



CENTER FOR IMMIGRATION STUDIES

March 13, 2023

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U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

RE: DHS Docket No. USCIS-2021-0010, U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements

Dear Ms. Cribbs:

The Center for Immigration Studies (CIS) submits the following public comment to the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) in response to the request for comments on the proposed rule titled *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, as published in the Federal Register on January 4, 2023.

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation’s only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration’s far-reaching impact. CIS is animated by a unique **pro-immigrant, lower-immigration** vision which seeks fewer annual admissions but a warmer welcome for those admitted.

I. Background

USCIS is primarily funded by immigration and naturalization benefit request fees charged to both applicants and petitioners. This fee collection funds the cost of running the agency, which is charged with administering the legal immigration system, and provides for approximately 95 percent of agency spending. USCIS operations include adjudicating immigration benefits requests, including those which are provided to beneficiaries without charge, such as asylum; verifying work authorization; providing certain civic integration services; and detecting fraud and national security threats. USCIS’s workload can fluctuate considerably from year-to-year.

USCIS is required to conduct a biennial review of the fee schedule to determine whether current immigration and naturalization benefit fees generate sufficient revenue to fund the agency’s anticipated operating costs.¹ USCIS reported that their budget and revenue estimates indicate that without an

¹ 31 U.S.C. § 901-03.

adjustment to its fee schedule, the agency would be subject to an average annual deficit of \$560 million.² These costs do not include limited appropriations provided by Congress at the expense of U.S. taxpayers.

DHS most recently adjusted the USCIS fee schedule in 2020 following its fiscal year (FY) 2019/2020 review. At that time, DHS increased USCIS's fees by a weighted average of 20 percent, which was slightly less than the average weighted increase imposed by the 2016 fee rule issued by the Obama administration (21 percent).³ The 2020 fee rule, which was scheduled to become effective on October 2, 2020, was preliminarily enjoined and, consequently, not implemented by the agency.⁴ This proposed fee rule, published on January 4, 2023, is intended to replace the 2020 fee rule entirely – albeit retaining many changes included in 2020 fee rule to the proposed fee schedule.

In the time since the 2020 fee rule has been issued, however, USCIS has endured serious fiscal challenges that has threatened the agency's ability to conduct operations and efficiently adjudicate immigration benefits. Most severely, international travel restrictions and fears related to the COVID-19 pandemic stunted USCIS's ability to collect fees and efficiently process immigration benefit requests.

The crisis on the southern border has also caused serious resource strains to USCIS.⁵ The credible fear process, or the process USCIS uses to screen aliens placed in expedited removal for eligibility for asylum, statutory withholding of removal, or protection under the Convention Against Torture, is neither funded by Congress nor application fees.⁶ Illegal border crossings and related credible fear claim submissions have skyrocketed since January 2021.⁷ In the interim, DHS and the U.S. Department of Justice (DOJ) have also issued an Interim Final Rule (IFR) to transfer much of the defensive asylum caseload off of the Executive Office of Immigration Review (EOIR)'s docket to the USCIS Asylum Division's portfolio.⁸

During this time, USCIS has also experienced historic processing times for nearly all of its application portfolios.⁹ These increases are attributed to many factors, including policy changes and related spikes in filings, litigation, operational hurdles caused by the pandemic, and “competing priorities” that have shifted resources away from adjudications.

Furthermore, inflation in the United States has increased by 26.28 percent since January 2016.¹⁰ This means that unless USCIS has been successful in decreasing the cost of adjudications amongst relevant form types, all fees that have been increased by less than 26.28 percent are being offered at a discount relative to the cost since DHS last amended its fee schedule.

²² 88 Fed. Reg. 402 (Jan. 4, 2023).

³ See 81 Fed. Reg. 73292 (Oct. 24, 2016).

⁴ See *Immigration Legal Resource Center et al., v. Wolf, et al.*, No. 20-cv-05883-JWS (N.D. Cal. Sept. 29, 2020); *Nw. Immigrant Rts. Project, et al., v. USCIS*, No. CV 19-3283 (RDM) (D.D.C. Oct. 8, 2020).

⁵ See 87 Fed. Reg. 18078 (Mar. 29, 2022).

⁶ 88 Fed. Reg. 402, 438 (Jan. 4, 2023).

⁷ U.S. Customs and Border Protection, *Nationwide Encounters* (Mar. 2023); 87 Fed. Reg. 18078 (Mar. 29, 2022).

⁸ 87 Fed. Reg. 18078 (Mar. 29, 2022).

⁹ U.S. Citizenship and Immigration Services, *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year* Fiscal Year 2018 to 2023 (up to January 31, 2023).

¹⁰ U.S. Bureau of Labor Statistics, *CPI Inflation Calculator* (January 2016-January 2023).

II. Proposed Fee Schedule

DHS published its proposed fee schedule for fiscal years (FY) 2022/2023 on January 4, 2023. The proposed fee schedule inappropriately imposes the political priorities of the Biden administration rather than fairly adjusting fees based on actual cost of adjudication for most benefit requests. CIS recommends that DHS amend its proposal to instead adopt a fee schedule that more strongly incorporates the beneficiary-pays principal to cover actual costs of adjudication for most immigration benefit categories, with limited exceptions. Additionally, CIS recommends impose a fee for Form I-589, Application for Asylum and Withholding of Removal, and rescind its March 2022 asylum processing interim final rule, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*. Finally, CIS recommends that DHS limit fee waiver eligibility in order to reduce the burden fee-paying beneficiaries must endure to cover these significant costs.

a. DHS Should Adjust USCIS's Fee Schedule to Cover Actual Costs of Adjudication for Most Immigration Benefits Requests

U.S. Government Accountability Office guidance describes equity of federal user fees as a balance between two principles: the beneficiary-pays principle, where beneficiaries of a service pay for the cost of providing that service, and ability-to-pay principle, where those who are more capable of paying should pay more for the service than those with less ability to pay.¹¹ CIS strongly urges DHS to more heavily incorporate the beneficiary-pays principle in setting USCIS's fee schedule in order to promote equity and efficiency in the legal immigration system. CIS disagrees with DHS's proposal to suppress fees for certain immigration benefits services that are not either waived or otherwise exempted by law or policy. Consistent with the beneficiary-pays principle, DHS should adjust fees for immigration services to cover actual cost of adjudication, but continue provide statutorily mandated fee exemptions and fee waivers for low-income aliens in certain circumstances.

DHS's current proposal unfairly suppresses fees for certain immigration benefits based on political preference, but significantly raises fees for certain immigration service beneficiaries, specifically U.S. employers, in order to recover the loss in revenue created by the inadequate fee schedule.¹² For example, the proposed rule will require employers hiring high-skilled foreign workers 70 percent more for beneficiaries on H-1B petitions, 201 percent more for employees on L-1 petitions and 129 percent more for aliens on O-1 petitions. (H-1B petitions increase from \$460 to \$780, L-1 petitions increase from \$460 to \$1,385, and O-1 petitions increase from \$460 to \$1,055.)¹³

USCIS, under this proposal, would also increase fees for immigration benefit requests related to the Employment-Based Immigrant Visa, Fifth Preference (EB-5) program significantly.¹⁴ Specifically, DHS proposes to increase the fees for Forms I-526, Immigrant Petition by Alien Entrepreneur, and Form I-526E, Immigration Petition by Regional Center Investor, by 204 percent (or an increase from \$3,675 to \$11,160). The proposal also increases the fee for Form I-956, Application for Regional Center

¹¹ U.S. Government Accountability Office, *Federal User Fees: A Design Guide* (May 29, 2008), GAO-08-386SP at pp. 7-12.

¹² 88 Fed. Reg. 402, 450 (Jan. 4, 2023).

¹³ 88 Fed. Reg. 402, 497 (Jan. 4, 2023).

¹⁴ 88 Fed. Reg. 402, 509 (Jan. 4, 2023).

Designation, by 168 percent (from \$17,795 to \$47,695), among other EB-5 service related fee increases. DHS, however, has appropriately attributed these fee increases consistently with the beneficiary-pays principle: to recover the cost of adjudication, determined by USCIS's projected staffing needs and increased processing times.¹⁵

Conversely, DHS proposes to suppress fee increases for numerous benefits requests at levels below what is required to cover cost of adjudication to conform with the Biden administration's political aim to increase access to naturalization and similar benefits.¹⁶ DHS proposes to accomplish this by increasing fees by just 18 percent for related or similar services, including:

- Form I-192, Application for Advance Permission to Enter as Nonimmigrant.
- Form I-193, Application for Waiver of Passport and/or Visa.
- Form I-290B, Notice of Appeal or Motion.
- Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant.
- Form I-600, Petition to Classify Orphan as an Immediate Relative.
- Form I-600A, Application for Advance Processing of an Orphan Petition.
- Form I-600A/I-600, Supplement 3, Request for Action on Approved Form I-600A/I-600.
- Form I-612, Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended).
- Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative.
- Form I-800A, Application for Determination of Suitability to Adopt a Child from a Convention Country.
- Form I-800A, Supplement 3, Request for Action on Approved Form I-800A.
- Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal.
- Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant.
- Form N-300, Application to File Declaration of Intention.
- Form N-336, Request for Hearing on a Decision in Naturalization Proceedings.
- Form N-400, Application for Naturalization.
- Form N-470, Application to Preserve Residence for Naturalization Purposes.
- Form N-600, Application for Certificate of Citizenship.
- Form N-600K, Application for Citizenship and Issuance of Certificate Under Section 322.¹⁷

By proposing to offer these services at a discount while drastically increasing fees for other immigration programs and lobbying for taxpayer-funded appropriations from Congress to meet shortfalls, DHS has failed to adequately incorporate the beneficiary-pays principle and given too much weight to the ability-to-pay principle.

¹⁵ *Id.*

¹⁶ 88 Fed. Reg. 402, 488 (Jan. 4, 2023) ("Similarly, in keeping the reduced fee for naturalization application, DHS is supporting and complying with Executive Order 14012 to reduce barriers and promote accessibility to the immigration benefits that it administers.")

¹⁷ 88 Fed. Reg. 402, 450-451 (Jan. 4, 2023).

b. The Proposed Fee Schedule Inappropriately Transfers the Costs of the Border Crisis to U.S. Employers and Businesses

In addition to significantly increasing fees for employers who petition for foreign workers and alien investors, the proposed rule adds an additional “Asylum Program Fee” to employers who petition for alien workers.¹⁸ The additional expense unfairly requires U.S. businesses to pay for the Biden administration’s failed border policies and collect costs of implementing DHS’s new asylum processing IFR’s, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078 (Mar. 29, 2022). DHS states that the Asylum Program Fee may also be used to fund part of the costs of administering the entire asylum program and would be due in addition to the fee those petitioners would pay using USCIS’s standard costing and fee calculation methodologies.¹⁹

Specifically, the proposed fee schedule imposes a new Asylum Program Fee of \$600 to be paid by employers who file either a Form I-129, Petition for Nonimmigrant Worker, or Form I-140, Immigrant Petition for Alien Worker.²⁰ DHS reported that the agency arrived at the amount of the additional fee by calculating the amount that would need to be added to the fees for Form I-129 and Form I-140 to collect the asylum processing IFR estimated annual costs (approximately \$425,900,395).²¹

In addition to transferring the costs of an unlawful regulation to petitioners who have no connection or from which they receive no benefit, the Asylum Program Fee also disproportionately impacts small and medium sized businesses that may experience staffing shortfalls for which Congress designed temporary and permanent worker programs to fill. The Forms I-129 and I-140 are also submitted by non-profit entities, research institutes, farms, and other agricultural employers, which often lack the same levels of resources as larger corporations.²²

The proposal will also negatively impact merit-based immigration and workers’ interests. For example, while employers are required to cover visa costs for foreign workers they petition, they are not required to cover costs for accompanying family members.²³ Because of these substantial fees, employers with limited resources will be less likely to cover visa fees for a worker’s spouse or dependents, affecting a foreign worker’s willingness or ability to take on employment in the United States. Such drastic increases in fees may also suppress wage growth in industries where foreign workers are legitimately needed to supplement the domestic workforce.

While CIS agrees that employers who seek to hire foreign workers to fill labor shortages should incur higher costs than they would normally incur by hiring U.S. workers, these costs should generally come in the form of higher pay proffered to both U.S. and foreign workers and petition fees. Requiring employers to subsidize the border crisis will enable bad immigration enforcement policies while simultaneously limiting U.S. businesses’ abilities to hire “the best and the brightest” workers.

¹⁸ 88 Fed. Reg. 402, 451-454 (Jan. 4, 2023).

¹⁹ *Id.*

²⁰ 8 C.F.R. § 106.2(c)(13).

²¹ 88 Fed. Reg. 402, 452 (Jan. 4, 2023).

²² *Id.*

²³ See, e.g., 20 C.F.R. § 655.731(c)(9)(C).

Additionally, CIS urges DHS to adopt reforms (discussed in section III, below) to deter illegal immigration, deter asylum fraud, and increase agency efficiency before requesting appropriations from Congress to fill gaps in the agency’s budget. Congress specifically created USCIS as a fee-funded agency in order to reduce the U.S. immigration system’s financial burden on U.S. taxpayers. Indeed, as recently as 1996, Congress clearly declared in its policy statement in the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* (PRWORA) that “self-sufficiency” has been “a basic principle of United States immigration law since this country’s earliest immigration statutes and that it should continue to be a governing principle in the United States.”²⁴

i. USCIS Should Impose a Fee for Form I-589, Application for Asylum and for Withholding of Removal

CIS strongly urges DHS to amend its USCIS fee schedule proposal to impose a fee on the Form I-589, Application for Asylum and for Withholding of Removal. Currently, USCIS imposes no fees to cover the costs of credible fear screenings, reasonable fear screenings, or asylum applications.²⁵ In recent years, however, USCIS has received an overwhelming spike in the submission of credible fear claims and asylum applications stemming directly from the illegal migration crisis on the southern border.²⁶

CIS disagrees with public comments that argue that USCIS may not lawfully impose a fee to asylum applications. Section 208(d)(3) of the INA expressly authorizes the Attorney General (now Secretary of Homeland Security) to impose fees “for the consideration of an asylum application, for employment authorization, and adjustment of status under section 209(b), not to exceed the costs in adjudicating the applications.”

Balancing both equity and the ability-to-pay principles, CIS recommends that USCIS impose a fee for asylum that represents the actual cost for adjudication for an asylum application. Asylum provides protection in the United States for persecution on account of race, ethnicity, national origin, political opinion, or membership in a particular social group.²⁷ Given the diversity of backgrounds and claims that may be submitted to support an asylum application, it is unreasonable to conclude that every asylum applicant is unable to pay a fee that covers the costs of adjudication to the agency.

This fee should include costs associated with operating credible and reasonable fear screenings, but should be applied to only those who file a Form I-589 with USCIS to exclude applications over which EOIR has jurisdiction. In order to overcome concerns that imposing a fee for Form I-589 may conflict with the United States’ *nonrefoulement* obligations, USCIS should also allow asylum applicants who are unable to pay to submit a fee waiver request.

Additionally, the inclusion of a fee waiver application would provide additional opportunities to screen for fraud. If an applicant makes inconsistent statements on a fee waiver application, a USCIS asylum officer may use that information for purposes of determining an applicant’s credibility.²⁸

²⁴ See 8 U.S.C. § 1601.

²⁵ 88 Fed. Reg. 402, 438 (Jan. 4, 2023).

²⁶ 87 Fed. Reg. 18078 (Mar. 29, 2022).

²⁷ INA § 208.

²⁸ 8 C.F.R. § 208.30(e)(2).

Charging those who are able to pay (and likewise permitting fee waiver applications for low-income applicants) will both increase the legitimacy of the asylum process as well as reduce the overall burden of USCIS's asylum program to non-asylum applicants and petitioners.

ii. DHS Should Rescind the Asylum Processing IFR, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*

CIS strongly recommends that DHS immediately rescind *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers* (asylum processing IFR).²⁹ The asylum processing IFR, which was issued on March 29, 2022, made sweeping changes to the expedited removal process to allow the U.S. government to transfer a large portion of EOIR's asylum docket to USCIS's already severely backlogged asylum docket.³⁰

This IFR purports to streamline the adjudication of asylum claims made by aliens in expedited removal by limiting the role of immigration judges from EOIR and prosecutors from U.S. Immigration and Customs Enforcement ("ICE") from credible fear cases and allow USCIS asylum officers to unilaterally grant an alien's defensive asylum application. Further, for aliens given negative credible fear determinations, the IFR unlawfully requires immigration judges to defer to an asylum officer's determinations on statutory withholding of removal and Convention Against Torture eligibility.³¹

Not only does the asylum processing IFR remove safeguards in the credible fear process that weed out fraud and ensure protection is only granted to aliens with legitimate fear claims, but expanded implementation of the IFR will also drastically increase costs associated with operating the USCIS Asylum Division. DHS reports that implementation of this regulation is estimated to cost USCIS \$438.2 million to account for payroll, on-boarding and training of new and existing staff, and other resource requirements or adjustments.³² Additionally, DHS reports that the FY 2022/2023 average annual budget requirement is estimated to be \$5.15 billion.³³ This represents a \$1.374 billion, or 36.4 percent, increase over the FY 2021 budget of \$3.776 billion to fulfill USCIS's operational requirements.³⁴

c. USCIS Should Limit Fee Waiver Eligibility to Recover Costs of Adjudication

USCIS should amend fee waiver eligibility to ensure that fee-paying applicants do not bear the costs of immigration benefit requests where fee waivers are inappropriate or unnecessary. CIS recommends USCIS adopt a more equitable approach, consistent with the "beneficiary-pays" principle, that considers whether a fee waiver is either statutorily required or otherwise appropriate given the nature of the immigration benefit sought, particularly whether such beneficiaries are subject to the public charge

²⁹ 87 Fed. Reg. 18078 (Mar. 29, 2022).

³⁰ As of December 2022, Syracuse University's Transactional Records Clearinghouse (TRAC) Immigration has reported USCIS's asylum backlog to stand at 778,084 cases, with a total asylum backlog of approximately 1.6 million cases when including asylum cases before EOIR immigration courts, *see TRAC Immigration, A Sober Assessment of the Growing U.S. Asylum Backlog* (Dec. 22, 2022).

³¹ 87 Fed. Reg. 18078 (Mar. 29, 2022).

³² 88 Fed. Reg. 402, 450-452 (Jan. 4, 2023)

³³ 88 Fed. Reg. 402, 428 (Jan. 4, 2023).

³⁴ *Id.*

ground of inadmissibility.³⁵ Incorporating such changes will both allow the agency to conserve limited resources and reduce costs to fee-paying applicants, consistent with Congressional intent in setting governing immigration policy principles.³⁶

Section 286(m) of the INA authorizes setting fees at a level that will recover the actual costs of services provided without charge, but it does not require that DHS provide any services without charge. The *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA), however, does require DHS to permit certain applicants to apply for fee waivers for “any fees associated with filing an application for relief through final adjudication of the adjustment of status.”³⁷ This means that, for these categories of aliens, the fee for the immigration benefit request (such as Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant or Form I-485, Application to Register Permanent Residence or Adjust Status) must be waivable as well as any additional form associated with the main benefit request up to and including the adjustment of status (green card) application.

Fee-paying applicants and petitioners must cover the costs of fee waivers and fee exemptions for services USCIS provides.³⁸ In recent years, USCIS has transferred significant costs to fee-paying applicants and beneficiaries as a result of an overbroad fee waiver policy, and estimated foregone revenue has increased significantly. USCIS reported forgoing \$191 million in revenue in its FY 2010/2011 fee review, \$613 million in revenue in its FY 2016/17 fee review, and an astounding \$1.494 billion in its FY 2019/2020 fee review.³⁹ In DHS’s 2023 proposed rule, DHS did not report how much revenue USCIS anticipates to forgo as a result of fee waiver projections.

CIS recommends that USCIS adopt the fee waiver policy put forth by *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Request Requirements* (Aug. 3, 2020),⁴⁰ which limited fee waivers to immigration benefit requests for which USCIS is required by law to consider a fee waiver, or where the Director of USCIS favorably exercises limited discretion (discussed below). In addition, USCIS could allow fee waivers for humanitarian programs and applicants not subject to the public charge ground of inadmissibility or affidavit of support requirements under section 213A of the INA, including petitioners and recipients of Special Immigrant Juvenile (SIJ) classification and those classified as Special Immigrants based on an approved Form I-360.⁴¹

Under this framework, benefits that would generally no longer be eligible for a fee waiver include: Form I-90, Application to Replace Permanent Resident Card; Form I-765, Application for Employment Authorization; CNMI related petitions and applications; Form I-485, Application to Register Permanent Residence or Adjust Status; Forms for applicants exempt from the public charge inadmissibility ground; Form I-751, Petition to Remove Conditions on Residence; and forms related to naturalization and

³⁵ INA § 212(a)(4).

³⁶ See 8 U.S.C. § 1601.

³⁷ INA § 245(l)(7).

³⁸ See INA § 286(m).

³⁹ 84 Fed. Reg. 62280, 62298 (Nov. 14, 2019).

⁴⁰ 85 Fed. Reg. 46788 (Aug. 3, 2020).

⁴¹ These classes include Afghan or Iraqi Translators or Interpreters, Iraqi Nationals employed by or on behalf of the U.S. government, or Afghan Nationals employed by or on behalf of the U.S. government or employed by the International Security Assistance Forces.

citizenship. At minimum, CIS agrees with DHS that USCIS should continue to preclude fee waivers from individuals that have financial means as a requirement for the status or benefit sought.

According to estimates provided by USCIS in 2020, this proposal would have equitably reduced the burden on fee-paying applicants and petitioners by saving the agency approximately \$532 million dollars in forgone revenue, resulting in a weighted average fee increase over ten percent higher than proposed for that fee schedule.⁴² CIS believes that these changes would make the fee increase more equitable for all immigration benefit requests by requiring fees for the service to be paid by those who benefit and are subject to Congressional expectations of self-reliance.⁴³

Additionally, to address certain compelling circumstances, USCIS should retain the amendments it put forth in 2020 to limit the Director of USCIS’s discretion to authorize fee waivers. Under this framework, the Director of USCIS only maintained the discretionary authority to waive fees in cases concerning asylees; refugees; matters relating to national security; emergencies or major natural disasters declared in accordance with 44 C.F.R. § 206(b); agreements between the U.S. government and another nation or nations; or USCIS error.⁴⁴ Additionally, this amendment only permitted the Director of USCIS to delegate this authority to the Deputy Director of USCIS and prohibited applicants from submitting requests for exercise of this discretion.⁴⁵ Limiting the exercise of such discretion is necessary to limit politically-motivated abuse of fee waiver eligibility policies and protect fee-paying applicants from unfair cost increases to cover such abuse.

d. USCIS Must Terminate All Unauthorized and Unlawful Parole Programs

CIS strongly urges USCIS to terminate its unlawful paroles programs. The creation of unauthorized and unappropriated programs diverts agency resources from the adjudication and administration of legitimate visa programs, resulting in fee increases and for which many applicants and beneficiaries experience significant wait times and processing delays – even when USCIS charges fees for applications.

Congress has not delegated DHS authority, through section 212(d)(5) of the INA or any other provision in law, to permit the limitless admission of classes defined solely by DHS’s interpretation of “significant public benefit.” Accordingly, DHS should also terminate DHS’s International Entrepreneur Parole (IEP),⁴⁶ Central American Minors (CAM) program,⁴⁷ and unauthorized parole “processes” DHS has

⁴² *Id.*

⁴³ See 8 U.S.C. § 1601.

⁴⁴ 85 Fed. Reg. 46788 (Aug. 3, 2020); 8 C.F.R. § 106.3.

⁴⁵ *Id.*

⁴⁶ *International Entrepreneur Parole Rule*, 82 Fed. Reg. 5,238 (Jan. 17, 2017).

⁴⁷ U.S. Citizenship and Immigration Services, *Central American Minors (CAM) Refugee and Parole Program* (Jun. 22, 2022).

recently created for Cuban,⁴⁸ Haitian,⁴⁹ Nicaraguan,⁵⁰ and Venezuelan⁵¹ nationals. These programs are *ultra vires* and result in unnecessary diversions of USCIS's limited resources.⁵²

The use of programmatic parole directly conflicts with Congress's intent in enacting the parole authority. The history of the parole statute is one of increasing tightening of its language in response to agency overreach. Congress's actions have resulted in the restriction of agency discretion.⁵³ Today, parole may only be granted: (1) temporarily, (2) "on a case-by-case basis," (3) for no other purpose than "urgent humanitarian reasons or significant public benefit," and (4) if the parolee was in the "custody" of DHS at the time of the grant of parole.⁵⁴

It is irrational to conclude that, while Congress acted to subdue the agency's discretionary parole authority, Congress simultaneously sought to expand the agency's parole authority without doing so expressly to the vast extent necessary to authorize class-based parole admissions programs.⁵⁵ No such provision in law exists. Rather, Congress has created a detailed and comprehensive scheme for regulating the admission and employment of aliens, including entrepreneurs, refugees, and familial relatives, into the United States.⁵⁶ It is likewise unreasonable to conclude that Congress regulated employment by aliens as carefully as it has, but also intended DHS to be able to use parole to admit an indefinite number of additional aliens, in its discretion, and to allow them to engage in employment.⁵⁷

Accordingly, DHS must return to the government's long-standing interpretation of the parole authority, which restricted parole to only aliens whose circumstances, on a case-by-case basis, were determined to meet the high "significant public benefit" standard and were temporary in nature.⁵⁸ This interpretation

⁴⁸ 88 Fed. Reg. 1266 (Jan. 9, 2023).

⁴⁹ 88 Fed. Reg. 1243 (Jan. 9, 2023).

⁵⁰ 88 Fed. Reg. 1255 (Jan. 9, 2023).

⁵¹ 88 Fed. Reg. 1279 (Jan. 9, 2023).

⁵² See *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007) ("The scope of § 1182(d)(5)(A) is carefully circumscribed: Aliens may be paroled into the United States 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.'").

⁵³ As a response to agency abuse of discretionary parole, Congress included in the 1980 Refugee Act a prohibition the discretionary exercise of parole for any "alien who is a refugee," unless the Attorney General determined that "compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207." 8 U.S.C. § 1182(d)(5)(B). In 1996, Congress acted again to rein in agency abuse of discretion to parole aliens into the United States by authorizing discretionary grants of parole by "only" where additional conditions had been met.

⁵⁴ 8 U.S.C. § 1182(d)(5)(A).

⁵⁵ See *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007) ("The scope of § 1182(d)(5)(A) is carefully circumscribed: Aliens may be paroled into the United States 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.'").

⁵⁶ See 8 U.S.C. § 1101 et seq.

⁵⁷ See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[H]ad Congress wished to assign ['a question of deep economic and political significance'] to an agency, it surely would have done so expressly."); See also *Whitman v. Am. Trucking Ass'n's*, 531 U.S. 457, 468 (2001) ("Congress [] does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes.").

⁵⁸ See U.S. Dep't of Homeland Sec., *Report to Congress: Use of the Attorney General's Parole Authority Under the Immigration and Nationality Act Fiscal Years 1997–1998*, ("...In general, the parole authority in section 212(d)(5) allows the INS to respond individual cases that present problems that are time-urgent or for which no remedies are available elsewhere in the Immigration and Nationality Act. The prototype case arises in an emergency situation. For example, the sudden evacuation of U.S. citizens from dangerous circumstances abroad often includes household members who are not citizens or permanent resident aliens, and these persons are usually paroled....").

will enhance DHS's ability to focus its resources on processing immigration benefits for which Congress has authorized or funded, and increase access to these benefits without unreasonable delays in processing.

e. DHS Must Terminate its Unlawful Deferred Action for Childhood Arrivals (DACA) Program

DHS must also immediately terminate the unlawful DACA program, which allows certain illegal aliens who arrived in the United States as minors to apply for forbearance of removal.⁵⁹ Those granted such relief become eligible for work authorization and various federal benefits. USCIS administers DACA, and like DHS's unlawful parole programs discussed above, the program diverts agency resources from the adjudication and administration of legitimate visa programs, resulting in fee increases and longer processing times for applicants – even when USCIS charges fees to recover costs.

On October 5, 2022, the Fifth Circuit Court of Appeals ruled that the original DACA program violated both procedural and substantive law, stating that “Congress determined which aliens can receive these benefits, and it did not include DACA recipients among them. We agree with the district court’s reasoning and its conclusions that the DACA Memorandum contravenes comprehensive statutory schemes for removal, allocation of lawful presence, and allocation of work authorization.”⁶⁰ Because the policy codified by the DACA regulation in 2022 is nearly identical to the original program established in 2012, it is unlikely to survive further Fifth Circuit review.⁶¹

As an unauthorized and unfunded program, all costs stemming from implementation of this program, including man-power, diverts attention and resources from lawful immigration programs, which only increase costs and delays for legitimate immigrant and nonimmigrant programs. More importantly, the creation of the DACA program is one of the strongest pull-factors that ignited the recent border crisis, which directly burdens the already severely-backlogged USCIS Asylum Division. CBP began reporting unprecedented numbers of illegal border crossing of unaccompanied alien minors and family units in excess of single adult aliens after the U.S. Government began signaling an unwillingness to enforce immigration law against these populations.⁶² The humanitarian crisis on the border continues to serve as a threat to national security, public health, wage levels and employment security, and poses unsustainable strains to DHS, DOJ and HHS resources.

f. USCIS Should Continue to Discount for Online Filing to Encourage Use and Expansion of its Electronic Systems

CIS supports DHS's proposal to maintain the 2020 fee rule's discount for applications that are filed electronically, where applicable.⁶³ Transitioning to online filing for benefit requests is a necessary step

⁵⁹ See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891(2020).

⁶⁰ *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022).

⁶¹ See 87 Fed. Reg. 53152 (Aug. 10, 2022); In its July 16, 2021 decision, the U.S. District Court for the Southern District of Texas signaled that a regulation codifying the program would not survive legal scrutiny so long as it continued to directly conflict with numerous federal statutes. The court explained that, “Against the background of Congress’ ‘careful plan,’ DHS may not award lawful presence and work authorization to approximately 1.5 million aliens for whom Congress has made no provision.” *Texas v. United States*, 549 F. Supp. 3d 572, 605 (S.D. Tex. 2021).

⁶² U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children FY 2014*, (Nov. 2015).

⁶³ 88 Fed. Reg. 402, 489-490 (Jan. 4, 2023).

to improving agency efficiency as well as transparency in the immigration system. Additionally, increase use of USCIS's online-filing systems can save the agency significant costs associated with paper storage, transport, and management, as well as minimize inter-agency red tape and increase overall processing times for adjudications. Equally important, collecting data electronically rather than using a paper-based system will facilitate data-sharing with the public, law enforcement, and relevant government agencies.

III. Alternative Policies DHS Should Implement to Minimize Costs of USCIS's Asylum Program to Fee-Paying Applicants and Petitioners

As an alternative to disproportionately raising fees for U.S. businesses above actual costs of adjudication, DHS should implement effective deterrence policies to faithfully enforce federal law and reduce costs associated with mass illegal immigration. As discussed above, USCIS currently operates the credible fear process without imposing any fee on applicants, and its credible fear operations are not funded by taxpayers.⁶⁴ Policies that effectively deter mass illegal immigration and related-mass asylum fraud will positively impact USCIS's budget and reduce the scale at which fee-paying applicants and petitioners must pay to support USCIS's asylum program.

a. Fully Implement the Migrant Protection Protocols (“MPP”) or Otherwise Operationalize Section 235(b)(2)(C) of the INA

CIS urges DHS to robustly utilize INA § 235(b)(2)(C) and require amenable arriving aliens to wait in Mexico pending their removal proceedings with an immigration judge in the United States as an alternative to detaining arriving aliens in the United States under expedited removal, pursuant to INA § 235(b)(1), or removal proceedings, pursuant to INA § 235(b)(2)(a)(i). DHS's operation of MPP, which implemented INA § 235(b)(2)(C), has a proven track record to reduce illegal immigration across the southern border and successfully ended the 2019 border surge.⁶⁵ DHS should reinstate MPP to end the current crisis.

The availability of employment authorization with a pending asylum application, combined with “catch-and-release” policies that ensure most aliens can avoid detention, provides a strong incentive for submitting a fraudulent or frivolous asylum claims at the border. By eliminating the possibility of release into the interior of the United States pending an alien’s immigration court hearing, MPP eliminated the most significant pull factor for illegal border crossings.

MPP also provides amenable aliens a significantly quicker avenue to an immigration hearing, where they are able to pursue a claim for any relief or benefits for which they may be eligible. Reducing the overall numbers of fraudulent and frivolous claims is critical to allow both DHS and DOJ to reduce their backlogs and allow legitimate asylum seekers access to benefits without unreasonable delays.

⁶⁴ 88 Fed. Reg. 402, 438 (Jan. 4, 2023).

⁶⁵ U.S. Citizenship and Immigration Services, *Credible Fear Workload Report Summary, FY 2019 Total Caseload*, U.S. Citizenship and Immigration Services (undated); U.S. Department of Homeland Security, *Assessment of the Migrant Protection Protocols (MPP)* (October 28, 2019).

b. End the 1997 Flores Settlement Agreement and Comply with the INA’s Detention Requirements for Recent Inadmissible Alien Arrivals

DHS must also take action to end the 1997 Flores Settlement Agreement (“FSA”) if it wants to take meaningful action to deter asylum fraud. The near guarantee of family unit release into the United States as a result of the FSA’s outdated restrictions on detention is a strong and well-known pull-factor for illegal immigration and related asylum fraud.⁶⁶ The expedited removal process is only effective when DHS is able to, consistently with Congressional design, detain aliens pending completion of their proceedings.

As DHS has explained in detail in its 2019 *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children* rule, the restrictions created by the FSA and limited detention space prevent DHS from detaining most family units for sufficient time to receive an immigration court ruling.⁶⁷ Prospective migrants to the United States, including adults and criminal organizations, are aware of this loophole and often exploit children to guarantee their release from DHS custody.⁶⁸

A new regulation, consistent with DHS’s final rule published in 2019, must also allow ICE to establish family residential standards without the existence of state licensing. Most states only have licensing laws governing the housing of unaccompanied minors, but not minors who are accompanied by parents or adult relatives.

Replacing the state licensing requirement with an alternative but equivalent federal licensing scheme is necessary to ensure that DHS has the resources and capacity to humanely detain family units who have recently crossed the border pending the duration of their immigration court proceedings. Such a regulation must comply with the relevant and substantive terms of the FSA regarding the conditions for custodial settings for minors, but, through federal licensing, DHS can provide the flexibility necessary to enhance public safety and enforce immigration laws given current challenges that did not exist when the FSA was executed.

Given the likelihood of continued litigation, DHS must also concurrently work with Congress to support legislation to supersede the FSA. A legislative solution terminating the Settlement Agreement, or

⁶⁶ Specifically, the FSA and subsequent, related court rulings restricted DHS’s ability to keep minors (including minors who are accompanied by an adult relative) in family residential centers (“FRCs”) for periods longer than 20 days. Under the FSA, the government must release unaccompanied alien minors, without unnecessary delay, to parents, other close relatives, or a suitable guardian, pending a determination of the unaccompanied alien minors’ claims to remain in the United States. The agreement also reasonably stipulated that if there was no suitable relative or guardian to take custody, minors would be held in the “least restrictive” setting possible, and receive basic comforts and amenities. In 2015, the U.S. Court of Appeals for the Ninth Circuit extended this consent decree to include family units. *See Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015). As a result, DHS cannot detain any adult migrant arriving to the United States with a relative child in excess of 20 days. The agreement, however, is inconsistent with federal laws that require certain recent border crossers to remain in federal detention for the duration of their immigration court hearings. It also disrupted the careful scheme Congress explicitly created to manage border surges and encounters with alien minors.

⁶⁷ 84 Fed. Reg. 44392, 44398-99 (Aug. 23, 2019) (explaining the history of the *Flores Settlement Agreement*).

⁶⁸ Homeland Security Advisory Council, *Final Emergency Interim Report, CBP Families and Children Care Panel* (Apr. 2019).

otherwise limiting the FSA's applicability to unaccompanied alien minors, would ensure DHS is not forced to violate unrelated provisions of federal immigration law, such as INA § 235 and INA § 212(d)(5), by releasing family units from mandatory detention or separate families to accommodate resource limitations.

c. Rescind DHS's Non-Enforcement Policies and Resume Worksite Enforcement

CIS urges DHS to allow ICE to enforce immigration laws by removing arbitrary limitations on who may be arrested or removed. DHS must immediately rescind its recent policies: *Guidelines for the Enforcement of Civil Immigration Law*, September 30, 2021;⁶⁹ *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksit*e, and the Dignity of the Individual, October 12, 2021;⁷⁰ and *Guidelines for Enforcement Actions in or Near Protected Areas*, Oct. 27, 2021.⁷¹

ICE has a Congressionally-mandated role to enforce our immigration laws in the interior of the country. Preventing ICE officers from initiating audits and enforcement actions serves no purpose aside from signaling to the world that the U.S. Government does not intend to enforce immigration laws against the vast majority of aliens unlawfully in the United States. The Biden administration's policies not only threaten public safety and undermine the integrity of the immigration system, but also incentivize illegal immigration and wayward employers to hire unauthorized aliens. These policies must be rescinded immediately to reduce significant and needless strains on the asylum system and restore order on our border.

d. Increase Detention Capacity

The near-guarantee of release into the United States via parole is an additional pull-factor for illegal immigration and mass asylum fraud. Unless DHS utilizes MPP to manage illegal immigration across the southern border, it must increase its family detention capacity in order to lawfully respond to the growing rate of family unit apprehensions at the southern border. Currently, DHS has just three family residential centers ("FRCs"), with a combined detention capacity of just 3,326 people.⁷² To put this figure in perspective, CBP encountered over 58,860 family units in the month of December 2022 alone.⁷³

⁶⁹ Memorandum for Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Guidelines for Enforcement of Civil Immigration Law (Sept. 30, 2021).

⁷⁰ Memorandum for Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (October 12, 2021).

⁷¹ Memorandum for Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Guidelines for Enforcement Actions in or Near Protected Areas (Oct. 27, 2021).

⁷² U.S. Immigration and Customs Enforcement, *Detention Management* (Mar. 2022).

⁷³ U.S. Customs and Border Protection, *Nationwide Encounters* (Mar. 2023).

e. Apply the Mandatory Bars to Asylum and Withholding of Removal to Credible Fear Screenings

CIS strongly urges DHS to require USCIS asylum officers to apply the mandatory bars to asylum and statutory withholding of removal at the credible fear screening stage. Specifically, DHS should require asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under INA § 208(a)(2)(B)-(D), or the bars to asylum eligibility under INA § 208(b)(2), including any eligibility bars established by regulation under INA § 208(b)(2)(C); and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the regulations implementing CAT.

With this policy in place, an alien who establishes a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal should receive a negative fear determination, unless the alien establishes a reasonable possibility of torture, in which case he or she should be referred to the immigration court for asylum-and-withholding-only proceedings. In those proceedings, the alien would have the opportunity to raise whether he or she was correctly identified as being subject to the bars to asylum and withholding of removal and also pursue protection under the CAT regulations.

Implementing this reform will facilitate backlog reduction by weeding out cases that asylum officers already know do not have a “significant possibility” of eligibility for protection. With the asylum processing IFR in place that now transfers positive credible fear determinations to the USCIS Asylum Division for consideration of a final grant of asylum, DHS can expect this reform to likewise result in significant cost savings, further reducing the burden fee-paying applicants and petitioners must bear to fund USCIS’S asylum program.

f. Maintain “Last-In, First-Out” Processing Priorities

USCIS should maintain its “Last-In, First-Out” asylum application processing priorities. Giving priority to recent filings allows USCIS to promptly place such individuals into removal proceedings, which reduces the incentive to file for asylum solely to obtain EAD. This approach, which had been used for nearly two decades, paused in 2014 and reinstated in 2018, also has allowed USCIS to decide qualified applications in a more efficient manner and allowed the agency to focus more resources on applications that are more likely to be meritorious as a result.

IV. Conclusion

Understanding Congress’s clear declaration that “self-sufficiency” has been and “continues to be a governing principle” in U.S. immigration policy,⁷⁴ CIS strongly recommends DHS adapt the USCIS FY 2022/2023 fee schedule to more strongly incorporate the beneficiary-pays principle to promote equity and efficiency in the U.S. immigration system. Accordingly, USCIS should adjust fees to recover actual costs of adjudication for most immigration benefit services and limit fee waiver eligibility to ensure that fee-paying applicants do not bear the costs of immigration benefit requests where fee waivers are

⁷⁴ 8 U.S.C. § 1601.

inappropriate or unnecessary. Additionally, CIS supports USCIS efforts to digitize its operations and promote electronic-filing with cost-appropriate discounts.

CIS also strongly recommends that USCIS impose a waivable fee for Form I-589, Application for Asylum and Withholding of Removal, and rescind its asylum processing IFR in order to recover costs of administering the USCIS Asylum Division without unfairly burdening U.S. businesses. Most importantly, DHS must terminate DACA and USCIS's unlawful parole programs, which divert USCIS resources from legitimate visa programs, and implement effective deterrence policies to minimize fraud in the asylum system, which excessively strains USCIS's budget, officer morale, and operations.

Respectfully Submitted,

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