

The Challenges of the Current USCIS Fee-Setting Structure Recommendation 63

June 15, 2022

U.S. Citizenship and Immigration Services (USCIS) employs over 20,000 persons, operates in more than 200 offices and other facilities throughout the United States and abroad, and has an annual budget averaging over \$4 billion since 2018. USCIS operates on a fee-for-service funding model, with approximately 97 percent of its budget funded by the filing fees it collects. By statute, the agency is required to set its fees at a level to ensure that it recovers the full costs of providing the benefits requested.

To adjust its filing fees, USCIS follows the Administrative Procedure Act rulemaking process. Before it may implement new fees, it must first announce the proposed fees in the Federal Register and explain why it needs to make the adjustments sought. The process gives the public an opportunity to comment on the proposal, and USCIS must respond to all reasonable and relevant comments. Invariably, this process is exceedingly slow.

While USCIS reviews its fees every 2 years, it can take many years to adjust its fees. In addition, some immigration benefits—such as humanitarian-related benefits—do not require a fee, so USCIS recovers these costs by increasing costs for other benefits. These and other challenges inherent to the fee-for-service funding model leave the agency frequently underfunded, requiring it to shift its limited resources (including its adjudications staff) between different lines of work to meet the demands placed on it by the executive, legislative, and judicial branches of the U.S. government.

The Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman) examined the USCIS funding model after observing the financial crisis and dysfunction that followed in the immediate wake of the COVID-19 pandemic, including the threat of furloughing much of its staff. While the agency ultimately avoided the furlough, it implemented austerity measures that significantly impaired its ability to fulfill its mission.

In this formal recommendation, we identify the challenges in USCIS' current funding model and offer five recommendations to put the agency in a sound financial position to fulfill its important mission and meet its goals.

We look forward to USCIS' response to this recommendation and appreciate its continued commitment to working with the CIS Ombudsman to improve how our nation's immigration benefits system operates.

Sincerely,

Phyllis A. Coven
CIS Ombudsman

RECOMMENDATIONS

The CIS Ombudsman recommends that USCIS:

1. Reengineer its fee review process, including its staffing allocation models, to ensure it fully and proactively projects the amounts needed to meet targeted processing time goals for future processing, as well as backlog adjudications.
2. Seek congressional appropriations to cover the cost of delivering humanitarian-related immigration benefits (including, but not limited to, USCIS' refugee and asylum programs).
3. Pursue authorization to establish a financing mechanism, through the auspices of the Department of the Treasury, that USCIS may draw upon to address unexpected revenue shortfalls and unfunded policy shifts and to maintain adequate staffing to meet its performance obligations.
4. Obtain annual appropriations specifically dedicated to eliminating backlogs.
5. Exercise its existing authority to adjust fees annually based on the salary/inflation factor calculated by the White House Office of Management and Budget (OMB).

REASONS FOR THE RECOMMENDATIONS

1. While USCIS reviews its filing fees every 2 years, the federal rulemaking process to change the fees can take years. Coupled with other legal hurdles, this has resulted in lengthy delays in implementing new fees.
2. Delays in rulemaking and other challenges inherent to the fee-for-service funding model leave USCIS chronically under-resourced, requiring it to constantly shift its limited resources between competing priorities and inhibiting its ability to meet emerging demands.
3. As currently modeled, USCIS must recover the cost of non-fee programs by increasing fees for other filers. In addition, current fee adjustments do not factor in the funds needed to address existing backlogs or to meet USCIS' target processing times.

Addressing the Challenges of the Current USCIS Fee-Setting Structure

June 15, 2022

The CIS Ombudsman, established by the Homeland Security Act of 2002, identifies systemic problems that individuals and employers face when seeking services from USCIS and makes recommendations based on: individual complaints and requests for help; information and inquiries we receive from non-governmental organizations and federal officials, including USCIS; and our interactions and meetings with applicants, petitioners, employers, non-governmental organizations including community and faith-based organizations, and immigration professionals across the country.

THE ISSUE

USCIS needs financial stability and flexibility to administer the nation's immigration benefits system and provide customers with predictable service and accurate and timely adjudications. The agency's current fee-for-service funding model does not fully equip the agency to meet these goals, placing the immigration benefits system at risk of systemic failure.

WHAT WE DETERMINED

In this study, we examined USCIS' fee-for-service funding model to determine how it currently sets and adjusts its filing fees and what can be done to address the agency's chronic funding challenges.

- Although a small handful of USCIS fees are established by statute,¹ the agency's fee-for-service funding model requires it to engage in the Administrative Procedure Act's (APA) rulemaking process to adjust fees, which has proven to take years.² The agency's rulemaking process establishing new fees is the most critical financial undertaking of the agency. In addition, since 2005, the agency has not exercised its authority to adjust fees annually for inflation.
- To raise fees, the agency must first conduct extensive fact gathering, analysis, and negotiation, and navigate through multiple reviews conducted by various offices in USCIS, the Department of Homeland Security (DHS), and OMB. The rulemaking process requires the agency to provide notice and a meaningful opportunity for the public to offer comments on proposed fee increases, and to respond to all unique public comments before it issues a rule setting the new fees. At a minimum, the rulemaking process adds at least a year, often two, to the fee-setting process. As a result, by the time USCIS issues a final rule, key data that it relied upon to set its future fees are already outdated—leaving the agency chronically under-resourced and understaffed.

¹ For example, USCIS premium processing fees to obtain faster processing of certain immigration benefit requests is set by statute. 8 U.S.C. § 1356(u).

² U.S. Government Accountability Office Report (GAO), "Federal User Fees: A Design Guide," GAO-08-386SP, p. 35 (May 2008); <https://www.gao.gov/cgi-bin/getrpt?GAO-08-386SP> (accessed Feb. 28, 2022).



Office of the Citizenship and
Immigration Services Ombudsman

Working to improve the immigration benefits process



- There are other challenges inherent in USCIS' fee-for-service funding model. Pay increases for existing employees and inflation that impacts non-payroll items are beyond its control but affect operations and capabilities. Although USCIS makes every effort to consider these variables in its forecasting, the agency's modeling may be significantly off.
- Another factor is the impact of statutory, regulatory, and policy-based directives that permit certain individuals to apply for immigration benefits without paying a filing fee. For example, individuals who are the victims of certain crimes, violence, and/or trafficking may file for an immigration benefit without a fee. Others may file for immigration benefits without paying a filing fee if they qualify for a means-tested fee waiver. Under its current fee-for-service funding model, USCIS shifts the cost burden of these fee waivers to other applicants in the form of a surcharge on the filing fees they pay. Perhaps the most significant of these unfunded costs come from the agency's extensive humanitarian work: asylum, refugee processing, and other workloads stemming from global emergencies.
- This last point stands in stark contrast to the costs incurred by the U.S. Departments of State (State) and Health and Human Services (HHS), which receive predictable funding from Congress for their respective humanitarian and refugee programs. Except for a recent appropriation for Operation Allies Welcome (OAW) and to support up to 125,000 refugee admissions in Fiscal Year (FY) 2022, USCIS has not received annual appropriations to support its refugee and asylum-based programs since FY 2011.³ The costs associated with these services are borne by USCIS' fee-paying customers.
- The cash flow disruptions that occurred during the first months of the COVID-19 pandemic, when filing fee revenues dropped 40 percent between March and May 2020,⁴ pulled back the curtain on the shortcomings of the USCIS financial structure.
- As a result, USCIS twice notified more than two-thirds of its workforce during the summer of 2020 that they might be furloughed due to the revenue shortfall. USCIS requested a loan from Congress to fund its operations until its fee revenues returned to normal, but it did not receive the funding it sought. Although the agency was ultimately able to stave off furloughing employees, it was forced to make deep cuts in nonpayroll expenses, including but not limited to renegotiating contracts with vendors providing important support services at its lockboxes, mail rooms, Application Support Centers, IT programs, and its Contact Center. These actions added

³ OAW is the U.S. Government's effort to support Afghans fleeing conflict as they resettle in the United States. USCIS received no appropriations for its humanitarian programs in FY 2010 but was appropriated \$29.95 million of the requested \$248 million to fund a portion of the refugee and asylum processing administered under the Refugee, Asylum and International Operations Directorate and military naturalization processing in FY 2011. *See* "U.S. Citizenship and Immigration Services Fee Schedule," 81 Fed. Reg. 73292, 73293 (Oct. 24, 2016).

⁴ The largest revenue decreases for USCIS' dedicated user fees occurred at the beginning of the pandemic. GAO, "COVID-19 Reviewing Existing Policies Could Help Selected Agencies Better Prepare for Dedicated User Fee Revenue Fluctuations," GAO-21-104325, p. 24 (Sep. 2021); <https://www.gao.gov/products/gao-21-104325> (accessed Feb. 28, 2022).

to already extensive and now unprecedented backlogs and have impacted critical services, including undercutting advances in digital processing essential to the agency's progress.

CIS Ombudsman Recommendations

USCIS' near-exclusive reliance on a fee-for-service funding model leaves USCIS chronically under-resourced, making it nearly impossible for the agency to meet its obligations to customers, the executive branch, or Congress, and inhibiting its ability to pivot quickly to address new and emerging circumstances and demands.⁵

As further explained below, we recommend that USCIS seek legislative or regulatory action to:

1. Reengineer the agency's biennial fee review process, particularly its associated staffing allocation models, to ensure it fully and proactively projects the staffing levels needed to meet targeted processing time goals for future processing as well as backlog adjudications.
2. Cover the cost of delivering humanitarian-based immigration benefits (including but not limited to USCIS' refugee and asylum programs) through congressional appropriations.
3. Authorize and establish a financing mechanism, through the auspices of the Department of the Treasury, that USCIS may draw upon to address unexpected revenue shortfalls and unfunded policy shifts and to maintain adequate staffing to meet its performance obligations to its customers and Congress.⁶
4. Obtain annual appropriations specifically dedicated to eliminating backlogs.

⁵ This conclusion is supported by an independent analysis conducted by the Niskanen Center. See "Markup of Legislative Proposals to Comply with the Reconciliation Directive Included in Section 2002 of the Concurrent Resolution on the Budget for Fiscal Year 2022," Before the H. Comm. on the Judiciary, 117th Cong. (Sep. 17, 2021) (Jeremy L. Neufeld, "Statement for the Record of the Niskanen Center"); <https://www.niskanencenter.org/statement-for-the-record-of-the-niskanen-center/> (accessed June 1, 2022). See also "Oversight of U.S. Citizenship and Immigration Services," Before the Subcomm. on Immigration and Citizenship of the H. Comm. on the Judiciary, 116th Cong. (Jul. 29, 2020) (Supplemental Statement for the Record of Doug Rand, Senior Fellow, Federation of American Scientists, and Testimony of Jessica M. Vaughan, Dir. of Policy Studies, Ctr. for Immigration Studies; <https://www.congress.gov/event/116th-congress/house-event/110946> (accessed Feb. 8, 2022)).

⁶ For example, the U.S. Postal Service recently received authority to draw upon the U.S. Treasury. Rick Owens, "U.S. Postal Service Reaches Agreement with Treasury on \$10 Billion CARES Act Lending Authority," Postal Employee Network (Jul. 29, 2020); <https://postalemployeenetwork.com/news/2020/07/u-s-postal-service-reaches-agreement-with-treasury-on-10-billion-cares-act-lending-authority> (accessed Feb. 8, 2022). Such borrowing authority is not unique and has been made available to the U.S. Department of Agriculture's Commodity Credit Corporation as needed to implement specific programs. See U.S. Department of Agriculture, "Commodity Credit Corporation," <https://www.usda.gov/ccc> (accessed May 18, 2022).

5. Resume exercising its existing authority to adjust fees annually based on the salary/inflation factor calculated by OMB under Circular A-76.⁷

USCIS' CURRENT FEE-FOR-SERVICE FUNDING MODEL

As the agency that oversees the nation's immigration benefits system, USCIS performs an essential mission. USCIS employs over 20,000 employees and operates in more than 200 offices and other facilities throughout the United States and abroad.⁸ The agency runs an annual budget averaging over \$4 billion.⁹ It operates on a fee-for-service funding model, with approximately 97 percent of its budget funded by the filing fees¹⁰ it collects for adjudicating applications, petitions, and other benefit services.¹¹

A Long History of Collecting Fees for Services as Actually Provided. When passed in 1952, the Immigration and Nationality Act (INA) prescribed the payment of fees for certain immigration benefits.¹² USCIS is required to set filing fees that ensure the agency can recover the full operating

⁷ Executive Office of the President, OMB Circular NO. A-76 (Revised), Attachment C, "Calculating Public-Private Competition Costs" (May 29, 2003); https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A76/a76_incl_tech_correction.pdf (accessed Mar. 29, 2022). This OMB circular establishes how federal agencies may factor in federal pay raise and inflation assumptions. Each year, OMB issues a transmittal memorandum in the Federal Register identifying the numbers that should be used. *See, e.g.*, "USCIS Adjustment of the Immigration Benefit Application Schedule," 70 Fed. Reg. 56182 (Sep. 26, 2005) (accessed Mar. 29, 2022).

⁸ 1 USCIS Policy Manual, Pt. A, Ch. 1(A).

⁹ DHS, "United States Citizenship and Immigration Services Budget Overview - Fiscal Year 2021 Congressional Justification," p. 12; https://www.uscis.gov/sites/default/files/document/reports/USCIS_FY_2021_Budget_Overview.pdf (accessed Feb. 8, 2022); DHS, "FY 2018 Budget-in-Brief," <https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf> (accessed Jun. 6, 2022).

¹⁰ Based on data and CIS Ombudsman calculations derived from DHS, "U.S. Citizenship and Immigration Services Budget Overview - Fiscal Year 2022 Congressional Justification," p. 6; https://www.uscis.gov/sites/default/files/document/reports/USCIS_FY_2022_Budget_Overview.pdf (accessed Feb. 8, 2022). The percentage of fee revenue under President Biden's FY 2022 budget dropped to approximately 91 percent. It is further noted that FY 2022 may prove to be unique as the agency received \$275 million from Congress to address its growing backlog and to meet the administration's refugee admission target of 125,000, and an additional \$193 million in support of OAW. Extending Government Funding and Delivering Emergency Assistance Act, § 132 Pub. L. No. 117-43 (2021); Consolidated Appropriations Act, 2022, Title IV, Pub. L. No. 117-103 (2022); DHS, "Detailed Review of the Fiscal Year 2022 Omnibus," p. 4 (Mar. 28, 2022). As the CIS Ombudsman was finalizing this recommendation, the Administration was requesting \$765 million in the FY 2023 budget presentation to Congress for USCIS to "efficiently process increasing asylum caseloads, address the immigration application backlog, and improve refugee processing." *See* OMB, "Budget of the U.S. Government - Fiscal Year 2023," p. 20; https://www.whitehouse.gov/wp-content/uploads/2022/03/budget_fy2023.pdf (accessed Mar. 29, 2022).

¹¹ USCIS receives direct appropriations for limited and discrete programs only, specifically its operation of E-Verify, citizenship-related activities, and citizenship and integration grants. Filing fees vary, from \$10 to register a beneficiary in the H-1B Cap Lottery to up to \$17,795 to apply for an EB-5 Regional Center Designation, and depend on the particular benefit sought, the status of the petitioner and beneficiary, and other factors. A portion of the filing fees USCIS collects is used to offset the costs of waiving filing fees in some matters when the applicant/petitioner demonstrates that they cannot pay the fee.

¹² Current USCIS filing fees can be found at 8 C.F.R. § 103.7 (2020). According to the GAO, a user fee is defined as a "fee assessed to users for goods or services provided by the federal government and applies to federal programs or activities that

costs of the services it provides.¹³ By statute, regulation, or policy, there are some immigration benefits that may be requested without paying a fee: certain filings by refugees and asylees, victims of certain crimes who assist law enforcement in the investigation or prosecution of certain crimes (U nonimmigrant applicants), as well as victims of human trafficking (T nonimmigrant status), certain battered spouses, and others.¹⁴ The law also caps other filing fees, such as a \$50 fee for Temporary Protected Status (TPS) applications,¹⁴ far less than the actual cost of processing the application.¹⁵ Still further, fee waivers are available for qualifying individuals who request a benefit but cannot pay the full filing fee due to financial distress. USCIS interprets the INA as authorizing it to provide these immigration benefit services without charge.¹⁶ To cover these costs, however, USCIS adds a surcharge to the actual cost of adjudicating other immigration benefit requests.¹⁷

How USCIS Sets Its Fees. USCIS follows the rulemaking process in Section 553 of the APA to set and adjust its filing fees.¹⁸ This process is the long-established practice recommended by OMB and is

provide special benefits to identifiable recipients above and beyond what is normally available to the public.” GAO, “Federal User Fees: A Design Guide,” GAO-08-386SP (May 2008); <https://www.gao.gov/assets/a203361.html> (accessed Feb. 8, 2022). Because of the injunction that nullified the 2020 Fee Rule, “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Requests,” 85 Fed. Reg. 46788 (Aug. 3, 2020), regulatory citations to fees themselves will reference the regulation in place before 2020, as these are the fees currently in place. See “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Requests,” 86 Fed. Reg. 7493 (Jan. 29, 2021).

¹³ This encompasses processing applications and petitions as they are submitted, adjudicating them, and retaining records of these filings. It also includes the costs of operating its facilities, paying personnel, and performing appropriate steps to ensure that USCIS approves only those who are eligible and qualified for a benefit. See below for additional cost factors. In addition, while USCIS itself does not have rulemaking authority and its regulations are issued by DHS, USCIS generally conducts the fee study, drafts the regulation, and undertakes the various other rulemaking tasks. As such, this article refers to USCIS as the rulemaking component, though the rule is ultimately issued by the Secretary of Homeland Security.

¹⁴ 8 C.F.R. § 106.3 (2022).

¹⁵ The filing fee is capped by statute at \$50. INA § 244(c)(1)(B).

¹⁵ USCIS has acknowledged it does not account for the cost of these activities in its Activity-Based Cost (ABC) model. See “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” 84 Fed. Reg. 62280, 62284 (Nov. 14, 2019).

¹⁶ INA Section 286(m) authorizes, but does not require, that DHS set fees to recover the full cost of administering USCIS adjudication and naturalization services. The INA also authorizes setting such fees at a level that will recover the costs of services provided without charge, but it does not require that DHS provide services without charge. “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Requests,” 85 Fed. Reg. at 46806. INA Section 286(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 all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants. Such fees may also be set at a level that will recover any additional costs associated with the administration of the fees collected.”

¹⁷ *Id.*

¹⁸ As described in detail in this study, the current rulemaking process is cumbersome and lengthy, resulting in setting fees that may be inadequate even as they are updated. The CIS Ombudsman acknowledges that replacing or supplementing the current notice and comment rulemaking process with an alternative fee setting mechanism presents potential legal and operational challenges. When we probed using a Computer Price Index (CPI) inflation-based adjustment as a supplemental mechanism, USCIS responded: “Previous DHS regulations provided the authority for USCIS to make inflationary adjustments to fees using a composite of the Federal civilian pay raise assumption and non-pay inflation factor for that fiscal year issued by the Office of Management and Budget for agency use in implementing OMB Circular A-76, weighted

commonly referred to as “notice and comment” rulemaking, used for the majority of regulatory actions. USCIS is accordingly required to issue a “Notice of Proposed Rulemaking” (NPRM) to announce proposed adjustments to filing fees, explain why a fee adjustment is needed, and provide supporting information. It must also allow the public an opportunity to provide comments and respond to all reasonable and relevant comments before a final rule may be implemented. USCIS has issued final rules increasing immigration benefit fees ten times since 1994.¹⁹

The agency’s fee-for-service funding model was developed to be consistent with the Chief Financial Officers Act (CFO Act)²⁰ and OMB guidance.²¹ Under these directives and constraints, USCIS reviews the fees it charges every 2 years to ensure that the filing fees accurately recover the full cost to the federal government of delivering the services rendered.²² More specifically, the CFO Act requires agencies that follow a fee-for-service model to: (1) review their user fee rates every 2 years; (2) determine the full costs of providing services and an appropriate share of direct and indirect services

by pay and non-pay proportions of total funding for that fiscal year. *See* previous 8 C.F.R. § 103.7(b)(3)(2020). Such adjustments were never made, however, in part due to legal obstacles in executing a fee change through a Federal Register notice alone.” Information provided by USCIS (May 9, 2022). The CIS Ombudsman is not privy to the legal obstacles USCIS referenced but encourages USCIS to work with DHS’s Office of the General Counsel to overcome any such challenges.

¹⁹ Final rules implementing adjustments to immigration benefit fees were implemented in 1994, 1998, 1999, 2001, 2004, 2005, 2007, and 2010, and 2016. *See* “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” 84 Fed. Reg. at 62284-85. USCIS published a final rule in 2020, but it was enjoined by a U.S. District Court before it was implemented. *See Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 549 (N.D. Cal. 2020).

²⁰ 31 U.S.C. §§ 901-903.

²¹ OMB Circular A-25 establishes Federal policy regarding fees assessed for government services and for sale or use of government goods or resources. First issued on Sep. 23, 1959, pursuant to authority provided in Title V of the Independent Offices Appropriations Act of 1952 (IOAA), revised on July 15, 1993, Circular A-25 was subsequently rescinded and replaced with Circular No. A-25A. *See* OMB, “Transmittal Memorandum No. 1, Memorandum for Heads of Executive Department and Establishments, User Charges;” https://obamawhitehouse.archives.gov/omb/circulars_a025/ (accessed Mar. 7, 2022).

²² INA section 286(m) authorizes DHS to charge fees for adjudication and naturalization services at a level to “ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants...” and the CFO Act, 31 U.S.C. § 901-03, requires each agency’s chief financial officer (CFO) to review, on a biennial basis, the fees imposed by the agency for services it provides and to recommend changes to the agency’s fees. More generally, “[a]gencies derive their authority to charge fees either from the IOAA or from specific statutory authority. The IOAA provides broad authority to assess user fees or charges on identifiable beneficiaries by administrative regulation. User fees assessed under IOAA authority must be (1) fair and (2) based on costs to the government, the value of the service or thing to the recipient, public policy or interest serviced, and other relevant facts. Fees collected under this authority are deposited in the general fund of the U.S. Treasury and are generally not available to the agency or the activity generating the fees. Unless otherwise authorized by law, the IOAA requires that agency regulations establishing a user fee be subject to policies prescribed by the President. OMB provides such guidance to executive branch agencies under this authority through Circular No. A-25.” GAO Report, “User Fee Design Guide,” GAO-08-386SP (May 2008); <http://www.gao.gov/cgi-bin/getrpt?GAO-08-386SP> (accessed Feb. 28, 2022).

based on market value;²³ (3) review new programs in the agency to identify potential new user fees; and (4) report the results of these reviews in their annual CFO reports.²⁴

The APA Rulemaking Process is Time-Consuming. In all, the APA rulemaking process by which USCIS adjusts its fees is methodical, deliberate, and slow. Before USCIS can even begin the rulemaking process, it must first conduct a fee review study.²⁵ A fee review study involves gathering various cost data; making future receipt volume projections; determining and quantifying the potential cost of the agency's future priorities; and considering existing and potential budget and staffing needs to meet those priorities. This first step alone can take 6 months or longer to complete and depends on accurately predicting several variables, such as what workloads the agency will likely need to prioritize in the coming years. For example, the fee rule finalized in August 2020 was proposed as an NPRM 10 months earlier, and the data points—including completion rates, utilization rates,²⁶ and other variables that drove its fee rule analysis—were extracted from as far back as FY 2018.²⁷

Only after the fee review study is complete can the agency do a full analysis to arrive at one or potentially several alternative fee-setting proposals for initial consideration by USCIS leadership. Once USCIS leadership decides on a course of fee-setting, the agency can move forward with drafting an NPRM to adjust its fees. The NPRM must not only explain why adjustments are needed and support these justifications with data, it also must include an economic analysis on the fee increase's effect on people filing for benefits and examine and demonstrate why alternatives are inadequate. After the director of USCIS approves the draft rule, it must then be circulated within DHS and signed off on by the Secretary of Homeland Security.²⁸

Next, the draft NPRM is submitted to OMB, where the Office of Information and Regulatory Affairs must review and clear it before it may be published in the Federal Register as an NPRM.²⁹ This process is typically characterized by numerous exchanges (also known as passbacks) between the agency and OMB. These passbacks may be based on a variety of reasons, including requests for further information or support, realignment with agency, DHS and/or White House priorities, or intervening circumstances that warrant reassessment, etc.³⁰ A change of any fee during passbacks may require the

²³ Full costs include direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement; physical overhead, consulting, and other indirect costs, including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment; management and supervisory costs; and the costs of enforcement, collection, research, establishment of standards, and regulation. See "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 84 Fed. Reg. at 62282-83.

²⁴ 31 U.S.C. § 901-03.

²⁵ *Id.*

²⁶ Utilization rates represent the proportion of time officers spend on adjudication activities, as opposed to other activities such as meetings, administrative activities, training, and leave.

²⁷ "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 84 Fed. Reg. at 62286 ("USCIS' FY 2018 annual operating plan (AOP) is the basis for the FY 2019/2020 cost projections.")

²⁸ 6 U.S.C. § 112(e).

²⁹ Information provided by USCIS (Oct. 13, 2021).

³⁰ OMB also coordinates and collects comments through an interdepartmental clearance process where other parts of the federal government, such as the Departments of Justice, Labor, State or other agencies may offer comments on the rule based their interests.

agency to recalculate all fees and the accompanying economic analysis, which in turn may have cascading effects on supporting documents. These additional steps can delay the publication of a draft rule by months before it is offered to the public as an NPRM.

Typically, when a fee schedule NPRM is published, the public has 60 days to provide comments. Once the public comment period closes, the agency must consider and draft responses to all unique comments to move forward with a final rule. This triggers a second round of intra- and inter-agency review. The review process (except for the initial fact-gathering phase) is repeated, with the final rule similarly requiring the USCIS director, DHS, and OMB to review and approve it. Like an NPRM, the draft final rule may itself be passed back to USCIS one or more times before it is published in the Federal Register as a final rule.

The APA rulemaking process is slow. In the case of the final rule that USCIS published in the Federal Register on August 3, 2020,³¹ the entire process from the initial fact-gathering to publication took approximately 2 and a half years.³² Much of the information regarding completion times, costs, staffing, and payroll the agency used to determine its fees was gathered more than 2 years before the effective date of the final rule. Even though USCIS projects increases to allow for this delay when setting the fees, factors such as future payroll and cost of living adjustments, as well as general inflation, can be difficult to adequately forecast and may consequently be inaccurate. USCIS' payroll represents approximately 50 percent of its total annual budget.³³

The U.S. inflation rate reached 7 percent in FY 2021, the highest since 1982. Before 2021, annual inflation rates hovered steadily near 2 percent, with a high of 3 percent in 2011 and a low of just 0.12 percent in 2015.³⁴ The agency's rulemaking process could not have completely predicted and captured such unexpected swings in inflation. On this note, we point out that USCIS' 2016 Fee Rule adjustment was finalized during a period of all-time low inflation.

Litigation is an Additional Variable That Can Impact the Agency's Fee-for-Service Model and its Overall Financial Health. Publishing a final rule does not always ensure that USCIS will actually collect the new filing fees. USCIS last attempted to adjust filing fees through an NPRM published on November 14, 2019, which sought to adjust fees by a weighted average of 21 percent.³⁵ USCIS

³¹ "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 Fed. Reg. 46788.

³² Information provided by USCIS (Mar. 9, 2021).

³³ GAO, "COVID-19: Reviewing Existing Policies Could Help Selected Agencies Better Prepare for Dedicated User Fee Revenue Fluctuations," GAO-21-104325 (Sep. 2021), p. 36; <https://www.gao.gov/products/gao-21-104325> (accessed Feb. 28, 2022).

³⁴ Based on the CIS Ombudsman's calculations using data provided in the web page, "US Inflation Calculator, Current US Inflation Rates: 2000-2022;" <https://www.usinflationcalculator.com/inflation/current-inflation-rates> (accessed June 1, 2022). During the same decade, the average annual pay raise was 0.94 percent; yet in FYs 2020, 2021 and 2022, the increases were 2.6 percent, 1 percent, and 2.2 percent, respectively. These seemingly small figures can be deceptive when one considers the size of USCIS' workforce. Comparing USCIS' FY 2021's payroll budget supporting approximately 20,035 full time employees (FTE) to the President's FY 2022 payroll budget proposal supporting approximately 21,253 FTEs, the difference is just over a half billion dollars (\$534,201,000).

³⁵ USCIS uses a weighted average instead of a straight average because of the difference in volume by immigration benefit type and the resulting effect on fee revenue.

completed the full rulemaking process when it published its final rule on August 3, 2020.³⁶ However, a U.S. District Court enjoined it from being implemented due to technical reasons largely unrelated to this study.³⁷ As a result, 16 months later, USCIS continues to accept filing fees based on its 2016 Fee Rule, essentially providing services at below cost.³⁸

USCIS Staffing Models Reflect the Cost of Future Benefit Filings, But Not Backlogs

As noted above, the goal of USCIS' biennial fee review is to determine whether the fees the agency collects for the benefit services it provides are sufficient or if they need to be adjusted. USCIS follows a well-established methodology used by other agencies in the federal government that are similarly fee-funded in whole or in part.³⁹ The methodology uses what is referred to as Activity-Based Cost (ABC) modeling.⁴⁰ Under this model, USCIS: (1) assigns costs to specific benefit requests in a manner consistent with OMB guidance (Circular A-25); (2) distributes costs that are not directly attributed to or driven by specific adjudication and naturalization services; and (3) makes additional adjustments to effectuate specific policy choices and objectives.⁴¹ The main ABC modeling inputs are employee staffing, workload volume, adjudication completion rates, and utilization rates for each of the immigration benefits services it provides.⁴² Working together, USCIS' Office of the Chief Financial Officer and Office of Performance and Quality⁴³ use Staffing Allocation Models (SAMs) to produce inputs into its ABC model.

³⁶ "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 Fed. Reg. at 46788.

³⁷ *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d at 549.

³⁸ USCIS conducted a comprehensive biennial fee review and determined that current fees do not recover the full costs of providing adjudication and naturalization services. "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 Fed. Reg. 46788.

³⁹ DHS, Immigration Examinations Fee Account, Fee Review Supporting Documentation with Addendum (May 2020); <https://downloads.regulations.gov/USCIS-2019-0010-12271/content.pdf> (accessed Feb. 8, 2022).

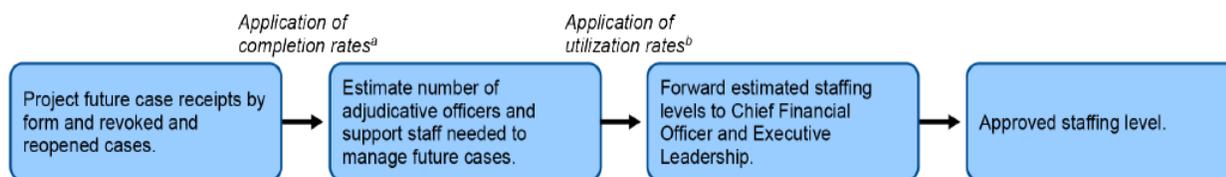
⁴⁰ *Id.*

⁴¹ As explained by USCIS, the ABC model makes use of four cost estimates to determine the full recovery cost for each of the benefit activities it performs. Specifically, the agency's ABC Model estimates: (1) Activity Cost: USCIS' budget by fee review activity; (2) Total Cost: Each immigration benefit request, including a share of overhead; (3) Unit Cost: Total cost divided by the total fee-paying receipts (or total receipts); and (4) Model Output: Fee-paying unit cost/fee paying receipts output. Information provided by USCIS (Oct. 13, 2021, Dec. 1, 2021, and Dec. 14, 2021).

⁴² "A common resource driver in the ABC model is the number of employees in an organization, and the percentage of time they spend performing various activities." DHS, "Immigration Examinations Fee Account, Fee Review Supporting Documentation with Addendum" (May 2020), p. 7; <https://downloads.regulations.gov/USCIS-2019-0010-12271/content.pdf> (accessed Feb. 8, 2022).

⁴³ The Office of Performance and Quality in USCIS "provides data and operational analyses to senior decision makers and key stakeholders, including Congress, DHS, and other governmental entities to promote a USCIS that is effective and efficient." USCIS Web page, "Management Directorate—What We Do" (May 17, 2022); <https://www.uscis.gov/about-us/organization/directorates-and-program-offices/office-of-investigations> (accessed June 14, 2022). More specifically, it is responsible for developing application-specific adjudication plans and performance goals for all field offices and service centers.

Figure 8: U.S. Citizenship and Immigration Services (USCIS) Staff Modeling Process



Source: GAO analysis of USCIS documentation. | GAO-21-529

^aCompletion rate is the number of hours it takes to fully process a specific form, which are calculated for each form-type.

^bUtilization rate is the average percentage of time adjudicators spend on adjudication, rather than other work.

Extracted from Government Accountability Office, “U.S. Citizenship and Immigration Services: Actions Needed to Address Pending Caseload” GAO-21-529, p. 31 (Aug. 8, 2021);

https://www.gao.gov/products/gao-21-529?utm_campaign=usgao_email&utm_content=topic_homelandsecurity&utm_medium=e_mail&utm_source=govdelivery (accessed Feb 8, 2022).

https://www.gao.gov/products/gao-21-529?utm_campaign=usgao_email&utm_content=topic_homelandsecurity&utm_medium=e_mail&utm_source=govdelivery (accessed Feb 8, 2022).

As currently configured and used, USCIS’ SAMs do not factor in additional staffing and associated resources the agency would need to reduce and eventually eliminate its backlogs. USCIS uses its SAMs to estimate the cost of adjudicating *future* benefit filings only. The agency explained that it does not incorporate its pending caseload (broadly including its backlogs) into its SAMs because it has already collected fees for those cases. USCIS applies this same logic to its lengthening processing times; again, the agency advised that its SAMs do not factor in staffing and other resources it would need to *reduce* its processing times. According to one USCIS official, when USCIS conducts its fee review under its current modeling and moves a fee rule adjustment through the regulatory process, it is seeking to set its fees at a level that only allows it to “tread water.”⁴⁴

A separate study conducted by the Government Accountability Office (GAO) in 2021 also examined USCIS’ SAMs⁴⁵ and expressed additional concerns that the SAMs do not adequately factor known risks that should be considered, including workforce-related risks such as those posed by hiring freezes, delays, and attrition.⁴⁶ USCIS’ SAMs are used to estimate the number of cases that each office and directorate is expected to complete in a given fiscal year, but these numbers assume that each office will have filled all authorized full-time positions on the first day of the fiscal year, and that all

⁴⁴ Information provided by USCIS (Dec. 14, 2021).

⁴⁵ “Staffing Allocation Models incorporate Hours per Completions (the number of hours it takes to fully process a specific form, which are calculated for each form); Utilization Rates (the average percentage of time adjudicators spend on adjudication, rather than other work); and Equivalent Units (the number of hours it will take to process a certain volume of forms).” GAO, “U.S. Citizenship and Immigration Services: Actions Needed to Address Pending Caseload,” GAO 21-529 (Sept. 2021), p. 31; https://www.gao.gov/products/gao-21-529?utm_campaign=usgao_email&utm_content=topic_homelandsecurity&utm_medium=email&utm_source=govdelivery (accessed Feb. 8, 2022).

⁴⁶ *Id.* at 33. USCIS advised the CIS Ombudsman that its annual attrition rate increased from 6 to 8 percent during the COVID-19 pandemic. Information provided by USCIS (Dec. 14, 2021). However, attrition rates vary. For example, in FY 2018, USCIS reported that the Reno Field Office had an attrition rate of 35 percent and the Las Vegas Field Office had an attrition rate of 26 percent. See letter from former USCIS Acting Director Ken Cuccinelli to Senator Catherine Cortez Masto (Jun. 25, 2019); https://www.uscis.gov/sites/default/files/document/foia/Processing_delays_in_Nevada_-_Senator_Cortez_Masto.pdf (accessed Feb. 8, 2022).



employees will remain in productive capacity throughout the year. This assumption does not comport with the reality of federal hiring practices and office staffing and attrition patterns. Even when authorization and funding for positions exist, hiring additional employees can be slow. And hiring freezes, such as those imposed in FYs 2019 and 2020, have even more of an impact.

Based on data provided to the CIS Ombudsman, in FY 2020, it took between 97 and 118 days on average to onboard a new adjudicator after a hiring decision was made.⁴⁷ The GAO figure below shows systemic staffing discrepancies when one considers the number of full-time employees USCIS has been authorized to hire in recent years compared to the number of employees it has actually onboarded. Analysis shows that vacancy rates within the agency’s Field Operations and Service Center Operations Directorates were between 4 percent and 8 percent between 2015 and 2020; the Refugee, Asylum and International Operations Directorate’s vacancy rate was much higher at 18 percent over the same period.

Table 4: U.S. Citizenship and Immigration Services’ (USCIS) Directorate Staffing Levels for Fiscal Years 2015 through 2020

Fiscal year	Field Operations		Service Center Operations		Refugee, Asylum and International Operations	
	Authorized	Onboard	Authorized	Onboard	Authorized	Onboard
2015	5,772	5,468	4,316	3,570	1,430	1,068
2016	6,097	5,842	3,969	3,799	1,587	1,392
2017	6,315	6,205	4,624	4,217	1,881	1,554
2018	6,656	6,435	4,874	4,589	2,124	1,588
2019	6,990	7,122	5,197	4,972	2,174	1,643
2020	7,308	7,044	5,197	4,967	2,171	2,087

Source: GAO analysis of USCIS data | GAO-21-529.

Note: The data for FY 2015 through FY 2019 are fiscal year-end data. FY 2020 data are staffing levels as of August 2020. The number of onboard staff in the Field Operations Directorate in FY 2019 exceeded its authorized level due to the conversion of about 300 contract staff to permanent federal positions. The Field Operations Directorate’s authorized staffing levels increased in FY 2020 to account for the additional number of positions.

Even after hiring, all new adjudicators undergo 6 weeks of basic immigration training; asylum officers undergo an additional 6 months of specific training before they are permitted to independently adjudicate asylum applications. USCIS informed the CIS Ombudsman that it is taking approximately 102 days for a new adjudicator to even begin this training.⁴⁸

In response to GAO’s September 2021 audit report, USCIS officials stated that the agency does not incorporate such workforce risks into the SAMs because its directorates have not implemented a methodology to assess how hiring delays and attrition affect its staffing models.⁴⁹

⁴⁷ Information provided by USCIS (Mar. 9, 2022). Over the 6-year period of FY 2016 through FY 2021, the average low was 89 days, and the average high was 113 days.

⁴⁸ Information provided by USCIS (Mar. 9, 2022).

⁴⁹ GAO, “U.S. Citizenship and Immigration Services: Actions Needed to Address Pending Caseload,” GAO 21-529 (Sept. 2021), p. 34; https://www.gao.gov/products/gao-21-529?utm_campaign=usgao_email&utm_content=topic_homelandsecurity&utm_medium=email&utm_source=govdelivery (accessed Feb. 8, 2022).

The agency's chronic underfunding and understaffing adversely impact its processing times. Since its formation in 2003, the agency has consistently missed its target processing times in many of its product lines. In testimony before Congress in 2019, USCIS officials conceded the agency was "not meeting most of the target processing goals ... set after the 2007 fee rule."⁵⁰ In short, as the current USCIS director recently remarked while outlining progress the agency made in implementing the administration's executive orders on immigration, "backlog reduction is linked to staffing, which means hiring new staff to mitigate that issue."⁵¹

Like backlogs, multiple discussions with USCIS made clear that it does not factor missed processing time targets into its modeling. This is true despite calls on USCIS year after year by Congress, the CIS Ombudsman, and USCIS' customers expressing concern over case backlogs and lengthening processing times. It is therefore unclear why USCIS has not yet developed a mechanism to include these important factors into its biennial fee review and staffing models.

THE IMPACT OF POLICY SHIFTS AND CHANGING PRIORITIES ON FEES

Although it may not be obvious to many observers, policy choices and shifting priorities directly and indirectly affect USCIS' financial health, and they frequently create rippling effects that emanate throughout the agency—impacting case completion rates, processing times, and backlogs. USCIS' SAMs do not adequately factor in the impact of known or foreseeable changes in policy, practice, or operations that often require the realignment of the agency's resources.

The Impact of Changes in Policy. Shifts in policy or practice often require USCIS to reassign employees from one product line to another, which can temporarily stop or slow adjudications in an affected product line(s) as reassigned employees receive training. As USCIS moves adjudicators around, the impact can increase the number of requests for evidence (RFEs) issued, slow processing times, and grow backlogs. With a finite number of adjudicators trained and onboard at any one time, the agency is typically playing a zero-sum game when it realigns its staff.

As noted earlier, even when the agency finds or receives sufficient resources to hire additional adjudicators, delays in hiring and attrition contribute to productivity declines, even if the delays are temporary. When we inquired with USCIS about this effect, the agency informed us that "when policy changes are contemplated or enacted, ad-hoc modeling is done to assess changes to the completion rates for the effected workload(s). Reasonable assumptions are also made regarding how the changes

⁵⁰ See "Hearing on Policy Changes and Processing Delays at USCIS," *Before the Subcomm. on Immigration and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. (Jul. 16, 2019) (joint written statement of Don Neufeld, Associate Director, Service Center Operations Directorate; Michael Valverde, Deputy Associate Director, Field Operations Directorate; and Michael Hoefler, Chief, Office of Performance and Quality, Management Directorate), p. 5; <https://www.uscis.gov/tools/resources-for-congress/testimonies/hearing-on-policy-changes-and-processing-delays-at-uscis-before-the-house-committee-on-the-judiciary> (accessed Feb. 8, 2022).

⁵¹ CIS Ombudsman notes from the USCIS director's public statements during a briefing on Feb. 2, 2022. See generally, USCIS Alert, "Readout of Director Ur M. Jaddou's Virtual Briefing with Stakeholders to Mark One-Year Anniversary of Executive Orders Aimed at Restoring Faith in Our Immigration System" (Feb. 3, 2022); <https://www.uscis.gov/news-room/alerts/readout-of-director-ur-m-jaddous-virtual-briefing-with-stakeholders-to-mark-one-year-anniversary-of> (accessed Feb. 8, 2022).

might increase or decrease completion rates, and those metrics are then used in the SAMs for subsequent fiscal years.”⁵² Yet, the agency qualified its response, stating: “In most cases, the fee review uses aggregate information that does not allow USCIS to estimate the cost impact or the impact on proposed fee levels for individual policy changes [and does] not have very specific estimates....”⁵³

The CIS Ombudsman is mindful of the agency’s position and acknowledges that some of the problematic factors identified fall outside of USCIS’ control. This includes policy directives thrust upon the agency by all three branches of government. Frequently, USCIS must implement these directives without receiving funding commensurate with their impacts on the agency’s operations and financial health.⁵⁴

One area that the agency does control is limiting policymaking in the fee rule itself. As a general proposition, the fee rule sets fees based on the agency’s projections of actual costs and its best estimate of how anticipated changes in policy will impact those costs. Making policy through the fee rule, however, impacts the speed and viability of that rule. One example of this was the implementation in the 2016 fee rule of a multi-tiered fee reduction option for naturalization application fees to encourage filings.⁵⁵ Although it was ultimately adopted, it created a policy debate that slowed down the rule’s progress. Major policy implications in a fee-setting rule can jeopardize the rule in clearance or in subsequent court action.

The Impact of Humanitarian Emergencies on USCIS Services Must Also Be Considered. While the agency can and does anticipate and plan for many contingencies, this is generally not possible in the context of humanitarian emergencies resulting from natural disasters and political turmoil. One example is the waves of migrants seeking asylum at the U.S. Southern border over the last 10 years. Between FY 2016 and FY 2019, for example, the agency temporarily deployed 475 asylum officers—approximately one quarter of its adjudicators—to the border.⁵⁶ Other figures show that from FY 2015 through June 2020, a total of 1,882 detailees rotated through the region to conduct credible fear and reasonable fear screenings,⁵⁷ taking them away from affirmative asylum adjudications work. This loss of adjudication hours has contributed to its excessively large asylum backlog.⁵⁸

Another example is the impact of the Secretary of Homeland Security designating a new country for TPS. Such designations are made in response to an environmental disaster, armed conflict, or other

⁵² Information provided by USCIS (Oct. 13, 2021).

⁵³ *Id.*

⁵⁴ As noted above, a recent exception to this general statement occurred this past year when USCIS received direct appropriations in support of OAW and to reduce backlogs, support refugee admissions up to 125,000, and invest in enterprise infrastructure improvements (\$275 million). Extending Government Funding and Delivering Emergency Assistance Act, § 132 Pub. L. No. 117-43 (2021); Consolidated Appropriations Act, 2022, Title IV, Pub. L. No. 117-103 (2022); DHS, “Detailed Review of the Fiscal Year 2022 Omnibus,” p. 4 (Mar. 28, 2022).

⁵⁵ See “U.S. Citizenship and Immigration Services Fee Schedule,” 81 Fed. Reg. at 73307-73308.

⁵⁶ CIS Ombudsman’s Annual Report 2020, p. 46. Between January and October 2019, asylum officers and other USCIS personnel detailed to the border performed over 7,400 Migrant Protection Protocol fear assessments.

⁵⁷ *Id.*

⁵⁸ From FY 2016 through FY 2019, USCIS’ asylum backlog grew from 116,774 to 329,836; CIS Ombudsman Annual Reports, 2018-2020.

extraordinary and temporary conditions.⁵⁹ USCIS cannot predict such events, but they do occur intermittently and there is no room in the agency's fee-for-service funding model to provide the additional resources it needs to adjudicate thousands of new TPS cases resulting from a designation.

There are also valid policy choices that the agency makes that may directly advantage one group or interest but are arguably to the detriment of others or its operations. For example, the current USCIS effort to implement the department-wide "Uniting for Ukraine" initiative, and all of the efforts currently underway assisting Ukrainian refugees and others, were not contemplated at the beginning of this fiscal year, much less at the last fee-setting exercise. Accordingly, these expenses come at the detriment of other programs or other processing lines, impacting other work at the agency. Its impact is inevitable, regardless of whether the policy choice is valid.

Another example, which is even more difficult to quantify, is how the 2017 rescission⁶⁰ of the agency's "deference policy"⁶¹ impacted case completion rates, processing times, and backlogs. First announced in 2004, the deference policy generally directed USCIS adjudicators to defer to a prior adjudicator's eligibility determination when reviewing an extension petition involving the same employer petitioning for the same individual doing the same work.⁶² The rescission decision⁶³ led directly to significant spikes in RFEs and denials of Form I-129, *Petition for a Nonimmigrant Worker*, between FY 2016 and 2018, while case completion rates fell during the same time frame as USCIS adjudicators needed more time to review extensions under the "no deference" policy.⁶⁴ The increase in RFEs and denials required

⁵⁹ For example, on March 3, 2022, the Secretary of Homeland Security designated certain Ukrainians as eligible for TPS due to the invasion of Ukraine by Russia just 3 weeks earlier. USCIS News Release, "Secretary Mayorkas Designates Ukraine for Temporary Protected Status for 18 Months" (Mar. 3, 2022); <https://www.uscis.gov/newsroom/news-releases/secretary-mayorkas-designates-ukraine-for-temporary-protected-status-for-18-months> (accessed Mar. 16, 2022).

⁶⁰ "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility, Policy Memorandum" (PM-602-0151) (October 23, 2017); USCIS News Alert, "USCIS Issues Policy Guidance on Deference to Previous Decisions" (Apr. 27, 2021); <https://www.uscis.gov/sites/default/files/document/memos/2017-10-23-Rescission-of-Deference-PM602-0151.pdf> (accessed Feb. 8, 2022).

⁶¹ "USCIS Policy Guidance: The Significance of a Prior CIS Approval of a Nonimmigrant Petition," HQPRD 72/11.3 (April 23, 2004); <https://www.hsdl.org/?view&did=20258> (accessed Feb. 8, 2022).

⁶² *Id.*

⁶³ The 2017 rescission was itself revoked on April 27, 2021, in effect restoring the 2004 Policy Guidance. *See* USCIS Policy Alert, "Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity" (PA-2021-05); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf> (accessed Feb. 8, 2022).

⁶⁴ Analysis of USCIS data by the CIS Ombudsman. Composite Form I-129 RFE rates for H-1B specialty occupation workers increased approximately 18 percent. Aggregate denial rates for all temporary worker categories during this same timeframe increased 26 percent, and completion rates fell 33 percent. (FY 2018 was the first full year that the "no deference" policy was in place.) *See* "USCIS Immigration and Citizenship Data, Nonimmigrant Worker Petitions by Case Status and Request for Evidence (RFE) Fiscal Year 2021, 4th Quarter, October 1, 2015-September 30, 2021;" https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data?ddt_mon=&ddt_yr=&query=RFE&items_per_page=10 (accessed June 1, 2022). *See also* U.S. Citizenship and Immigration Services Response to February 12, 2019 Letter from Representative Jesus G. "Chuy" Garcia; https://www.uscis.gov/sites/default/files/document/foia/Processing_Delays_-_Representative_Garcia.pdf (accessed Feb. 28, 2022). The CIS Ombudsman acknowledges that other policies were implemented during this same timeframe that contributed to these rate changes; nevertheless, we cite specifically to the "no deference" policy to underscore that this consequence was predictable, yet USCIS was not resourced to perform this additional work, resulting in longer processing

adjudicators to review a larger number of the same cases at a higher level of scrutiny before performing the adjudication. Although this increase in work was entirely predictable, it did not comport with the agency's fee-for-service approach. These additional reviews were not anticipated, nor accounted for, when USCIS set the filing fee for processing these petitions.

Unlike State and HHS, USCIS Does Not Receive Funding for Its Humanitarian Programs

Since FY 2011, USCIS has not received appropriated funds to support its humanitarian programs,⁶⁵ even though it serves some of the same interests and same programs that the State Department and HHS administer with appropriated funds.

In FY 2021, the United States provided nearly \$13 billion in humanitarian assistance worldwide, including funding from the State Department's Bureau of Population, Refugees and Migration.⁶⁶ Congress recently appropriated over \$2 billion to fund the United States Emergency Refugee and Migration Assistance Fund that the State Department administers.⁶⁷ In a White House analysis of the FY 2022 Continuing Resolution's reference to the funds appropriated to the Emergency Refugee and Migration Assistance Fund, it was noted that these funds "enable the United States to respond to unexpected and urgent global humanitarian or migration emergencies in FY 2022, should they occur."⁶⁸ This is important as Congress pre-committed these funds, recognizing that such events are unforeseen and inevitable but nevertheless demand a U.S. government response.

Similarly, Congress appropriated almost \$3 billion to HHS to support OAW with assistance activities to nationals of Afghanistan who were paroled into the United States under section 212(d)(5) of the INA.⁶⁹ In an exception to the norm, USCIS also received appropriated funding to assist it with the unique all-of-government approach to implementing OAW and supporting refugee admissions,⁷⁰ including a

times and growing its backlogs. For a further discussion of changes in approval and denial rates that likely resulted from policy choices, *see generally* David J. Bier, "Immigration Application Denial Rates Jump 37% Under Trump," CATO Institute (Nov. 15, 2018); <https://www.cato.org/blog/immigration-application-denials-jump-37-percent-under-trump> (accessed Feb. 28, 2022).

⁶⁵ Information provided by USCIS (Oct. 13, 2021). As related, USCIS found it necessary to include the costs of its Refugee, Asylum and International Directorate, its SAVE program, and the Office of Citizenship back into its ABC modeling after Congress failed to appropriate public funds for these programs. *See* 75 Fed. Reg. 58961, 58966 (Sept. 24, 2010).

⁶⁶ U.S. Department of State Web page, "Refugee and Humanitarian Assistance," <https://www.state.gov/policy-issues/refugee-and-humanitarian-assistance/> (accessed Feb. 8, 2022).

⁶⁷ Extending Government Funding and Delivering Emergency Assistance Act, Title IV, Pub. L. No. 117-43; Further Extending Government Funding Act, Title IV, Pub. L. No. 117-70 (2021).

⁶⁸ White House Analysis, "FY 2022 Continuing Resolution Appropriations Issues (anomalies required for a short-term CR)," p. 22; https://www.whitehouse.gov/wp-content/uploads/2021/09/CR_Package_9-7-21.pdf (accessed Mar. 6, 2022).

⁶⁹ Extending Government Funding and Delivering Emergency Assistance Act, Title III, Pub. L. No. 117-43; Further Extending Government Funding Act, Title III, Pub. L. No. 117-70.

⁷⁰ These responses to the demands placed on the United States to implement humanitarian efforts addressing the displacement and protection of certain Afghan nationals, in the wake of our military withdrawal, stand in stark contrast to the lack of a similar funding commitment and declaration of the country's national interest when it comes to helping USCIS provide no-fee, fee-capped, and fee-waived programs for refugees and asylees, victims of certain crimes and victims of trafficking, and others such as impoverished petitioners and applicants. DHS Web page, "Secretary Mayorkas Delivers Remarks on Operation Allies Welcome," Sept. 3, 2021; <https://www.dhs.gov/news/2021/09/03/secretary-mayorkas-delivers-remarks->

USCIS Afghan Refugee Resettlement program that is an essential element of this coordinated approach.

In FY 2021 alone, USCIS adjudicated no-fee or fee-capped humanitarian-based filings totaling approximately \$330 million. During the ten-year period of FY 2010 through FY 2020, USCIS' humanitarian programs cost the agency \$2.7 billion.⁷¹

Unlike the current situation at State and HHS, the costs associated with humanitarian programs at USCIS are shouldered almost entirely by its fee-paying customers.⁷² While this is a policy choice for Congress to make, given the financial difficulties USCIS has been suffering as documented in this piece and elsewhere, the CIS Ombudsman believes that this choice should be reexamined. It is worth considering whether there should be a limit to how much of the cost burden of supporting its humanitarian programs the agency can or should shift to its customers, and whether some of that shift should be imposed on the public at large as it is for these other agencies.

Reconsidering the Implementation of Automatic Fee Adjustments Based on Inflation

USCIS has had the authority to adjust its user fees on an annual basis to keep pace with inflation using a process that was far simpler than the requirements of APA rulemaking. Under the previous 8 C.F.R. § 103.7(b)(3),⁷³ USCIS could make these adjustments based on a “composition of the Federal civilian pay-raise assumption and non-pay inflation factor for that fiscal year” as issued by OMB.⁷⁴ Under that regulation, it could modify fees to supplement the established fee rule by issuing an annual notice in the Federal Register.

operation-allies-welcome (accessed Feb. 8, 2022). *See also* USCIS Response to the Citizenship and Immigration Services Ombudsman's 2021 Annual Report to Congress, p. 7; DHS Oversight Hearing Video, “Secretary Mayorkas Says Immigration System Is ‘Fundamentally Broken,’” C-SPAN (Nov. 16, 2021); <https://www.c-span.org/video/?c4986750/secretary-mayorkas-immigration-system-fundamentally-broken> (accessed Feb. 8, 2022).

⁷¹ Information provided by USCIS (May 12, 2022).

⁷² Section 286(m) of the INA authorizes USCIS to set its fees at a level to allow it to provide immigration benefit services to “asylum applicants and other immigrants.” While this language authorizes the agency to shift the cost burden of these services to other fee-paying customers, Congress did appropriate funds to USCIS prior to 2010 for the purpose of supporting the country's humanitarian programs.

⁷³ 8 C.F.R. § 103.7(b)(3)(2020): “The fees prescribed in paragraph (b)(1)(i) of this section may be adjusted annually by publication of an inflation adjustment. The inflation adjustment will be announced by a publication of a notice in the Federal Register. The adjustment shall be a composite of the Federal civilian pay raise assumption and non-pay inflation factor for that fiscal year issued by the Office of Management and Budget for agency use in implementing OMB Circular A-76, weighted by pay and non-pay proportions of total funding for that fiscal year. If Congress enacts a different Federal civilian pay raise percentage than the percentage issued by OMB for Circular A-76, the Department of Homeland Security may adjust the fees, during the current year or a following year to reflect the enacted level. The prescribed fee or charge shall be the amount prescribed in paragraph (b)(1)(i) of this section, plus the latest inflation adjustment, rounded to the nearest \$5 increment. This regulation was superseded in 2020.

⁷⁴ OMB Circular No. A-76 (Revised), Attachment C, “Calculating Public-Private Competition Costs” (May 29, 2003); https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A76/a76_incl_tech_correction.pdf (accessed Mar. 29, 2022).

USCIS and its predecessor, the Immigration and Naturalization Service, adjusted fees based on this regulation multiple times: in 1994, 2002, 2004, with the last use of this authority in 2005.⁷⁵ In the 2005 adjustment, USCIS explained why interim adjustments based on inflationary factors are important;⁷⁶ by 2005, it had been seven years since the agency conducted a comprehensive fee review using the ABC model and adjusted its fees through the APA rulemaking process.⁷⁷

The CIS Ombudsman believes that the agency should resume use of this authority which will at least enable it to keep pace with inflationary impacts on both payroll and non-payroll expenses. It has now been nearly 6 years since the last comprehensive fee rule was successfully promulgated in 2016. Had USCIS used this tool in these intervening years, the additional revenues generated would have: (1) reduced its current annual operating deficit, which is estimated to be over \$1 billion annually; (2) given USCIS greater flexibility to deploy resources for unanticipated events and demands; and (3) helped mitigate against some of its customers' sticker shock associated with large fee increases.⁷⁸

In fact, had USCIS adjusted its fees annually using its authority under § 103.7(b)(3), it would have made an inflationary-based adjustment of 1.6 percent in 2017. In 2018, the inflationary adjustment would have been 2.0 percent; in 2019, the adjustment would have been 2.5 percent; in 2020, 1.7 percent; and in 2021, 1.1 percent. Accordingly, fee revenue would have increased by 8.9 percent. Clearly, the agency's operations would have benefited from this additional revenue.⁷⁹ USCIS might have mitigated or even avoided the threat of employee furloughs in 2020, which had a devastating impact on employee morale, or the unfortunate cuts to many of its operations, including its digital strategy developments.

⁷⁵ See "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 84 Fed. Reg. at 62284-85.

⁷⁶ USCIS stated, "Since Congress enacted a different federal civilian pay raise percentage than the percentage used in calculating the current fees for the FY 2004 and FY 2005 biennial period, the fees are also adjusted to reflect the congressionally-enacted levels... Even with the inflationary fee adjustments, the fees collected do not exceed the full cost of providing immigration benefits, including the full cost of providing benefits such as asylum and refugee admission for which no fees are assessed ... Besides the normal payroll increases mandated for government employees each year, inflation-based cost increases have appeared in significant non-payroll items such as rent, physical security, investment technology, and contracts. More specifically, USCIS has observed cost increases due to inflation in some of its largest contracts including those for Service Center operations, adjudications clerical support, Application Support Centers, card production facilities, the National Records Center, the National Benefits Center, and the National Customer Service Center." "Adjustment of the Immigration Benefit Application Schedule," 70 Fed. Reg. at 56183.

⁷⁷ See "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 84 Fed. Reg. at 62284-85.

⁷⁸ This concern is in line with the GAO recommendation that USCIS conduct more frequent fee reviews to reduce the need for disproportionately large increases. GAO, "Federal User Fees: Fee Design Options and Implications for Managing Revenue Instability," GAO-13-820 (Sep. 2013); <https://www.gao.gov/products/gao-13-820> (accessed Mar. 18, 2022) and GAO, "Federal User Fees: Additional Analyses and Timely Reviews Could Improve Immigration and Naturalization User Fee Design and USCIS Operations," GAO-09-180 (Jan. 23, 2009); <http://www.gao.gov/products/GAO-09-180> (accessed Mar. 17, 2022).

⁷⁹ In the 2016 Fee Rule, for example, USCIS points out that the fee for a naturalization application, if adjusted only for inflation, would be even higher (\$690) than the fee established by the rule (\$640). See "U.S. Citizenship and Immigration Services Fee Schedule," 81 Fed. Reg. at 73308.

Recommendations to USCIS

USCIS' near exclusive reliance on a fee-for-service funding model, as implemented through the APA rulemaking process, leaves USCIS chronically underfunded and unable to meet customer and stakeholder obligations. It also inhibits USCIS' ability to quickly address emergent circumstances and demands. Congress and USCIS should explore additional financial pathways to place USCIS on sound fiscal footing and ensure that it is funded appropriately to deliver immigration services to the public on time.

The CIS Ombudsman offers several options for addressing the concerns discussed in this article. We do not represent these as the only potential options available to USCIS, nor do we suggest that only one of these options should be selected. A combination of these may well be the most appropriate path forward to put the agency in a solvent and more sustainable financial position.

The CIS Ombudsman recommends that USCIS:

1. Reengineer the agency's biennial fee review process and associated staffing models to ensure they fully and proactively project the amounts needed to meet targeted processing time goals for future processing as well as backlog adjudications. The CIS Ombudsman has expressed concern that the agency's current SAMs and resulting staffing projections are deficient because they fail to include important considerations that affect USCIS' ability to meet its mission. USCIS adjudicators and support personnel should have the time needed to do a thorough review of all filings to ensure that they make quality decisions without sacrificing national security or benefit integrity. Having the right number of staff and ensuring that its employees receive the robust training they need to perform their jobs as immigration professionals must be considered one of the agency's highest priorities.
2. Seek public appropriations to cover the cost of delivering humanitarian-based immigration benefits (including but not limited to USCIS' refugee and asylum programs). Doing so places USCIS on the same footing as the Departments of State and HHS with respect to these same policy commitments without having to seek money from other applicants in the form of premiums added to their processing fees. It is also consistent with the humanitarian values our country embraces and promotes both nationally and internationally.⁸⁰

⁸⁰ Danny Bahar, "Why Accepting Refugees is a Win-Win-Win Formula," The Brookings Institution (June 19, 2018); <https://www.brookings.edu/blog/up-front/2018/06/19/refugees-are-a-win-win-win-formula-for-economic-development/> (accessed Feb. 8, 2022); "Immigrants as Economic Contributors: Refugees Are a Fiscal Success Story for America," National Immigration Forum (Jun 14, 2018); <https://immigrationforum.org/article/immigrants-as-economic-contributors-refugees-are-a-fiscal-success-story-for-america/> (accessed Feb. 8, 2022); "From Struggle to Resilience: The Economic Impact of Refugees in America," New American Economy (June 19, 2017); <https://research.newamericaneconomy.org/report/from-struggle-to-resilience-the-economic-impact-of-refugees-in-america/> (accessed Feb. 8, 2022); Pia M. Orrenius & Madeline Zavodny, "From Brawn to Brains: How Immigration Works for America," Federal Reserve Bank of Dallas Annual Report (2010); <https://ideas.repec.org/a/fip/feddar/y2010.html> (accessed Feb. 8, 2022).

3. Consider seeking congressional authority to establish a new financing stream through the Department of the Treasury's Federal Financing Bank⁸¹ or through some other mechanism to draw upon as needed, and at its discretion.⁸² Such an account would essentially be a line of credit to help USCIS meet the dynamic nature of its operations and make adjustments to address irregular receipt revenues due to unplanned circumstances (such as COVID-19, TPS designations, etc.) and mandates placed on it by Congress, the courts, or the administration.⁸³ This would appropriately require the agency to repay/replenish the amount borrowed with a portion of the filing fee revenues it collects. To the extent that fee receipt revenues prove inadequate to repay loaned funds, USCIS would be required to factor repayment into the next fee rule. While this pathway may prove difficult and would require extended discussions and understandings between DHS, OMB, and the Department of the Treasury, the benefit of evening out the agency's cashflow would allow USCIS to pivot quickly to address unexpected events and engage in long-term planning and hiring. This would quickly enhance the agency's ability to meet its mission with speed.
4. Request annual appropriations specifically dedicated to eliminating backlogs. The agency received \$275 million in FY 2022 to contend with backlogs and delays, support the refugee program, and invest in enterprise infrastructure improvements."⁸⁴ Continuing such non-revenue funding would allow the agency to hire enough adjudicators to reduce the backlog to acceptable levels, including through term-limited hiring. USCIS customers who paid filing fees expect USCIS to adjudicate their forms in a timely way and must be treated fairly. The lives of individuals and the fortunes of businesses can thrive or suffer depending in part on the agency's ability to work efficiently. Additionally, publicly funding this effort would ensure that new customers are not burdened with a future surcharge to cover the cost of adjudicating backlogged filings.⁸⁵
5. Resume using its authority to adjust fees annually based on the salary/inflation factor calculated by OMB under Circular A-76. Using this mechanism to adjust non-statutory fees would enable the agency to at least keep pace with the inflationary cost increases it is now absorbing in the

⁸¹ Congress created the Federal Financing Bank (FFB) in 1973, and among other things, gave it "the authority to purchase any obligation issued, sold, or guaranteed by a Federal agency." See Federal Financing Bank Web page, "About the FFB;" <https://ffb.treasury.gov/about> (accessed May 18, 2022).

⁸² For example, the U.S. Postal Service received lending authority to draw upon the U.S. Treasury. Rick Owens, "U.S. Postal Service Reaches Agreement with Treasury on \$10 Billion CARES Act Lending Authority," Postal Employee Network (Jul. 29, 2020); <https://postalemployeenetwork.com/news/2020/07/u-s-postal-service-reaches-agreement-with-treasury-on-10-billion-cares-act-lending-authority/> (accessed Feb. 8, 2022).

⁸³ USCIS response to the CIS Ombudsman's Annual Report 2007, p. 2; <https://www.dhs.gov/xlibrary/assets/USCIS-Response-Ombudsman-06-Report-May-2007.pdf> (accessed Feb. 8, 2022).

⁸⁴ Extending Government Funding and Delivering Emergency Assistance Act, § 132, Pub. L. No. 117-43; Consolidated Appropriations Act, 2022, Title IV, Pub. L. No. 117-103 (2022); DHS, "Detailed Review of the Fiscal Year 2022 Omnibus," p. 4 (Mar. 28, 2022).

⁸⁵ As noted at *supra* note 10, the Administration has requested a \$765 million appropriation to USCIS in FY 2023 for processing to "efficiently process increasing asylum caseloads, address the immigration application backlog, and improve refugee processing." If approved by Congress, programming these funds to these objectives is consistent with the recommendation we make. Yet, as we discuss elsewhere in this study, USCIS will likely need an appropriation on an annual basis to supplement its fee-for-service funding model to make meaningful and lasting reductions in the agency's long processing times and sizeable backlogs.



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years between fee adjustments implemented through the CFO Act and the rulemaking process. We view this as a complement to the current biennial fee-setting process, providing much-needed real-time increases to cover rising costs, and doing so may also have the benefit of tamping down the need to make drastic fee increases.