the suggested fee increases. Microsoft is confident that once such an analysis is performed, the Administration will determine that there are far better alternatives, from a cost-benefit standpoint, to funding USCIS solely through application fees.

A. USCIS and Its Customers Would Benefit From a More Balanced Mix of Fee-Generated and Appropriated Funding.

We understand that a significant portion of the agency's costs have historically been provided through application fees. However, USCIS (as well as the former INS) has historically received significant appropriations to support application processing as well. Section 286(m) of the Immigration and Nationality Act, 8 U.S.C. § 1356(m), states that fees "for providing adjudication and naturalization services *may* be set at a level that will ensure recovery of the full costs of providing such services" (emphasis added). The statutory language clearly provides DHS and the Administration with the necessary flexibility to consider alternative funding, including the overwhelmingly most common and proper: additional appropriations from Congress. USCIS has received substantial appropriations from Congress over the past several years that were specifically targeted at reducing application processing backlogs and improving customer service. For example, in FY 2005, Congress appropriated approximately $160 million toward the elimination of the immigration backlog. *Department of Homeland Security Act of 2005*, H.R. 4567, 108th Cong. (2004). Likewise, in the six years preceding 2003, Congress appropriated some $430M specifically to address the backlog of immigration applications. H.R. Rep. No. 108-010 (2003). Unfortunately, this money was only appropriated for specific projects. Because of the agency's unstable fee-based structure, much of this money went to covering budgetary shortfalls, rather than permanent investments in customer service improvements, and the purpose of the appropriation was thwarted. There is every likelihood that, if the Administration does not adopt a long-term strategy to appropriate funds for managing USCIS

performance, the pattern of "catch-up" funding for USCIS principally through fees will produce continued USCIS underperformance.

Funding USCIS operations only or primarily through user fees adversely impacts its performance in a number of significant ways. According to one internal DHS report, under current funding structures, "USCIS is unable to maximize efficiency and make USCIS a true world-class customer service provider."[1] USCIS regularly faces budget uncertainty because, as an overwhelmingly fee-funded agency, its funding stream is entirely dependent on the number of applications filed. Additionally, while most of its revenues are variable, the vast majority of the costs those fees must cover are fixed. This can create significant budgetary problems for the agency should the number of applications filed vary significantly from its projections in either direction. Should the number of applications filed fall below the agency's projections, then it will need to make up the budgetary shortfall by other means. In recent years DHS has covered these shortfalls by relying on fees from temporary programs, curtailing necessary spending, and by allocating premium processing fees that, by law, were to be used for investments in infrastructure improvements to adjudications processes, to cover operating costs.[2]

The Administration's decision to fund USCIS solely through user fees has exacerbated the budgetary uncertainties the agency has faced in recent years. It has significantly restricted USCIS' ability to plan for, develop, fund, and implement customer service improvements such as modernized IT systems, because USCIS has had to struggle to pay its operating costs.[3] A base of annually appropriated funding in support of the filing fees that the agency collects would provide additional stability to the agency's budget and markedly improve its ability to make long-term investments in technology and personnel to improve its performance.

Microsoft urges DHS and the Administration to reassess the decision to fund USCIS solely through immigration application fees. Instead it should consider seeking a balance of

---

[1] *See* U.S. Department of Homeland Security, Citizenship and Immigration Services Ombudsman, *2006 Annual Report to Congress*, (June 29, 2006) p. iv.

[2] *See* 72 Fed. Reg. 4892. The preamble to the PROPOSED RULE makes clear that the budget uncertainties the agency has faced due to shortfalls in fee-generated revenues are the direct cause for the agency's inability to improve its information technology systems: "investment in new technology and business process platforms to radically improve USCIS' capabilities and service levels."

[3] *See U.S. Citizenship and Immigration Services' Progress in Modernizing Information Technology*, Office of Inspector General, Department of Homeland Security, p. 6 (Nov. 30, 2006), ("USCIS' unique funding structure poses major obstacles to transformation planning"); *Annual Report 2006*, Citizenship and Immigration Services Ombudsman, Department of Homeland Security, p. 26 (June 29, 2006)("The manner in which USCIS currently obtains its funding affects every facet of USCIS operations, including the ability to: (1) implement new program and processing initiatives; (2) begin information technology and other modernization efforts; and (3) plan for the future").

appropriated and fee-generated funds. This would ensure a more stable base of funding for the agency that is less tied to changes in the numbers of applications filed, providing it with greater budgetary certainty and the ability to plan and make long-term investment decisions to improve performance and to adapt to sudden changes in application flows. There are a number of alternatives for allocating additional appropriated funds. The processing costs for a range of benefits, such as asylum applications and naturalizations for those in military service, are currently supported by the revenues from fee-paying applicants. These processes and services could instead be paid for with appropriate funds. Appropriations could also be made to cover the agency's overhead costs. Security-based background check policies should be paid for through appropriations. Alternatively, while application fees would support the costs of processing and overhead, appropriated funds could be allocated for infrastructure investments and technology improvements. This is clearly the trend of thinking in Congress. Before this comment period even ended, a bill was introduced in the Senate to address the need for USCIS to seek appropriations for certain costs associated with adjudication and naturalization services. That bill would state the Sense of Congress that -

> (1) the Secretary of Homeland Security should set fees under Section 286(m)(3) . . . at a level that ensures recovery *only of the direct costs* associated with the services described in such section 286(m)(3); and
>
> (2) Congress should appropriate to the Secretary of Homeland Security such funds as may be necessary to cover the indirect costs associated with the services described in such section 286(m)(3).

The Citizenship Promotion Act of 2007, S. 795, 110th Cong. § 2(b) (emphasis added). This approach recognizes what USCIS has regrettably read out of its statutory authority: there are some expenses associated with the agency's adjudication and naturalization services that we – as the public – should all bear. Regardless of the particular alternative chosen, the agency's operations would be improved by increasing the stability of its budget.

In spite of the large fee increases in this proposed rule, there is absolutely no reason for DHS to be confident that USCIS will not suffer similar funding shortfalls once again in the near future. The agency's variable fee revenues do not match well with its large fixed costs. The costs of processing immigration benefit applications have increased dramatically in recent years, particularly due to the enhanced security procedures that have been put into place. The process for raising fees can be protracted, including fee studies, cost analysis, regulatory development and internal review, and public comments. In part based upon past history, there is the clearest likelihood that DHS (if it continues to rely on fees only) will not be able regularly to complete fee studies and adjust fee levels in sufficient time to avoid future funding problems. Prior to the fee study that was completed to support the proposed rule, the last comprehensive fee study that the agency completed was almost ten years ago. The use of appropriated funds, in addition to fees, would help minimize the disruptions to adjudications and application processing that might occur due to delays in making fee changes in the future.

B. Immigration and an Efficient Adjudication System Provide Important Benefits to the General Public Beyond the Specific Benefits that Individual Applicants Receive.

It is entirely appropriate for the Administration to seek appropriations to cover a portion of the costs of processing immigration applications. Legal immigration and an efficient immigration system are public goods that benefit our economy and society in ways that are greater than the individual benefits that applicants and petitioners receive. Immigrants and visitors to our country bring their talent and hard work to our economy and enrich our community life. Our economy benefits because employers can obtain necessary foreign national employees and expand their businesses. An efficient immigration system also increases our national security and provides important humanitarian benefits to individuals and families. Microsoft in particular generates huge economic and social benefits in significant part because of the innovation and job growth that it generates.

The reasons for properly funding the responsible delivery of immigration services are powerful. When Microsoft files a petition or application, its adjudication is typically of importance not just to Microsoft, but to the innovation and job creation goals of the whole county. Delays interrupt those goals. Prompt and efficient processing of immigration applications and petitions and access to our legal immigration system also can improve our national and border security. Access to fast and efficient immigration adjudication services can provide increased incentives to come to the United States through legal channels.[4] Where individuals can afford to pay the application fees and can be assured of receiving a prompt decision on their application, they will be far less likely to try to enter the U.S. by improper means. This will help to reduce the workload on our border security and interior enforcement agencies and allow them to better focus their resources on true criminal and security threats.

Effective immigration adjudication processes can also serve promptly to screen applicants for criminal or national security concerns and help to prevent individuals who pose a threat from entering or remaining here. Appropriations would allow significant improvements to be made to these procedures over the agency's current abilities. More efficient screening for security would allow the Government to identify and take action against those individuals who pose true security concerns, so that they are unable to remain at large while their applications are considered, and it would also allow the agency to determine more quickly when individuals do not actually pose any risk, allowing their applications to be processed normally. The screening processes now in place appear to delay a massive number of cases without offering any articulable basis for believing that our security has been strengthened.

Our economy and society also benefit from immigration and an efficient immigration system. Immigrant entrepreneurs create jobs and increase tax payments. High-skilled workers and

[4] *See* Carafano, J.J. & Mayer, M., *Better, Faster, Cheaper Border Security Requires Better Immigration Services*, (Washington, DC, Heritage Foundation, Feb. 28, 2007), p. 2.

foreign-born students and researchers have led innovation in key sectors of our economy. Immigrant workers produce, and consume goods and services, creating jobs that would otherwise not have existed. Immigration also serves important humanitarian purposes, such as unifying families. The proposed application fees, by raising hiring costs and limiting many individuals' access to the immigration system will, in part, negate these important general benefits. Thus it is in the country's interest to limit the application fee increases by appropriating funds to support USCIS' operations.

C. By Exceeding the Scope of its Authority under the Homeland Security Act, the USCIS Impermissibly Includes Costs in the Calculation Underlying the Proposed Fee Increases That Must Be Borne Exclusively by the DHS Immigration Enforcement Agencies.

Microsoft believes that the proposed rule reflects a fundamental mistake in the imposition on petitioners and applicants seeking immigration benefits of liability for the costs of enforcement of the immigration laws, particularly the huge amount of enforcement costs earmarked for the Fraud Detection and National Security ("FDNS") Division. The error turns on the inclusion by USCIS in the proposed fee increases of the costs of law enforcement activities, costs which are only allocable to federal agencies expressly authorized to enforce the immigration statutes and regulations.

OMB Circular A-25 prescribes permissible allocations by federal administrative agencies of "User Charges" (accessible at http://www.whitehouse.gov/omb/circulars/a025/a025.html). In relevant part, OMB Circular A-25, at ¶ 6 a., provides:

> When a service (or privilege) provides special benefits to an identifiable recipient beyond those that accrue to the general public, a charge will be imposed (to recover the full cost to the Federal Government for providing the special benefit, or the market price).

As an example, ¶ 6 a. lists a "passport [or] visa" among the services for which a recipient derives a "special benefit." Clearly, then, immigration benefits accruing to petitioners and applicants are properly classified as "special benefits." The inquiry then turns to the definition of the "full cost" to the Federal Government to provide such special benefits. OMB Circular A-25, at ¶ 6 d., provides the definition of "full cost" as follows:

> "Full cost" includes all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service. These costs include, but are not limited to, ***an appropriate share of ... the costs of enforcement***, collection, research, establishment of standards, and regulation, including any required environmental impact statements.

(Emphasis added.) Under the Homeland Security Act of 2002 ("HSA"), P.L. 107-296, Congress determined to transfer the authority of the Immigration and Naturalization Service from the Department of Justice to DHS and to divide the powers and functions of legacy INS so

transferred between the Director of USCIS and the Under Secretary for Border and Transportation Security ("BTS") which includes Immigration and Customs Enforcement ("ICE") and Customs and Border Protection ("CBP") as follows:

DHS Official	**Director of USCIS**	**Under-secretary of BTS[5]**
DHS Agency	**USCIS**	**BTS (ICE & CBP)**
Operative Statutory Provision	**HSA § 451**	**HSA § 441**
Scope of the Transfer	**"[T]he following functions, and all personnel, infrastructure, and funding provided to the Commissioner in support of such functions immediately before the effective date [of the HAS:]** **(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 Immigration and Naturalization Service**	**"[A]ll functions performed under the following programs, and all personnel, assets, and liabilities pertaining to such programs, immediately before such transfer occurs:** **(1) The Border Patrol program.** **(2) The detention and removal program.** **(3) The intelligence program.** **(4) The investigations program.** **(5) The inspections program.**

[5] This chart reflects the DHS structure set out initially in the HSA. Though the office of Undersecretary of BTS technically no longer exists, that fact does not diminish the distinctions between HSA §§ 451 and 441 nor the arguments made herein.

In light of the clear division of statutory authority noted above, Microsoft believes that the cost of enforcement should not be included in the USCIS calculation of proposed fee increases. We note in the preface to the proposed rule (72 Fed. Reg. at 4899) that ICE has established a "threshold" involving "large conspiracies" and "multi-party" frauds before suspected law violations are "accepted for criminal investigation" and that, as a result, USCIS believes that it must instead use its FDNS division for frauds of lesser magnitude. However, as ICE is the agency with the prime role in investigating fraud and ensuring integrity in the system, the fact that it has chosen not to request appropriations for these activities, while USCIS is seeking to fund them on a massive scale, raises questions about the level of strategic coordination between the two agencies, and about the utility and necessity of the particular enforcement measures that USCIS has put into place.

While this division of enforcement responsibilities is a DHS policy choice involving an exercise of power that appears to exceed the grant of authority in HSA § 451, we believe that the imposition of such *ultra-vires* costs on petitioners and applicants is wholly unwarranted. As noted, under OMB Circular A-25, at ¶ ¶ 6 a. and d., only an "appropriate share" of the "cost of enforcement" may be imposed for the special benefit of a user of government services. That ICE has apparently chosen a policy to decline investigation of criminal immigration frauds below a certain threshold does not justify the imposition of the cost of enforcement on users of USCIS adjudicative services.

Equally improper is the imposition of the costs of USCIS' extralegal immigration-enforcement activities on applicants and petitioners requesting immigration benefits. The legality of decisions by USCIS through the FDNS division to engage in immigration-enforcement activities beyond the purview of its solely adjudicative authority under HSA § 451 can be left for another day and decided in a different forum. Insofar as the proposed rule is concerned, however, Microsoft firmly believes that persons and entities requesting immigration benefits should not be required to pay for activities benefiting the general public "involving detection, combat, and deterrence of immigration and naturalization benefit fraud." 72 Fed. Reg. at 4897.

D. DHS Has Not Conducted a Sufficient Analysis of the Costs, Benefits and Foreseeable Consequences of Imposing the Costly Fees Proposed.

It does not appear that DHS has performed appropriately the required analysis of the costs and benefits of issuing this regulation. Nor does it appear that DHS has considered the potential costs and benefits of pursuing possible alternative funding sources. This is unacceptable, given the impact of the additional costs that the proposed rule would impose. Under Executive Order 12866, a regulatory action is considered economically significant if it will have an annual effect on the economy of $100 million or more. DHS has appropriately labeled the proposed rule as economically significant, because it will impose over $500 million – under DHS's analysis – in annual additional costs for immigration applicants.[6] Under Executive Order 12866 and Office of

[6] The section of the preamble discussing Executive Order 12866 can be found at 72 Fed. Reg. 4913 (Feb. 1, 2007).

Management and Budget Circular A-4, federal agencies are required to perform a rigorous regulatory analysis, particularly where a regulation is deemed economically significant, of the costs and benefits of any proposed rulemaking.

The Executive Order provides that federal agencies, when deciding whether and how to regulate, are required to "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." 58 Fed. Reg. 51735 (October 4, 1993).[7] In choosing among alternative regulatory approaches, "agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach." *Id.* Such an analysis is required both to help agencies in their decision making processes and also to provide the public with information regarding the effects of alternative actions.

These requirements do not at all appear to have been met in the development of the proposed rule. Neither the preamble nor any information in the docket for this rulemaking contains any cost/benefit analysis of the rule's proposals. The preamble states the agency's need for additional funding and argues that customer service will suffer if the proposed fee increases (and the investments that would be funded with those fees) do not become effective. However, it does not contain an analysis of the costs and benefits should this rule go into effect, or of the costs and benefits of raising the application fees to the levels proposed. Nor is there apparently even the slightest consideration of the costs and benefits of pursuing alternative approaches, such as seeking more limited fee increases that are supplemented by appropriated funds.

DHS should not go forward with this rulemaking until it has considered more carefully the burdens and benefits that its proposal will create and has provided the public a reasonable opportunity to review and comment on its analysis. The decision to fund USCIS's operations solely through application fees, and the increases in the fee levels that DHS has proposed, will have significant adverse costs for both individual applicants and the general public. USCIS will remain tied to the variable funding that has failed so clearly in the past, and the accompanying budgetary shortfalls that have hindered its ability to modernize itself in past years will continue.

II. The Proposed Rule Fails to Demonstrate that the Fee Increases Will Result in Improved Customer Service.

Microsoft strongly supports the agency's goals of enhancing security, improving its technology systems, and increasing customer service. However, this proposed rule provides entirely inadequate assurance to the public that the rate increases will lead to appropriate improvement in customer service for the agency's customers. USCIS (and the former INS) has increased filing

[7] Executive Order 12866 was recently amended. The amendments, which did not affect the quoted passages, were published on January 23, 2007. *See* 72 Fed. Reg. 2763 (Jan. 23, 2007).

fees regularly over the past decade. The increases have been substantial, particularly in recent years. For example, in 1998 the cost to file an I-130 relative petition was $110. That increased to $130 in 2002, increased again in 2004 to $185, and was increased in 2005 to $190. DHS is now proposing to increase the fee to $355. The N-400 application for naturalization has increased in cost from $225 in 1998 to $330 in 2005, and it would rise again just two years later to $595 under the current proposal. The cost of filing an I-485 application to adjust status would make one of the largest jumps under the proposed rule. The new fee would now be $905, an increase of $580 from the current cost of $325. In 1998 the fee for filing this application was $220. Fees for virtually all other application forms will see similar increases under the proposed rule.

In spite of the fee increases enacted over the past decade, the agency is still plagued with outdated technology and information systems and still provides inadequate customer service in many areas. Backlogs and prolonged processing times for many benefits continue, particularly with regard to employment-based green card applications. The agency's security check procedures, particularly FBI name checks, are run inefficiently and continue to result in very serious adjudication delays in a substantial number of cases.[8] The agency has failed to modernize its IT systems and continues to rely on paper-based files and adjudication processes rather than current technologies.[9] The continued reliance on outdated, paper-based processes results in inefficient use of the agency's human and financial resources and results in higher processing costs.

According to the proposed rule, DHS will use the additional revenue to cover its current budgetary shortfalls and make a number of additional investments at a cost of over $524 million per year. These will allow the agency to reduce processing times by 20%, according to the agency's estimates, by the end of FY 2009. There is no business analysis or any other basis to conclude that the additional investments that DHS has detailed in the proposed rule will allow the agency to accomplish this goal. This stems from the instability of fee-based funding, as demonstrated by the agency's past inability to make improvements in spite of substantial fee increases.

Out of the $524 million DHS is proposing to spend, $123.8 million would go to additional adjudications and support staff. The agency is also planning to spend an additional $124.3 million on information technology. However, much of this additional IT spending appears to be for maintenance of the agency's outdated legacy systems, rather than the development of modernized systems. Most of the remaining investments will have, at best, a limited or indirect impact on improving benefits processing and services for the agency's customers. Over $113 million in additional funds is targeted for overhead (including facility costs, new training programs, transferring records to the National Archives, etc.), limited programs such as the

---

[8] *Annual Report 2006*, Citizenship and Immigration Services Ombudsman, Department of Homeland Security, p. iii (June 29, 2006).

[9] *Id.* at 29-32.

Cuban Haitian Entrant Program, and such other support costs as additional attorneys and policy personnel. Another $152 million of the additional fee revenue will be spent on security enhancements, including additional money for FBI security checks, additional fraud investigators, and increased physical security and internal audits. While Microsoft fully supports and endorses the need for effective procedures to ensure our nation's security, no case at all is made why these security-related funds will result in service improvements. We believe that a number of these security-related investments might be more appropriately made by other agencies that are statutorily charged with immigration enforcement and are funded through appropriations rather than by USCIS, which is charged by statute with providing immigration services.

While the proposed rule provides some detail regarding the additional $524 million in investments that DHS is proposing to fund with increased fee revenues, it does not adequately indicate how these investments, when taken as a whole, will allow the agency to accomplish its goals. It also fails to provide any details regarding alternative investments that the agency may have considered. In addition, many of the investments the agency is proposing to make are not sufficiently tied to improvements in the agency's adjudication processes. As a result, there is little reason for the public to believe that the dramatic fee increases in the DHS proposal will result in matching improvements in service.

III. The Proposed Fee Increases Will Eliminate Access to Our Immigration System for Many Eligible Immigrant Families and Limit Their Integration into Our Society.

The proposed fees, once effective, will simply be unaffordable for many deserving immigrants and their families. Significant numbers of eligible immigrants and petitioners will be unable to access the immigration system and obtain the legal status or benefits to which they may be entitled. This will not only cause significant hardships for affected individuals and their families; ultimately, it will harm our immigration system and our society overall.

We believe many deserving immigrants are going to find it extremely difficult, if not impossible, to afford these fees. The following example will illustrate this point. Currently, a family of four with an income of 125%[10] over the poverty line (as assessed by the Department of Health and Human Services)[11] would make approximately $25,813 per year, or approximately $2,151 per

---

[10] An income level of 125% above the current HHS poverty guidelines was chosen because this is the income level required for filing an affidavit of support in connection with sponsoring a family member to immigrate to the United States. This is necessary in order to demonstrate that the sponsored family member will not be inadmissible as a public charge under section 212(a)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(4). An individual or household whose earnings are at or above this 125% level is legally eligible to sponsor family members as immigrants.

[11] The poverty level guidelines for 2007 were published in the Federal Register on January 24, 2007. *See* 72 Fed. Reg. 3147.

month, *before* taxes. If such a family lived in a two-bedroom apartment in the Washington D.C. area, they would be faced with an average fair market rent as determined by the Department of Housing and Urban Development of $1,225 per month. After factoring in taxes and other necessary expenses such as food, transportation, and utilities, such a family would have little or no additional funds to pay these proposed application fees.

Once the proposed fees are in effect, if the head of this household wished to file the necessary applications to adjust the status of his or her spouse and two children, and if the two children were both over fourteen years old, he or she would be required to pay $4,020,[12] even before paying the additional expense to obtain the necessary medical examinations or paying for any legal help in completing and filing the applications. Once these additional expenses are taken into account, the family will be required to pay approximately one-fifth of its *gross* annual income to file these applications. The proposed fees will simply be unaffordable for many families in this situation. Many households will face the unfortunate position of deciding whether or not to file for immigration benefits for some or all members of the family. As a result, many eligible individuals and families will be unable to obtain lawful permanent residence, and in some cases this may mean that they are unable to legalize their status.

Many eligible families will also be precluded from obtaining the important benefits of citizenship should this rule become effective. Under the proposed rule, the fee for filing naturalization applications will also be sharply increased. For example, should the hypothetical family of four wish to apply for naturalization, they would need to pay an additional sum of $2,700, or over ten percent of the family's gross annual income, simply to cover the costs of filing the applications and to pay for the necessary biometric checks.[13] The family might also have to pay significant costs for language and U.S. history classes in preparation for the naturalization process. Regardless of the particular benefit being sought, the fee increases that DHS is proposing in this rule will unquestionably limit access our immigration system. Our hypothetical example, a family of four earning 125% above the poverty guidelines, is quite a common one. Approximately one-half of the millions of immigrants who are eligible for naturalization have incomes under 200% of the poverty guidelines.[14] There is no reason to believe that the income statistics for individuals in the United States applying for other benefits are any different. Many individuals and families at these income levels will not have the money available to pay the filing costs to apply for immigration benefits, and millions of current lawful permanent residents may be unable to seek citizenship, simply because it will become unaffordable.

---

[12] This cost would include the cost of three I-485 applications at $905 each, three I-130 petitions at $355 each, and three separate biometric fees at $80 each.

[13] The $2,700 cost would consist of four N-400 applications at $595 each and four biometric fees at $80 each.

[14] Fix, Passel, & Sucher, *Trends in Naturalization*, (Washington, DC: Urban Institute, September 2003); *Immigration Fee Increases In Context*, (Washington, DC; Migration Policy Institute, Feb. 2007) p.1.

Families and individuals in this situation will encounter significant additional burdens. Individuals who are unable to pay the cost of inflated filing fees may fall out of legal immigration status and may lose their legal authorization to work in the United States. This also can be expected to adversely impact employers, who stand to lose valuable employees. Aliens who are unable to legalize their status or obtain employment authorization are also more susceptible to exploitation by unscrupulous employers.

Immigrants who cannot afford to pay the application fees to apply for naturalization will be unable to enjoy the important benefits of citizenship, including the right to vote and hold office, the ability to sponsor family members for immigration, the ability to travel freely on a U.S. passport, and the increased access to employment and educational scholarships.

Our economy and society will also suffer. A significant percentage of the large number of individuals with low incomes (200% or less of the poverty guidelines level) who are eligible for naturalization will be discouraged from applying because of the high application fees.[15] Obtaining immigration benefits, particularly permanent benefits such as naturalization and adjustment of status, are important steps in the integration of recent immigrants into our overall society.

Increased naturalization and integration bring significant benefits to the country. Citizenship may make foreign nationals more dedicated to democratic principles, better informed about the Constitution, and more fully engaged in civic life. Naturalization is an important affirmation of commitment to the country and its principles. In order to naturalize, immigrants must learn a basic level of English and study our history.[16] The Administration has already recognized the value to our society of increased naturalization and integration. Promoting assimilation and integration into our society is one of the five fundamental tenets of the President's plan for comprehensive immigration reform.[17] The fee levels that DHS is proposing will discourage many individuals from applying for naturalization and will be counterproductive to achieving the Administration's integration goals.

IV. DHS Should Not Limit the Possibility of Obtaining Fee Waivers in Individual Cases At the Same Time the Agency Is Proposing to Increase Application Fees in Such a Dramatic Fashion.

It seem highly inappropriate that DHS is proposing to restrict significantly the availability of fee waivers at the same time that it is proposing to increase dramatically the filing fees for virtually

---

[15] *Immigration Fee Increases In Context*, (Washington, DC; Migration Policy Institute, Feb. 2007) p.1.

[16] *Id.*; *A More Perfect Union: A National Citizenship Plan* (Washington DC: The Catholic Legal Immigration Network, Inc., Jan 2007), p.1.

[17] *See* www.whitehouse.gov/infocus/immigration/

all of its application and petition forms. Historically, under the regulations at 8 C.F.R. § 103.7(c), as well as the various iterations of agency guidance issued by both the former INS and USCIS, the agency has had the flexibility to waive application or petition costs (for virtually all application types) for those individuals who were able to demonstrate that they were unable to afford the prescribed fee. The agency's proposal to eliminate any possibility of fee waivers for a number of widely used application forms is an ill-advised shift from this historical practice. Eliminating the possibility of fee waivers will only exacerbate the problems that eligible immigrants and their families who cannot afford the proposed fees will face, should this rule become effective.

The proposed amendments to 8 C.F.R. § 103.7(c) would prohibit fee waivers for all but a short list of specific application types.[18] A number of widely-used forms are not included on this list, and thus applicants for those benefits would longer be eligible even for consideration of a fee waiver, regardless of their individual circumstances. While the application types that would no longer qualify for the possibility of a fee waiver include many business-based petitions and applications, we are puzzled by DHS's decision to exclude several important family-based form types as well. Included among the applications that USCIS would no longer consider for a waiver are Form I-130 relative petitions, Form I-360 petitions filed by widowers, and Form I-485 applications to adjust status to become a permanent resident.

The justifications provided for this proposal are flawed, and the proposed change is entirely unnecessary to address any perceived problems with the current waiver process. It appears from section XI of the preamble that DHS is proposing this change for two reasons. The agency's first reason is that, because it is a fee-funded agency, any fee waiver that it grants transfers the costs to all other fee-paying applicants. The second, and this should be no surprise, is that the agency expects to receive a higher rate of fee waiver requests once the proposed fee increased become effective. "To offset this potential," the preamble explains that DHS is amending the current regulations to limit the possibility of fee waivers where the "basic premise of a fee waiver is wholly or largely inconsistent with the status held or the benefit being sought."[19]

The agency provides several examples of situations in which DHS considers fee waivers to be inconsistent with the benefit being sought. These include companies that can request a waiver when seeking to admit a foreign worker to whom they must pay appropriate wages; individuals who can apply for a fee waiver when seeking status based on a substantial investment; or an extension of stay, where such persons must demonstrate the ability to support themselves during that stay without working; individuals who can seek a waiver who must demonstrate that they can support themselves; and those seeking to sponsor relatives who must commit to providing

---

[18] Under the proposed rule, the only application forms that would still be eligible for consideration of a waiver would be Form I-90, Form I-751, Form I-765, Form I-817, Form N-300, Form N-336, Form N-400, Form I-470, Form N-565, Form N-600, Form N-600Km and Form I-290B.

[19] *See* 72 Fed. Reg. 4912 (Feb. 1, 2007).

necessary financial support to those relatives, so that they do not become a public charge.[20] However, the changes in this proposed rule are entirely unnecessary for ensuring that only deserving applicants receive fee waivers. USCIS already has the authority, under the current regulations, to reject any fee waiver request in any case where it determines that the applicant has failed to demonstrate that he or she cannot afford the fees. More importantly, the agency's underlying premise that fee waivers are automatically inappropriate in several of the examples cited, particularly those involving family-based immigration and sponsorship, is simply incorrect.

There is no automatic inconsistency between an individual applying for adjustment of status or seeking to sponsor a relative for admission to the United States and that particular applicant's need for a fee waiver. This will be particularly true should the fee increases proposed in this rulemaking go into effect. An applicant for adjustment of status, or a petitioner seeking to sponsor one or more relatives to immigrate to the U.S., may very well be able to meet his or her financial obligations under the immigration laws but still be unable to pay, in one lump sum, the filing fees. As discussed in section I, above, a substantial portion of the population who are eligible to apply for immigration benefits have incomes that are less than 200% of the poverty level. Earlier, we discussed a hypothetical head of a family of four who earned 125% over the current poverty guidelines. At that income level his three immediate family members seeking to adjust status are legally eligible and cannot be considered inadmissible for economic reasons. The head of the household may be fully able to support their needs on a daily basis. However, he or she may very well be unable to afford to pay over $4,000 in a single lump sum, as would be required (if the proposed fees become effective), to file the application forms. As in countless other similar situations, there is no inconsistency in considering a fee waiver with the benefit being sought. However, the proposed rule would eliminate the agency's possibility of considering a fee waiver in just such cases, and, therefore, would only exacerbate the problems of individuals and families being cut off from our legal immigration processes.

In addition, should the agency's proposal to sharply limit fee waivers become effective, it will create a strange inconsistency between the handling of fee waivers by DHS and the handling of waiver requests for many of the very same application types by the Department of Justice (DOJ). Immigration Judges, who are within DOJ, adjudicate many of the same applications for individuals in immigration court who have been placed in removal proceedings. *See* 8 C.F.R. § 1003.24(d). Should the DHS proposal go into effect, an individual who is in the United States legally who cannot afford to pay the $985 necessary to file an application for adjustment of status will be unable to obtain a waiver of the fee from USCIS. However, an alien whom the Government is expending resources to deport in removal proceedings before an Immigration Judge will still be able to apply for fee waiver for the very same application. There does not appear to be any reasonable basis for allowing an illegal alien to be considered for a waiver but preclude even the possibility of a waiver for individuals who are here legally. As noted above, this is not a situation that Microsoft itself would regularly confront. As an entity that thrives,

[20] *Id.*

however, in arrangements in which it is imperative that the immigration system can be made to work, Microsoft feels it is important to comment on this section.

The proposed rule also fails to demonstrate that there is any real necessity for making this change. No evidence is provided that fee waivers prove overly burdensome for the agency under the current regulations, for example, nor is there any evidence provided that the fees that are waived add excessively to the costs for other applicants who can afford to pay the fees. No data has been provided regarding the number of fee waiver requests that the agency currently processes, the number of requests that are currently granted or denied, and the number of fee waiver applications that the agency expects to receive should the proposed fees go into effect. Thus, insufficient information has been provided to allow the public to reflect carefully on this proposal and assess its necessity. However, it is our understanding that the number of fee waiver requests that the agency receives is a very tiny percentage of the total number of applications received. At an oversight hearing before the House Immigration Subcommittee on February 14, 2007, USCIS officials indicated that last year the agency received approximately 56,000 fee waiver requests, and that this represented only one-tenth of one percent of the overall application volume. Just as striking, those same officials testified that USCIS currently grants approximately 85% of the fee waiver requests that it receives.[21]

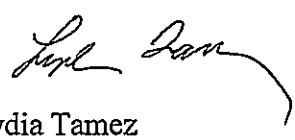
Microsoft strongly urges DHS to reconsider its proposal to limit fee waivers in this rulemaking. The fact that far less than one percent of the applicants who currently file applications request waivers, combined with the fact that USCIS grants the vast majority of those requests that are made, clearly indicates that there is no current systemic problem with abuse of the fee waiver process that requires correction. The agency already has the authority to deny any waiver request that fails to demonstrate an inability to pay. Additionally, the agency's underlying premise, that certain application types or benefits are automatically inconsistent with even the possibility of a fee waiver is fundamentally flawed, particularly with regard to family-based applications. While many family sponsors may be able to fully support the economic needs of the relatives they sponsor, they may not have the money to pay the large upfront fees that will be required to file a number of applications should the increased fees go into effect. The proposal to eliminate fee waivers thus is based upon faulty premises, is targeted at a problem that doesn't demonstrably exist, and will cause extreme hardship in many individual cases where deserving applicants do not have the funds to file immigration applications and can no longer be considered for a waiver.

[21] Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law Oversight Hearing on *The Proposed Immigration Fee Increase*, February 14, 2007. A video webcast of the hearing is available at http://judiciary.house.gov/oversight.aspx?ID=270.

Conclusion

Microsoft thanks DHS for the opportunity to comment on this proposed regulation. Microsoft strongly supports USCIS' goal to improve customer service, and it endorses the agency's need for additional funding to accomplish that goal. However, DHS should seek those funds at least partly through additional appropriations from Congress rather than through higher application fees. The proposed rule would put in place a fee regime that is excessive, not required by law or facts, and detrimental to the goal of avoiding delays to key processing in systems that USCIS (and Microsoft) considers indispensable. The fee amounts in the proposed rulemaking are entirely out of line with the benefits processed for a "regular user" company like Microsoft. It is critical to remember that Microsoft is a major employer for U.S. workers, and will continue to be so as long as conditions make that possible. The more these fees increase, the more that affects the business calculation that a company must make about where it should hire globally. U.S. policy should strive always to make sure the answer to that is, "the United States." The proposed rule should be withdrawn so that DHS can perform an analysis of all of the relevant costs and benefits and seek additional appropriations.

Sincerely,



Lydia Tamez
Associate General Counsel
Legal and Corporate Affairs
Microsoft Corporation

Cc: By facsimile (866-466-5370)

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