



September 12, 2022

Memorandum

TO: Phyllis Coven
CIS Ombudsman

FROM: Ur M. Jaddou
Director

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Date: 2022.09.13
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SUBJECT: **Response to Formal Recommendation to USCIS on How to Address Its Funding Problems**

I would like to thank you for your recommendations to U.S. Citizenship and Immigration Services (USCIS) regarding how USCIS may remedy its underfunding through legislative or regulatory actions. USCIS welcomes the opportunity to respond to your thoughtful recommendations.

Background:

On June 15, 2022, you sent me a formal recommendation titled, The Challenges of the Current USCIS Fee-Structure Recommendation 63.

Recommendations:

You made the following recommendations:

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.

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5. Resume exercising its existing authority to adjust fees annually based on the salary/inflation factor calculated by the White House Office of Management and Budget (OMB).

USCIS' Response to Your Recommendations:

- 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.**

USCIS Response: USCIS concurs in part.

The Office of Performance and Quality (OPQ) provides a Staffing Allocation Model (SAM) for staffing of the Fee Rule in proportion to the production expected in the period of the fee rule. The fundamental purpose of the SAM is to determine the cost of the number of staff needed to complete all incoming work within the two-year fee period, and USCIS sets its fees to accomplish this goal. Once OPQ has completed the SAM for each USCIS office, the data are forwarded to the Revenue and Cost Analysis Branch (RCA) within OCFO. Upon receipt, RCA prepares the data for costing. This includes grouping positions by fiscal year (FY), office, locality, and grade. Positions are then costed utilizing a multiyear modular cost table (MCT). One MCT is used for every position gained and every position removed per FY, locality, and office.

The total costs are accumulated with each year onboarding new full-time equivalents (FTEs) and each future-year inheriting the inflationary costs of previously onboarded FTEs. Positions that are removed per the SAM recommendations are included in the total cost, but the payroll is calculated as a negative and the non-pay costs are calculated as a positive. This accounts for the non-pay items such as furniture, training, laptops, etc., that have been paid for in the onboarding FY but no longer create future-year costs.

The summarization of costs is utilized in the formulation of the payroll analysis for the fee review. In addition, a breakout of total FTEs is also provided directly from the SAM for recording purposes. This summarization of costs and FTEs calculated from the SAM is added to the preexisting USCIS cost figures for each of the two years that fall within the purview of the fee review.

USCIS agrees with the Ombudsman that assessing resource allocation for the purpose of addressing the backlog is as critical as using staffing models for future processing. However, if there is an existing backlog as there is today, incorporating the backlog into the fee review would force future fee-paying USCIS applicants and petitioners to subsidize applications and petitions that were received by USCIS in the past, on top of covering the costs of humanitarian operations and fee-waived applications. This burden might put immigration benefits out of the financial reach of some USCIS customers. USCIS must also contend with the fact that if this recommendation were adopted and the backlog were eventually eliminated, the fees recovered would eventually exceed the cost of USCIS operations.

Although the SAM as currently utilized in the fee rule process may not be an appropriate method for determining staffing allocation to address the backlog, USCIS has other tools, including the Model for Operational Planning (MOP), which account for the backlog and indicate the number of staff required to reduce it over a specified period of time. At this time USCIS is not including backlog reduction costs in fee reviews, but we review what the impact to fee-paying applicants would be by including the backlog reduction costs in the USCIS fees. This model was already used for Congressional appropriation requests in FY 2022 and FY 2023 to reduce the backlog and bring cycle times closer to USCIS' goals. The model is able to quantify how many additional staff are needed, to calculate the anticipated productivity of those staff in advance, and to track their actual productivity for Congressional reporting when they are already on board.

Other efforts that USCIS has taken to reduce the backlog include authorizing overtime, a hiring surge to get the agency to its full authorized level, issuing policy decisions (e.g., the I-918 BFD process and updating interview waiver guidelines), and making IT investments and improvements to ensure that more officer hours are being spent on areas where an in-person interaction or professional decision is critical.

USCIS is committed to continually assessing resource needs and allocation to meet processing times for pending requests and future filings.

- 2. Seek congressional appropriations to cover the cost of delivering humanitarian-related immigration benefits (including, but not limited to, USCIS' refugee and asylum programs).**

USCIS Response: USCIS concurs.

In FY 2023, the President's Budget request of over \$900 million for USCIS includes specific funding for the humanitarian mission, which entails support for the refugee program (\$133M) as well as for adjudicating Asylum cases (\$375M). The overall appropriated request (\$765M) in FY 2023, specifically in Application Processing, includes continuation of base funding, which was provided through the FY 2022 enactment and covers support for humanitarian-based immigration benefits including asylum and refugee, as well as funding to address immigration benefits that have a backlog.

In order to have dedicated appropriations for key agency priorities such as addressing backlog and supporting the humanitarian efforts, USCIS will continue seeking discretionary funding from Congress in order to reduce the burden on fee-paying customers who are seeking immigration benefits.

- 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.**

USCIS Response: USCIS does not concur.

USCIS does not see establishing a financing mechanism, such as loan authority, as a viable option to pursue, as it is highly likely that any such mechanisms would require repayment and may require USCIS to impose a separate fee (surcharge) to future fee-paying applicants through rulemaking. Instead USCIS believes that the best defense against revenue shortfalls and unfunded policy shifts is to regularly update fees and to maintain a sufficient carryover balance. Given the direct funding structure of the Immigrations Examinations Fee Account (IEFA), it is critical that USCIS maintain adequate available funds to meet daily obligation and outlay requirements, thereby mitigating the risk of Anti-Deficiency Act (ADA) violations. Per Section 2.12 – DHS Fee Review and Guidance of the Financial Management Policy Manual (FMPM), USCIS establishes a minimum carryover balance target that, when combined with new fee receipts, ensures IEFA obligations will not exceed available funding. USCIS evaluates four methods outlined in FMPM (summary below).

Option A: An average of actual first quarter (Q1) obligations during the last three FYs.

Option B: An average of the actual Q1 difference between obligations and fee collections during the last three FYs.

Option C: An average of the actual largest periodic deficits during the last three FYs.

Option D: The planned total Q1 spending plus the annual net sequestration difference.

USCIS has chosen Option D to calculate its minimum carryover balance target. This provides the safest carryover balance by which USCIS can meet anticipated costs through the first fiscal quarter and avoid ADA violations or reduce operations. In past years, Option A was selected by USCIS but that ended in FY 2022 with the addition of Option D to the FMPM. Options A through C use historical data to determine the minimum target and fail to account for anticipated costs and estimated revenue for USCIS in the following FY.

4. Obtain annual appropriations specifically dedicated to eliminating backlogs.

USCIS Response: USCIS concurs.

Since FY 2022, USCIS with support from the Administration and Congress has received dedicated appropriated funding (\$275M) to address the growing backlog of immigration cases as well as support the refugee admission ceiling of 125,000, which is a significant increase of the FY 2020 cap of 18,000 and the FY 2021 cap of 62,500. In the FY 2023 President’s Budget to Congress, the Administration continued with the same focus of addressing the USCIS backlog and requested continuation of discretionary funding.

The current immigration backlog is a significant concern not only for USCIS, but for applicants who are applying for benefits from the agency. As the backlog increases, customers experience a longer wait time to a decision on their benefit requests. USCIS agrees with this recommendation and is already undertaking a multiyear effort to

significantly reduce and ultimately eliminate the backlog, including requesting appropriations. The annual appropriations and dedicated funding are critical because USCIS will continue funding new personnel, offering overtime to employees, and investing in information technology to process cases more efficiently and thereby mitigate backlog growth.

5. Resume exercising its existing authority to adjust fees annually based on the salary/inflation factor calculated by the White House Office of Management and Budget (OMB).

USCIS Response: USCIS concurs in part.

Regardless of DHS having completed its biennial fee reviews as required by the CFO Act, 31 U.S.C. 901-03, and Office of Management and Budget (OMB) Circular A-25, the time required to propose and finalize new full cost recovery fee schedules does not allow DHS to make timely adjustments to USCIS fees to keep up with the effects of changes in immigration laws, policy, or the costs of services. As a result, USCIS may benefit from the legal authority for DHS to adjust USCIS fees in the future based on inflation.

USCIS is working with DHS to explore proposing a provision in its upcoming proposed rule, “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” or in another future rulemaking that will authorize it to adjust the proposed fees by the rate of inflation.¹

Meanwhile, however, USCIS cannot necessarily use its existing authority to adjust fees using an inflation factor calculated by OMB. The authority at 8 CFR 103.7(b)(3)(Oct. 1, 2020) provides that DHS may adjust USCIS immigration benefit fees annually by publication of an inflation adjustment notice in the Federal Register.² In spite of that provision being codified, publishing a document in the Notices category of the *Federal Register* that provides that regulated parties disregard the text of the CFR and follow what the Notice provides instead violate the Federal Register Act, 44 U.S.C. § 1510, and its implementing regulations, 1 CFR part 21. Thus, while an inflation adjustment may be permitted, it would require at a minimum a final rule. At this time, USCIS is devoting its resources to completing the total cost recovery rulemaking effort.

¹ See Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, Department of Homeland Security, at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1615-AC68>.

² The provision remains in effect as it was before the 2020 fee rule was to take effect on October 2, 2020, because the United States District Court for the Northern District of California and the United States District Court for the District of Columbia both granted motions for a preliminary injunction and stay of the effective date of the 2020 fee rule. See *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520 (N.D. Cal. 2020) (*ILRC*); *Nw. Immigrant Rights Project v. USCIS*, 496 F. Supp. 3d 31 (D.D.C. 2020) (*NWIRP*).