

# Proposed Rules

Federal Register

Vol. 69, No. 229

Tuesday, November 30, 2004

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 103

[CIS No. 2245-02; Docket No. DHS-2004-0021]

RIN 1615-AA88

#### Adjustment of the Appeal and Motion Fees to Recover Full Costs

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** On March 1, 2003, the Immigration and Naturalization Service (Service) transferred from the Department of Justice (DOJ) to the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002 (Pub. L. 107-296). The adjudications functions transferred to the U.S. Citizenship and Immigration Services (USCIS). This document proposes to raise the fee for filing appeals of, and motions to reopen or reconsider, any decision under the immigration laws in any type of proceeding other than those described at 8 CFR 1003.1(b), over which the Board of Immigration Appeals (BIA) has appellate jurisdiction.

This proposed rule applies to fees for appeals and motions relating to the types of cases under the jurisdiction of the Administrative Appeals Office (AAO). The AAO is an appellate office of USCIS. The BIA remains a component of DOJ, and has appellate jurisdiction over the orders of immigration judges, denials of relative immigrant visa petitions (Form I-130), and decisions involving administrative fines and penalties. Appeals from denials of all other types of applications and petitions, and any subsequently filed motions, are under the jurisdiction of the AAO.

In this proposed rule, the fees, which are deposited into the Immigration Examinations Fee Account (IEFA), are being raised from \$110 to \$385 to

recover the full costs associated with the processing of an appeal or motion to reopen or motion to reconsider. Federal statutes and guidelines authorize USCIS to establish and collect fees to recover the full cost of processing immigration benefit applications, rather than supporting these services with tax revenue.

**DATES:** Written comments must be submitted on or before December 30, 2004.

**ADDRESSES:** You may submit comments, identified by Docket No. DHS-2004-0021, by *one* of the following methods:

- EPA Federal Partner EDOCKET Web Site: <http://www.epa.gov/feddocket>. Follow instructions for submitting comments on the Web site. The Department of Homeland Security has joined the Environmental Protection Agency (EPA) online public docket and comment system on its Partner Electronic Docket System (Partner EDOCKET). The Department of Homeland Security and its agencies (excluding the United States Coast Guard and Transportation Security Administration) will use the EPA Federal Partner EDOCKET system. The USCG and TSA [legacy Department of Transportation (DOT) agencies] will continue to use the DOT Docket Management System until full migration to the electronic rulemaking federal docket management system in 2005.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: [rfs.regs@dhs.gov](mailto:rfs.regs@dhs.gov). When submitting comments electronically, please include Docket No. DHS-2004-0021 in the subject line of the message.

- Mail: The Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529. To ensure proper handling, please reference Docket No. DHS-2004-0021 on your correspondence. This mailing address may also be used for paper, disk, or CD-ROM submissions.

- Hand Delivery/Courier: U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529. Contact Telephone Number (202) 514-3048.

**Instructions:** All submissions received must include the agency name and

Docket No. DHS-2004-0021 for this rulemaking. All comments received will be posted without change to <http://www.epa.gov/feddocket>, including any personal information provided.

**Docket:** For access to the docket to read background documents or comments received, go to <http://www.epa.gov/feddocket>. You may also access the Federal eRulemaking Portal at <http://www.regulations.gov>. Submitted comments may also be inspected at the Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529. To ensure proper handling, please reference CIS No. 2245-02 on your correspondence.

**FOR FURTHER INFORMATION CONTACT:** Paul Schlesinger, Director, Office of Budget, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., 4th Floor, Washington, DC 20529, telephone (202) 272-1930.

#### SUPPLEMENTARY INFORMATION:

##### What Legal Authority Does DHS Have To Charge Fees?

*A. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Acts of 1989*

Section 209 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1989, Public Law 100-459, section 209(a), 102 Stat. 2186, 2203 (October 1, 1988), 8 U.S.C. 1356(m), authorizes DHS to prescribe and collect fees to recover the cost of providing certain immigration and naturalization benefits. That law also authorized the establishment of the IEFA in the Treasury of the United States. All revenue from fees collected for immigration and naturalization benefits are deposited in the IEFA and remain available to provide immigration and naturalization benefits and to provide for the collection, safeguarding, and accounting for fees. 8 U.S.C. 1356(n).

##### *B. The Independent Offices Appropriation Act, 1952*

DHS also employs the authority granted by the Independent Offices Appropriation Act, 1952 (IOAA), 31 U.S.C. 9701, commonly referred to as the "User Fee Statute," to develop its fees. The IOAA directs federal agencies

to identify services provided to unique segments of the population and to charge fees for those services, rather than supporting such services through general tax revenues. The IOAA states that “[i]t is the sense of Congress that each service or thing of value provided by an agency \* \* \* to a person \* \* \* is to be self-sustaining to the extent possible.” 31 U.S.C. 9701(a).

The IOAA further provides that charges for such services or things of value should be fair and based on “(A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts.” 31 U.S.C. 9701(b).

### C. The Chief Financial Officers Act of 1990

DHS must also conform to the requirements of the Chief Financial Officers Act of 1990 (CFO Act), Public Law 101-576, 104 Stat. 2838 (1990). Section 205(a) of the CFO Act, amending 31 U.S.C. 902, requires each agency’s Chief Financial Officer to “review, on a biennial basis, the fees, royalties, rents, and other charges imposed by the agency for services and things of value it provides, and make recommendations on revising those charges to reflect costs incurred by it in providing those services and things of value.” Public Law 101-576, 104 Stat. 2838 (1990) at 2844, 31 U.S.C. 902(a)(8).

### What Federal Cost Accounting and Fee Setting Standards and Guidelines Were Used in Developing the Proposed Fee Changes?

#### A. Office of Management and Budget (OMB) Circular No. A-25, User Charges

When developing fees for special benefits, DHS adheres to the principles contained in OMB Circular No. A-25, Revised, User Charges (1993). OMB Circular No. A-25 states at Section 6, that as a general policy a “user charge \* \* \* will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public.”

The guidance contained in OMB Circular No. A-25 is applicable to the extent that it is not inconsistent with any federal statute. For example, specific legislative authority to charge fees for special benefits takes precedence over OMB Circular No. A-25. Specifically, section 4(b) provides “where a statute prohibits the assessment of a user charge on a service or addresses an aspect of the user charge (e.g., who pays the charge; how much is the charge; where collections are deposited), the statute shall take

precedence over the Circular.” When a statute does not address issues of how to calculate fees or what costs to include in the fee calculation, federal agencies must follow the principles and guidance contained in OMB Circular No. A-25 to the fullest extent allowable. The guidance directs federal agencies to charge the “full cost” of providing benefits when calculating fees that provide a special benefit to recipients. Section 6(d) of OMB Circular No. A-25 defines “full cost” as including “all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service.” These costs include, but are not limited to, an appropriate share of:

(a) Direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement;

(b) 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;

(c) Management and supervisory costs; and

(d) The costs of enforcement, collection, research, establishment of standards, and regulation.

Finally, section 6(d)(1)(e) states that “[f]ull cost shall be determined or estimated from the best available records of the agency, and new cost accounting systems need not be established solely for this purpose.”

#### B. Federal Accounting Standards Advisory Board Statement of Federal Financial Accounting Standards No. 4: Managerial Cost Accounting Concepts and Standards for the Federal Government

When developing fees for services, DHS also adheres to the cost accounting concepts and standards recommended by the Federal Accounting Standards Advisory Board (FASAB). The FASAB was established in 1990, and its purpose is to recommend accounting standards for the Federal Government. The FASAB defines “full cost” to include “direct and indirect costs that contribute to the output, regardless of funding sources.” Federal Accounting Standards Advisory Board, Statement of Financial Accounting Standards No. 4: Managerial Cost Accounting Concepts and Standards for the Federal Government 36 (July 31, 1995). To obtain full cost, FASAB identifies various classifications of costs to be included, and recommends various methods of cost assignment, as will be discussed later. *Id.* at 36-42.

### How Are the Adjudications of Immigration Benefit Applications Funded and Supported?

Fees collected from immigration benefit applications are used to fund the full costs of processing immigration benefit applications. Fees deposited into the IEFA have been the primary source of funding for the processing of immigration benefit applications, and generally have replaced the annual appropriation that was received for such services.

### How Were the Unit Cost and Proposed Fees for Filing an Appeal or Motion Determined?

#### A. Insufficiency of the Current Fees

Since 1989, the fees for the vast majority of immigration benefit applications have increased more than threefold based on an improved cost accounting methodology as well as a general rise in resource requirements commensurate with the mission to provide immigration information and benefits for USCIS customers in a timely, accurate, consistent, courteous, and professional manner.

However, the current appeal and motion fees of \$110 have neither been reviewed nor adjusted since 1989. In addition, recent performance data indicates that the processing time for an appeal or motion did not meet the President’s 5-year goal of processing immigration benefit applications in 6 months or less due, in large part, to staffing shortfalls.

A review to adjust appeal and motion fees was not conducted in the past given the low workload volume. However, recent data indicates a significant and steady increase of 12% in appeal and motion filings from 1993 to 2002. Thus, USCIS deemed it was reasonable and necessary to perform a fee review of the appeal and motion process to ensure full compliance with applicable federal law and user fee guidance by recovering the full costs of appeal and motion filings.

#### B. The Appeal and Motion Process

When a petition or application is denied or revoked by USCIS, in most cases the applicant or petitioner may appeal that decision to a higher authority. The AAO has appellate jurisdiction over 66 types of petitions and applications. If an applicant or petitioner receives an appealable denial notice, the denial notice will advise the applicant or petitioner of his or her right to appeal to the AAO or BIA, whichever is appropriate; provide the applicant or petitioner with the appropriate appeal form; and include instructions on any

applicable time limit for filing an appeal.

There are strict deadlines that must be met to file an appeal properly. In addition, only the person that submitted the original application or petition may file the appeal. For example, if a U.S. employer petitions for an alien employee, only the U.S. employer may appeal the denial. If the AAO has jurisdiction over the decision, the notice of appeal must be filed on Form I-290B, Notice of Appeal to the Administrative Appeals Unit (AAU). The appeal, as well as the accompanying fee, must be filed with the office that made the original decision to deny the application or petition. The applicant or petitioner may file a brief written explanation in support of an appeal. After review, the AAO may agree with the applicant or petitioner and change the original decision, disagree with the applicant or petitioner and affirm the original decision, or send the matter back to the originating office for further action. Only one appeal may be filed for each denial or revocation; there is no further administrative appellate review of an AAO decision.

In addition to the right to appeal (in which the applicant or petitioner asks a higher authority to review a denial), the applicant or petitioner may file a motion to reopen the case or a motion to reconsider the denial with the office that made the unfavorable decision, such as the field office or AAO. By filing these motions, the applicant or petitioner may ask the office to reexamine or reconsider its decision. A motion to reopen must state the new facts that are to be provided in the reopened proceeding and must be accompanied by affidavits or other documentary evidence per 8 CFR 103.5(a)(2). Under 8 CFR 103.5(a), a motion to reconsider must establish that the decision was based on an incorrect application of law or USCIS policy, and further establish that the decision was incorrect based on the evidence of record at the time the initial decision was issued. Any motion to reopen or reconsider must be filed with the correct fee within 30 days of the decision.

Form I-290B is used to appeal decisions issued by adjudication officers located at DHS service centers and district offices. Appeals and motions require approximately the same amount of effort, on average, according to discussions with AAO management. The core work of writing and editing performed at the AAO is very labor intensive, given the three full days it requires to process an average appeal/motion case.

*C. Methodology*

In Fiscal Year 2003, KPMG Consulting was hired to provide an independent fee review as well as to ensure adherence to applicable federal law and fee guidance. The fee review identified the full costs of processing appeals and motions and the estimated completion volumes over the Fiscal Year 2003/2004 biennial time period. The full cost determination included the labor-intensive activities involved in application logistics, legal research, decision writing, and decision review. The full cost determination also included the staffing necessary to meet the President's 5-year goal of processing immigration benefit applications in 6 months or less.

*D. Basis for the Proposed Fees*

The unit cost of \$382.98 was determined by dividing the full costs of processing appeal/motion cases associated with the FY 2003/2004 biennial time period (\$13,021,582) by the FY 2003/2004 completion volumes (34,000). The time required to process an average appeal versus an average motion case is essentially the same. Therefore, their respective unit costs are equal.

The table below identifies the unit cost of \$382.98 and the proposed fee of \$385.

UNIT COST AND PROPOSED FEE CALCULATIONS

	FY 2003/2004
Appeal/Motion Processing Costs .....	\$13,021,582
Appeal/Motion Completion Volume .....	34,000
Appeal/Motion Unit Cost .....	382.98
Rounding Adjustment .....	2.02
Proposed Appeal/Motion Fee	385.00

This rule also clarifies that the fee amount of \$385 also applies when an appeal is filed by, or on behalf of, two or more aliens and the two aliens are covered by one decision. In so doing, it corrects a transcription error in the Code of Federal Regulations in 1989 that failed to amend the fee amount from \$50 to \$110 for two or more aliens when the aliens are covered by one decision when the base fee (for one alien) was raised from \$50 to \$110, as provided in the final rule dated April 4, 1989 (54 FR 13513). The failure resulted in an unintended discrepancy between the base fee, and the fee for two or more aliens when the aliens are covered by one decision. Notwithstanding this transcription error, affected aliens have been properly charged, and the Service as well as USCIS have collected the

correct fee since the 1989 amendment. The form instructions also reflected the proper fee amount. This rule corrects the discrepancy in 8 CFR 103.7(b)(1) and brings this fee as properly amended (\$50 to \$110) from \$110 to \$385 so that both fees are now equal as intended.

Finally, this proposed rule also makes a conforming change to 8 CFR 103.5(a)(1)(iii) to replace an obsolete reference to a withdrawn form, Form I-290A, with a reference to Form I-290B.

**Does USCIS Have the Authority To Waive Fees on a Case-By-Case Basis?**

Yes, USCIS has the authority to waive fees on a case-by-case basis pursuant to 8 CFR 103.7(c).

**Regulatory Flexibility Act**

DHS has reviewed this regulation in accordance with 5 U.S.C. 605(b), and by approving it, DHS has determined that this rule will not have a significant economic impact on a substantial number of small entities since a majority of motions and appeals are submitted by individuals and not small entities as that term is defined in 5 U.S.C. 601(6).

DHS acknowledges, however, that some small entities, particularly those filing appeals of and/or motions to review denials of business-related applications and petitions, such as the Form I-140, Immigration Petition for Alien Worker, Form I-526, Immigrant Petition for Alien Entrepreneur, and Form I-829, Petition for Entrepreneur to Remove Conditions, may be affected by this rule. USCIS does not collect data on the size of the businesses filing appeals and/or motions related to employment based petitions, and therefore does not know the precise number of small businesses that may be affected by this rule (as the majority of petitions are filed by individuals). USCIS projects the following number of denials for business-related petitions for the Fiscal Year 2003/2004 biennial period:

Form I-140, Immigrant Petition for Alien Worker (35,866 denials);

Form I-526, Immigrant Petition by Alien Entrepreneur (217 denials);

Form I-829, Petition by Entrepreneur to Remove Conditions (174 denials).

Although this volume represents the total number of denials, it does not represent the total number of motions/appeals filed on these petitions which would be far less given that the number of motions/appeals filed by individuals and businesses totaled only 34,000 in the Fiscal Year 2003/2004 biennial period. However, even if all of the motions/appeals were filed by small businesses, the resulting degree of economic impact would not require a

Regulatory Flexibility Analysis to be performed.

#### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### Executive Order 12866

This rule is considered by DHS to be "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget (OMB) for review. DHS has assessed both the costs and benefits of this rule as required by section 1(b)(6) of Executive Order 12866 and has made a determination that, although increasing the fee to \$385 will increase the cost to the individual applicant and/or petitioner, USCIS must establish and collect fees to recover the full cost of processing immigration benefit applications, rather than supporting these services with tax revenue. There are no identifiable alternatives associated with this fee increase. The implementation of this rule also will provide USCIS with an additional \$6.7 million in FY 2005 over the fee revenue that would be collected under the current fee structure. If USCIS does not adjust the current fees to recover the full costs of processing immigration benefit applications, the backlog will likely increase. The revenue increase is based on USCIS costs and projected volumes that were available at the time of this rule.

#### Executive Order 13132

This rule will not have substantial direct effects on the States, on the

relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### Executive Order 12988: Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, 109 Stat. 163 (1995), all Departments are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act. This rule proposes that the fees for motions and appeals be increased. Since an increase of these fees will increase the cost burden on the public, DHS will submit the required Paperwork Reduction Change Worksheet (OMB-83C) to the Office of Management and Budget (OMB) reflecting the new fees and cost burdens on the public. It should also be noted that changes to the fees require changes to the application form (Form I-290B) to reflect the new fees. USCIS will submit a notification to OMB with respect to any such changes.

#### List of Subjects in 8 CFR Part 103

Administrative practice and procedure, Authority delegations (government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

Accordingly, part 103 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

#### PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

1. The authority citation for part 103 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

2. In § 103.5(a)(1)(iii), the introductory text is revised to read as follows:

#### § 103.5 Reopening or reconsideration.

(a) \* \* \*

(1) \* \* \*

(iii) *Filing Requirements*—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

\* \* \* \* \*

#### § 103.7 [Amended]

3. In § 103.7(b)(1):

a. The entry for "Form I-290B" is amended by revising the fee "\$50" to read: "\$385.00", and by revising the fee "\$110.00" to read: "\$385.00"; and

b. The entry for "Motion" is amended by revising the fee "\$110" to read: "\$385", wherever that fee appears in the entry.

Dated: November 18, 2004.

**Tom Ridge,**

*Secretary of Homeland Security.*

[FR Doc. 04-26370 Filed 11-29-04; 8:45 am]

BILLING CODE 4410-10-P

#### DEPARTMENT OF HOMELAND SECURITY

#### 8 CFR Parts 103, 204, 214, 245, and 245a

[CIS No. 2287-03; Docket No. DHS 2004-0020]

RIN 1615-AB13

#### Removal of the Standardized Request for Evidence Processing Timeframe

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to amend Department of Homeland Security (Department) regulations by removing the absolute requirement for, and the fixed regulatory time limitations on responses to, a U.S. Citizenship and Immigration Services (USCIS) issued Request for Evidence (RFE) or Notice of Intent to Deny (NOID). These changes will enable USCIS to set an appropriate deadline for responding to an RFE or NOID, specific to the type of case, benefit category, or classification, and thus improve the process of adjudication of applications and petitions by reducing the time a case is held awaiting evidence, and by reducing average case processing time. This rule will result in improved efficiency in the USCIS adjudication process.

In addition, this rule also replaces references to the Immigration and Naturalization Service (Service) with references to USCIS in light of implementation of the Homeland