

# CompeteAmerica

The Alliance for a Competitive Workforce

December 27, 2019

Ms. Samantha Deshommes  
Chief, Regulatory Coordination Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue, NW  
Washington, DC 20529

**Re: DHS Docket No. USCIS-2019-0010  
Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements  
RIN 1615-AC18**

Dear Chief Deshommes,

The Compete America Coalition advocates for ensuring that the United States has the capacity to educate domestic sources of professional talent and to obtain and retain the talent necessary for American employers to continue to innovate and create jobs in the United States. Our [Coalition members](#) include higher education associations, industry associations, the nation's largest business and trade associations, and individual employers that work together concerning issues pertaining to the high-skilled immigration system of the United States. For more than 20 years, Compete America has worked with successive administrations and Congress on issues critical to the global mobility of talent and compliance, functionality, and integrity in the employment-based immigration system of the United States.

## **COMMENTER INTEREST AND SUMMARY OF POSITION**

Members of our coalition often seek both nonimmigrant and immigrant classification for foreign-born professionals offered employment in the United States. Across our Coalition, our members are attentive to changes and policies in both the nonimmigrant visa and immigrant visa systems. For that reason, we have reviewed the proposed regulation ("Notice of Proposed Rule Making" or "NPRM") that United States Citizenship and Immigration Services ("USCIS" or "the agency") recently published that increases filing fees and makes other changes, and are writing to share our views concerning the fee rule NPRM.

The proposal from USCIS would *significantly* increase the fees charged for such nonimmigrant visa petition adjudications. According to the proposed fee increases published in the

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Federal Register on November 14, 2020,<sup>1</sup> fees for L-1 filings would increase 77%, H-1B filing costs would increase 22%, O-1s would increase 55%, and TNs would increase 53%. In addition, while fees for I-485 adjustment applications and I-140 immigrant petitions are not shown to increase under the NPRM, it appears USCIS is proposing to separate filing fees for an Employment Authorization Document (I-765 form) and Travel Document (I-131 form) that are currently included in one adjustment of status application fee. Because USCIS proposes to increase fees for both I-765 and I-131 requests and since those are commonly filed by employment-based adjustment applicants, this will raise the cost of filing for immigrant status. Moreover, given the visa availability backlogs for employment-based immigrants, increasing the cost of maintaining and extending nonimmigrant status while awaiting the opportunity to file for adjustment is directly tied to the total cost of sponsoring a foreign professional for immigrant status. At the same time as these fees are likely to increase for both nonimmigrant and immigrant classification, employers are facing growing backlogs at USCIS and uncertainty in timing of employment-based requests in both the nonimmigrant and immigrant systems.

The Compete Coalition asks that USCIS revise the proposed rule in five ways:

1. USCIS should not move forward with a fee increase for any form or benefit until the agency provides a backlog reduction plan for that class of adjudication, including a specific plan for ensuring consistency in processing times.

2. USCIS should not pursue user fee transfers to ICE from the account established in 286(m) of the INA, as such transfers are not anticipated by the Homeland Security Act, as amended, and user fees paid for adjudications should go for adjudications and activities directly tied to an adjudication or class of adjudication.

3. USCIS should announce that the new, bifurcated Form I-129 will be optional for cap-subject H-1B requests for FY2021 or will have at least a 6-month effective date delay from the date of final rule publication.

4. USCIS should reconfirm that the 15-day period for premium processing continues to be measured by calendar days, instead of being changed to business days.

5. USCIS should retain the current interpretation concerning “combined” filing and fraud fees, because it is seemingly required by the current statute and it is important to only change agency interpretations where there is statutory ambiguity.

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<sup>1</sup> Because of its revised, lower estimate for fee transfers to Immigration and Customs Enforcement, “DHS therefore anticipates a downward adjustment in the proposed fees” but the fee reduction has not been specified as of yet. 84 Fed. Reg. 67243, at 67244 (December 9, 2020) so we have no way of knowing if the proposed level of increases for nonimmigrant visa petition will decline.

## **INCREASED DELAYS IN HIGH-SKILLED IMMIGRATION PROCESSING AT USCIS SHOULD BE ADDRESSED BY THE AGENCY BUT NO BACKLOG REDUCTION PLAN IS INCLUDED IN THE PROPOSED FEE HIKES**

USCIS is experiencing significant backlogs in its adjudication services. This is true across all of the agency's areas of adjudication, to include applications and petitions for employment-based immigration benefits. These backlogs have been documented in a [Policy Brief on USCIS Processing Delays from the American Immigration Lawyers Association](#) and elsewhere, including multiple, bipartisan letters from the House and the Senate in the 116<sup>th</sup> Congress.<sup>2</sup>

The Society for Human Resource Management (SHRM) conducted a survey earlier this year of its membership regarding a variety of workplace issues and [SHRM's 2019 State of the Workplace](#) report reveals that the top challenge organizations face when hiring foreign talent are lengthy processing times and unpredictability of the visa process.<sup>3</sup>

### **A. Employment-Based Nonimmigrant Visa Delays Have Dramatically Increased**

The lengthening of the timelines for adjudications over recent years has impacted U.S. employers. Some employer members of our Coalition looked at their internal data to assess processing times for FY19 as compared to FY16. Employers have learned that while USCIS was completing H-1B adjudications in a relatively timely fashion three years ago, they cannot rely on USCIS to complete timely H-1B adjudications today. For example, one employer noted the following concerning striking changes regarding adjudication timelines for cap-subject H-1B petitions:

<b>Timeliness of cap-subject H-1B adjudications</b>		
	<b>Adjudication completed within 60 days of filing petition (by 6/1)</b>	<b>Adjudication completed after start of FY (after 10/1), more than 6 months after filing</b>
<b>FY16</b> Percentage of cap-subject petitions filed April 2015, selected in lottery and adjudicated by 6/1 or after 10/1	84%	5%
<b>FY19</b> Percentage of cap-subject petitions filed April 2018, selected in lottery and adjudicated by 6/1 or after 10/1	53%	29%

<sup>2</sup> For example, USCIS backlogs have been the subject of a [May 2019 bipartisan letter on USCIS delays from 38 Senators](#), a [March 2019 letter from a bipartisan group of House Members from the Texas delegation](#), a [May 2019 letter to GAO from 82 Members of the House](#) asking for an independent investigation of USCIS processing delays, and a [February 2019 letter from 86 House Members to USCIS](#) asking for information about the agency's backlogs.

<sup>3</sup> See p. 11 of SHRM's 2019 report. When asked to identify the top three challenges when hiring foreign-born talent, 66% of organizations identified lengthy delays as one of the top three challenges, 60% identified complex application paperwork, and 55% identified unpredictability.

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Similarly, when filing nonimmigrant work-authorized extensions of status petitions (regardless of classification) as early as possible, the agency cannot consistently complete extension adjudications involving the same employer, the same employee, and frequently the same job. Three years ago, such adjudications never took longer than 240 days and almost never took longer than 180 days. Today, such adjudications cannot reliably be completed in those time frames. An employer explained the following about nonimmigrant visa petition extension adjudications:

Timeliness of I-129 nonimmigrant visa (NIV) extension petition adjudications		
	Adjudication completed within 240 days of expiration, before end of work authorization under 8 CFR 274a.12(b)(2)	Adjudication completed within 180 days of filing extension
FY16 NIV extension petition filed prior to expiration of status	100%	90%
FY19 NIV extension petition filed 180* days prior to expiration of status	90%	60%

\*Extension petitions cannot be filed more than 6 months before the expiration of status. Employers have moved to filing extensions as early as possible with the timing delays currently plaguing the system. Combining the 180 days before expiration with the 240 days of regulatory work authorization is not always enough with present agency backlogs.

When an employer contacts USCIS for customer service about case processing delays or other related issues concerning nonimmigrant visa petitions filed by the employer there are no timely or reliable mechanisms provided by USCIS to obtain assistance. Service requests for nonimmigrant visa petitions are taking approximately two months to see a response. Phone calls to the USCIS customer service line take approximately 30 minutes to reach a first-tier customer service agent and over 6 hours to reach a second-tier agent or officer for escalations. Additionally, USCIS has deactivated contact email addresses, resulting in a further decline in customer service.

**B. International Student Issues**

USCIS failure to complete H-1B adjudications by the start of the fiscal year is particularly problematic for companies engaging in robust on-campus recruiting efforts across the nation's universities, leading to the hiring of American graduates beginning their careers as well as foreign-born professionals earning degrees in the United States. That's because F-1 nonimmigrants graduating from U.S. colleges and universities often have gap in their status and work authorization when H-1B numerical caps mandate a delayed start date for their change of status to H-1B.

This so-called "cap-gap" occurs in any year when the H-1B numerical cap is met so early in a fiscal year that the employer cannot file for a change of status effective until the start of the next fiscal year or October 1. The cap-gap regulation extends the status and work authorization of an F-1 nonimmigrant caught in a cap-gap between the end of his or her practical training and the October 1 start date on his or her H-1B petition. 8 CFR 214.2(f)(5)(vi)(A). Whenever USCIS does not complete adjudication of an H-1B petition by October 1 for an F-1 nonimmigrant with cap-gap

protection, the individual's employment authorization ends and the individual must stop working until adjudication is completed.

In promulgating the cap-gap relief regulation, DHS anticipated that H-1B petitions would be adjudicated by October 1. Specifically, in describing its cap-gap relief regulation DHS explained that "in light of the importance that DHS places on international students, USCIS prioritizes petitions seeking a change of status from F-1 to H-1B. This prioritization normally results in the timely adjudication of these requests, so the vast majority of F-1 students changing status to H-1B do not experience any gap in status."<sup>4</sup> DHS also reiterated that the "cap-gap provision is based in part on the premise that students who seek to benefit from the provision actually qualify for H-1B status."<sup>5</sup> Lastly, in finalizing the cap-regulation DHS made a commitment to "make every effort to complete adjudications on all petitions seeking H-1B status for Cap-Gap beneficiaries prior to October 1, including by timely issuing RFEs in cases requiring further documentation."<sup>6</sup> During the last three years, USCIS has seemingly abdicated its commitment to timely adjudication of these cases on behalf of international students, and we would ask that a final fee rule and accompanying backlog reduction plan provide specifically to address cases filed on behalf of F-1 nonimmigrants.

### C. Portability of H-1B Professionals

Longer adjudication timelines are troublesome when considering the free movement of professional workers. Such movement, for both American and foreign-born professionals, should be considered a priority for a healthy economy. However, when an employer seeks to laterally hire a high-skilled professional who happens to be employed in H-1B status with a different employer, both employer and employee must think carefully on how to proceed given the current adjudication delays. The failure to provide timely adjudications has a direct impact on the portability of such workers, despite the fact Congress has already established that such portability is supposed to be encouraged and protected by statute (section 214(n) of the INA).

### D. Request

The failure to provide timely adjudications is a universal issue in employment-based immigration. These unfounded long delays create real world disruption for U.S. employers. Before increasing fees paid by users for these cases, USCIS should provide the public with a detailed backlog reduction plan justifying the payment of higher fees, including how the agency will address timely adjudication of petitions on behalf of F-1 nonimmigrants.

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<sup>4</sup> 81 Fed. Reg. 13040 at 13101 (March 11, 2016).

<sup>5</sup> Id.

<sup>6</sup> Id.

## **THE PROPOSED TRANSFER TO IMMIGRATION AND CUSTOMS ENFORCEMENT OF USER-PAID ADJUDICATION FEES SHOULD BE ABANDONED**

Beginning with the funding of the federal government October 1, 1988, immigration adjudications were directed to be funded by user fees. At that time, legacy INS (Immigration and Naturalization Service) activities were divided among several programs: Examinations, Investigations, Detention and Deportation, Inspections, and Intelligence. It is our understanding that the Immigration Examinations Fee Account (IEFA) was well-understood to relate solely to adjudications completed by Examinations. That is why legacy INS and later USCIS attempted to set fees based on the cost of the service being provided to the immigrant – or petitioner sponsoring the immigrant. Indeed, charging fees for government services is not a new idea. The executive branch’s Office of Management and Budget uses the term “user fees” to apply to “fees, charges, and assessments the Government levies on a class directly benefitting from, or subject to regulation by, a Government program or activity, to be utilized solely to support the program or activity.”<sup>7</sup>

The user fee model for immigration adjudications, however, has run into serious complexity and serious debate, 30 years from its inception. In part because of the intricate and difficult nature of many immigration benefit adjudications today and in part because of the important public policy implications of such adjudications, significant questions have arisen about how USCIS should use the fees collected and whether it makes sense to have USCIS funded as a fee reliant agency. There is a legitimate question and pros and cons around whether USCIS user fees should cover solely the services provided or should recover the agency’s full costs so it is not subsidized by taxpayer funding.

### **A. USCIS user fee transfers to ICE**

We are certain that USCIS joins our Coalition members in being committed to the importance of protecting the integrity of the immigration system. The Coalition well understands that preventing fraud and ensuring compliance in the implementation of the nation’s high-skilled immigration laws is fundamental. However, the USCIS Fraud Detection and National Security directorate does exactly that with respect to *USCIS adjudications*, supplementing USCIS’s own refocused efforts to ensure full compliance with the statute and regulations in its adjudications. Immigration and Customs Enforcement (“ICE”) undoubtedly engages in important law enforcement activities that support, complement, and protect the integrity of USCIS adjudications. However, the importance of these activities neither necessitates or sustains the policy choice of transferring funds paid by USCIS users to ICE.

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<sup>7</sup> See, e.g., OMB, *Analytical Perspectives* (2009), concerning the Budget of the United States Government FY2000, at chapter 18 on User Charges and Other Collections, p. 271-285, and GAO, *Glossary of Terms Used in the Federal Budget Process* (2005), at p. 100 (A user fee is “a fee assessed to users for goods or services provided by the federal government. User fees generally apply to federal programs or activities that provide special benefits to identifiable recipients above and beyond what is normally available to the public.”)

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When Congress reorganized legacy INS into separate agencies within the new Department of Homeland Security it initially established one agency responsible for almost all of INS functions and a separate, second agency responsible for immigration adjudication and naturalization services. The new DHS directorate for Border and Transportation Security (BTS) was given control of detention and removal, intelligence, investigations, and inspections (all programs previously run by INS), along with Border Patrol, as part of a Bureau of Border Security (resident within BTS), while immigration adjudication and naturalization services were placed in a new Bureau of Citizenship and Immigration Services in DHS.<sup>8</sup> The Bureau of Border Security (which included what is now ICE and Customs and Border Protection<sup>9</sup>) and Bureau of Citizenship and Immigration Services were each deemed to be so important that Congress *explicitly stated* that these separate bureaus had distinct responsibilities and that Examinations fees from Citizenship and Immigration Services could not as a general rule be transferred for the law enforcement functions performed by the Bureau of Border Security:

“...It is the sense of Congress that – (1) the missions of the Bureau of Border Security and the Bureau of Citizenship and Immigration Services are equally important, and, accordingly, they each should be adequately funded. ...” Section 474 of the Homeland Security Act

“...(d) Fees Not Transferable.—No fee may be transferred between the Bureau of Citizenship and Immigration Services and the Bureau of Border Security for purposes not authorized by section 286 of the Immigration and Nationality Act (8 U.S.C. 1356). ...” Section 476 of the Homeland Security Act, entitled Separation of Funding

These provisions, coupled with the reality that Examinations was a known and understood program within legacy INS when immigration user funding was first established, make clear that Congress did *not* contemplate USCIS transferring to ICE any user fees paid for “immigration adjudication and naturalization services” and described in sections 286(m) and (n) of the INA.

A separate debate, and one not part of the USCIS fee increase proposal, is whether and to what extent the fraud prevention and detection fees paid by users pursuant to 286(v) of the INA should be transferred to ICE. We are unaware if those monies are shared with ICE today, but do know that 286(v) payments, and a portion of USCIS user fees, go to the USCIS Fraud Detection and National Security (or “FDNS”) directorate to specifically take steps to detect, deter, and prevent fraud in USCIS adjudications. Indeed, Senator Grassley and presumably others have requested that

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<sup>8</sup> See sections 441 and 442 of the Homeland Security Act (Pub. L. No. 107-296, November 25, 2002)(creating a new DHS, effective March 1, 2003). Section 441 established that INS functions other than adjudications were made part of the Border and Transportation Security (BTS) directorate and section 442 established that the Bureau of Border Security (part of BTS) was responsible for these BTS functions previously performed by INS. Beginning FY2006, DHS was further reorganized by eliminating the BTS directorate and dividing the activities of the Bureau of Border Security into Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), as part of the DHS appropriations legislation passed in 2005 effective October 1, 2005.

<sup>9</sup> *Id.*

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286(v) funds should be shared with ICE.<sup>10</sup> Fee sharing of the 286(v) fraud fees is certainly a legitimate inquiry and a fee sharing that is not in any way barred by any limitation in 286(v) or the Homeland Security Act.

**B. Request**

We ask that USCIS confirm it will not transfer user fees to ICE collected under the agency's 286(m) authorities, such as those fees the agency proposes to increase in this rulemaking. We observe that on December 17, 2020 the House passed a spending bill for FY2020 that included the additional \$207 million the Trump administration sought for ICE – the same amount USCIS initially proposed be transferred to ICE for adjudication services. The Senate passed the bill on December 19<sup>th</sup> and the President signed it into law December 20<sup>th</sup>. We presume, therefore, that USCIS will drop altogether its proposal to transfer funds to ICE. It is still worth noting for the administrative record of this rulemaking that this outcome is *mandated* because it is at best unclear whether USCIS has statutory authority to transfer funds to ICE from the user fee accounts described at 286(m) and (n) of the INA, as opposed to transferring monies from the fraud prevention account established at 286(v) of the INA to which certain employment-based petitioners also pay separate fees. We ask that when finalizing the fee rule, USCIS acknowledge these legal issues and also note that the agency recognizes the value of applying user fees for the purpose of reducing backlogs and providing more processing time certainty at times when there are significant backlogs and uncertainty in processing times. We also ask that the proposed fee increases be further decreased to reflect the fact that there will be no fee transfer to ICE.

**ADDITIONAL CONCERNS AND CONSIDERATIONS**

The Coalition has three other concerns about the fee proposal, one relating to the timing of the newly devised I-129 form, one relating to the accounting for premium process timing, and the last relating to statutory fees set by Congress.

(1) Revised Form I-129. The new proposed fee schedule differentiates fee levels for the various nonimmigrant work-authorized categories using the Form I-129. As a result, USCIS is proposing to require a bifurcated I-129 form submission that will include new, separate forms for requests for each H-1B, H-2A H-2B, L-1, O-1, TN and other categories for which employers utilize Form I-129 to petition for authorization to hire a foreign-born worker. This is a sensible approach. However, plans and forms preparation are already underway for submissions regarding H-1B cap-subject filings to be considered under the numerical limits for FY2021. Because such filings are regularly filed in much larger number than can be selected for processing, and because such filings must be filed in particular, limited windows, there is a significant up-front process to collect all data and prepare all forms for all potential H-1B beneficiaries. Changing the forms mid-stream for this

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<sup>10</sup> For example, when the Obama administration's last USCIS Director, Leon Rodriguez, had his confirmation hearings in 2014 Senator Grassley asked Mr. Rodriguez to answer Questions for the Record concerning USCIS sharing fraud fees under 286(v) with ICE. See <https://www.judiciary.senate.gov/imo/media/doc/031214QFRs-Rodriguez.pdf>.

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class of petition will be extremely disruptive, especially in light of the brand-new pre-registration process that will be utilized for the first time in calendar year 2020 for FY2021 cap-subject cases. We ask that the agency clearly state that any new Form I-129 will be optional for cap-subject H-1B requests for FY2021. Alternatively, we suggest the agency establish a delayed effective date for the new forms, with mandated use of the new forms not being in place sooner than 6 months from the date a final rule is published.

(2) Premium Processing. The Coalition is concerned about the proposed change to pay premium processing fees for the longer 15-day clock running on business days as opposed to calendar days. We are unclear as to why USCIS feels it desirable or justified to ask stakeholders to pay more for less. Should the agency nevertheless proceed with the switch from counting calendar days to instead counting business days, we request that the new rule establish that the only days exempted from the regular 15-day clock are weekends and federal holidays. The agency proposal identifies other days that would not be part of the regular 15-day accounting, including local or regional office closings for weather or other local or regional closure reasons. Such closings would not be readily knowable to petitioning employers, and in any event businesses choosing to pay for premium processing need to have certainty about the 15-day clock and need to plan accordingly. For that reason, if the agency moves from counting calendar days then the standard 15-day clock should be defined as weekdays that are not federal holidays.

(3) Fees mandated by Congress. We know that USCIS retains authority to interpret, and reinterpret, provisions of laws enacted by Congress that are *ambiguous*. But an important bedrock of administrative law, and the smooth operation of government, including high-skilled immigration adjudications, is that federal agencies do not retain authority to revise statutory provisions that are *unambiguous*. For this reason, the Compete Coalition draws the agency's attention to the simple fact that Public Law 111-230 (2010) and Public Law 114-113 (2015) do not support the USCIS NPRM revisions to the immigration fees created by those statutes. While USCIS describes policy reasons why it would like to change the fees, in this case Congress set the fee amounts *and* set the parameters for when they apply.

Since 2010 when first enacted by Congress, USCIS has required these statutory fees to be paid whenever a fraud prevention fee is due and has collected the statutory fee amount as the total fee due to include the fraud prevention amount. This interpretation is not only correct, it is mandated by the statutory language. The agency may prefer a different policy, such as not combining the fraud fee as included in the statutory fee and not limiting the collection of the statutory fees to those initial or extension requests where the fraud fee is due. However, in this case Congress has decided otherwise and the agency's hands are tied.

## **CONCLUSION**

The Compete Coalition fully endorses a commitment at USCIS to ensure the agency has sufficient funding to both protect the integrity of its adjudications and ensure that all agency adjudications across product lines, including employment-based adjudications, are completed in a timely and consistent fashion. And, we appreciate that the agency is faced with a difficult task in ensuring USCIS has sufficient funding to properly, accurately, and timely complete adjudications. However, the complexity of the agency's effort to fund its activities does *not* necessitate, and should not entail, acting without agency accountability for adjudication timeline uncertainty and growing adjudication backlogs. In order to effectuate such accountability, it seems evident that the agency must share a backlog reduction plan with the public before it proceeds with fee increases. As a matter of good governance and fairness, we consider the specifics of a backlog reduction plan for employment-based nonimmigrant and immigrant cases a necessary prerequisite to asking users to pay more.

USCIS has not provided a rational explanation for transferring considerable user fees to ICE when USCIS is faced with substantial, agency-wide delays and timing uncertainty, or how such transfers would be justified when it appears Congress expressly separated the funding of USCIS and ICE by statute. Thus, we ask that the final fee rule abandon the user fee transfer approach of transferring user fees from USCIS to ICE.

We also ask that the agency clarify that the new, bifurcated Form I-129 will not be required for cap-subject H-1B cases filed for FY2021 and that the agency retain the current 15-calendar day clock for premium processing. Because we recognize that only Congress can change the basis or amount of the statutory fees we presume that the agency will not continue its attempt to revise those fees through notice and comment rulemaking.

We appreciate the opportunity to participate in the public notice and comment process and thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott Corley", written in a cursive style.

Scott Corley  
Executive Director  
Compete America Coalition