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U.S. Citizenship and Immigration Services
Department of Homeland Security
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Submitted via www.regulations.gov
DHS Docket No. USCIS-2019-0010

Re: DHS Notice and Request for Comments: U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements

Dear Ms. Deshommès:

The American Immigration Lawyers Association (AILA) and American Immigration Council (Council) submit the following comments in response to the above-referenced Notice and Request for Comments on the Department of Homeland Security (DHS) proposed rule, “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” published in the Federal Register on November 14, 2019.¹ These comments also address the notice of the same name published in the Federal Register on December 9, 2019.²

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a nonprofit organization that strengthens America by shaping how America thinks about and acts towards immigrants and immigration. In addition, the Council works toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring. The Council envisions an America that values fairness and justice for immigrants and advances a prosperous future for all.

I. AILA and the Council Oppose the Proposed Fee Increases

If implemented as written, the proposed rule would require customers to pay increased fees for decreased services. In recent years, U.S. Citizenship and Immigration Services (USCIS) case processing has slowed dramatically, due in significant part to the agency's own inefficient policies. During that same period, the quality and consistency of adjudications, as well as access to case information assistance, have eroded. The proposed rule offers no remedy for this decline in agency performance. To the contrary, it promises more of the same delays and other failings, but at heightened cost to customers.

The increased fees would price many of those customers out of the legal immigration system altogether. Fees for Form I-485, for instance, when filed together with Form I-765 and Form I-131, would likely rise by at least 75 percent, and for Form N-400s by at least 80 percent. Affected individuals could no longer seek fee waivers, which the proposed rule would eliminate for those form types and many others. Altogether, this elevation of the "invisible wall" would leave numerous hard-working, law-abiding noncitizens on the other side, blocking their path to naturalization and other immigration benefits and prompting their families' long-term separation.

The proposed rule would go so far as to impose—for the first time in our nation's history—a fee for affirmative asylum applications. The \$50 expense would often prove insurmountable for vulnerable protection seekers, compelling their return to countries where they could suffer further persecution and even death. What is more, the proposed rule would increase by at least 50 percent the fee for DACA renewal applications. This hike would limit the ability of DACA recipients, many of whom have resided in the United States since early childhood and recognize no other nation as home, to obtain protection from deportation.

The proposed rule would harm American businesses as well, making it cost-prohibitive to hire necessary employees by hiking fees by more than 50 percent for an array of employment-based petition types. For example, the fee for filing an L-1 petition would increase by at least 72 percent, an H-2A named worker petition by at least 82 percent, and an O-1 petition by at least 50 percent. At the same time, it would relax USCIS's premium processing deadline from 15 calendar days to 15 business days—a change that would delay time-sensitive hiring for companies facing critical workforce gaps and create significant uncertainty for American businesses. The fee rule also proposes to significantly expand the application of the 9-11 Response and Biometric Entry-Exit Fee (herein "Public Law 114-113 fee") for certain H-1B and L-1 petitions every time an employee seeks to extend his or her status, even if it is because the government limited the prior petition approval to just one day. The outrageous application of the \$4,500/\$5,000 fee in such manner is contrary to clear congressional intent and an effort to deter legal immigration for individuals from certain countries.

Additionally, as written, the proposed rule would transfer over \$100 million in application and petition fees out of USCIS into the U.S. Immigration and Customs Enforcement (ICE). This proposal defies Congress's mandate that USCIS function as a service-oriented immigration benefits agency, distinct from the immigration enforcement missions of ICE and the U.S. Customs

and Border Protection (CBP). Making matters worse, the proposed rule fails to explain why, if USCIS is justifying its fee increases in large part by citing a need for more adjudicators and other staff, over the past year the agency diverted hundreds of its employees to perform enforcement work for ICE and CBP. In all, the proposed rule illustrates USCIS's increasing prioritization of immigration enforcement over its own service-oriented statutory mission.

Section 286(m) of the Immigration and Naturalization Act (INA) only authorizes USCIS to charge fees 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.” Congress has not authorized DHS to increase fees beyond this mandate. However, as proposed it is not clear that DHS has stayed within its statutory mandate as there is insufficient evidence and data in the proposed rule and the supporting documentation to justify the significant increase in fees as proposed by DHS.

Despite these and a host of other changes, DHS in an unprecedented manner changed the proposed rule during the middle of the comment period by publishing a notice in the Federal Register on December 9 that substantively altered the proposed rule and its impacts without providing precise information on what the resulting fee increases would be. USCIS has provided the public with only 45 days to comment, an insufficient period to meaningfully address a regulation of this size and complexity.

Finally, USCIS fails to provide any meaningful evidence that the changes it proposes would relieve case processing delays or otherwise improve services. Instead, the proposed rule assumes that lengthy delays will persist. Rather than raise fees to support the continued administration of backlog-expanding policies, the agency should end those policies. For all these reasons, AILA and the Council urge DHS to withdraw this misguided rule.

II. By Not Identifying the Nature and Costs of Inefficient Policies Implemented by USCIS, the Proposed Rule Fails to Meet its Own Objectives and Leaves the Public Without Information Essential to Proper Notice and Comment.

In the proposed rule, DHS emphasizes that a key reason for conducting the fee review is to assess USCIS policy changes along with agency costs. Yet, nowhere in the proposed rule or supporting documentation does DHS properly identify, much less assess, those changes or the costs attending them. The proposed rule therefore fails to meet its own objectives, while leaving the public in the dark regarding many of the expenses that the proposed fee increases are supposed to cover.

The proposed rule states that “important reasons for conducting the FY 19/FY 20 fee review” include assessments of “USCIS policy changes” and of “costs.”³ Underscoring the need for these assessments, the proposed rule provides evidence that changes in USCIS policy in recent years account for a significant proportion of the total cost growth driving the proposed fee increases. For instance, the proposed rule states that “the growing complexity of the case adjudication process over the past few years”—an evident reference to policy changes altering the adjudication process during that time—has slowed officers’ per-case adjudication rates,⁴ and that slower adjudications

contribute to the \$245.5 million needed for new hiring over the next two fiscal years.⁵ The proposed rule also notes that, “[t]hrough this rule, USCIS expects to collect sufficient fee revenue to fund additional staff that will support FY 2019/2020 workload projections **as well as perform more national security vetting and screening**,”⁶ highlighting that changes to vetting and screening policies contribute to the need for more personnel. Similarly, when addressing \$150.8 million in “net additional costs” in FY 2019, the proposed rule cites expenses associated with “enhancement requests” such as “increased background investigations”⁷—another apparent policy shift. Taken together, these and other sections in the proposed rule signal that a large amount of the overall costs underlying the proposed fee increases stem from changes in agency policy.

Despite this evidence of policy-fueled cost growth, and though DHS deemed the assessment of policy changes an important aim of the fee review, neither the proposed rule nor supporting documentation meaningfully examine the nature of those changes or associated expenses. The proposed rule’s vague references to the “growing complexity of the case adjudication process,” “more national security and vetting screening,” and “increased background investigations,” leave unclear the manner in which the agency has altered the case adjudication process, the nature of the screening modifications, how and to what degree USCIS escalated background investigations, and the costs associated with any of these shifts. Even when acknowledging that “USCIS is also interviewing a greater proportion of adjustment of status applicants, requiring more time and effort to adjudicate Form I-485,”⁸ the proposed rule fails to disclose specific information regarding what that “greater proportion” represents or the added costs associated with this increase. Just as troubling, the proposed rule omits mention of numerous USCIS policy changes that, in combination, have transformed the agency’s adjudications in recent years. The proposed rule, then, fails to realize its own aims—a failure forcing the public to reckon with unknown costs resulting from unspecified policies and precluding proper notice and comment. AILA and the Council recommend not only that DHS withdraw the proposed rule, but also that any fee rule issued in its place provide a transparent and thorough assessment of the nature and costs of relevant USCIS policy changes.

In particular, the assessment must examine whether those measures are efficient and cost-effective relative to the fulfillment of USCIS’ statutory mandate to fairly and efficiently administer immigration benefits services. Critically, inefficient USCIS policies have acted as core drivers of the agency’s recent case processing slowdown—the same slowdown cited by DHS as a principal factor underlying the need for costly additional staff. From FYs 2014 to 2018, the average USCIS case processing time climbed by 91 percent.⁹ During that span, the processing time for some form types doubled or even tripled. USCIS has sought to attribute these delays in substantial part to what it characterizes as high application rates. But according to the agency’s own “All USCIS Application and Form Types Data,” overall application receipts declined by 13% in FY 2018 compared to the prior year, representing a drop of more than one million cases.¹⁰ Furthermore, USCIS’s budget increased by over 30 percent from FY 2014 through FY 2018.¹¹ In other words, in FY 2018 the agency had more resources with which to adjudicate fewer new cases, yet processing times still rose by 19 percent.¹²

This and other evidence—including declining USCIS “case completions per hour,” a key index of agency productivity—show that the agency’s own policies have played an outsize role in producing the case processing delays cited in the proposed rule as part of the justification for the changes proposed. According to DHS, “USCIS completion rates are the average hours per adjudication of an immigration benefit request. They identify the adjudicative time required to complete (render a decision on) specific immigration benefit requests.”¹³

Although USCIS uses case completion data to help determine fees, DHS failed to disclose actual case completion per hour statistics anywhere in the proposed rule or in supporting documentation. Case completion data submitted to Congress in April 2019, however, illustrates the processing inefficiencies that USCIS’s unnecessary policy changes have created.¹⁴ AILA’s analysis of that data shows that USCIS case completions per hour decreased for 79 percent of immigration benefit types from FY2014 to FY2018 and for 81 percent of immigration benefit form types from FY2016 to FY2018.¹⁵ Critically, USCIS has acknowledged the association of these falling rates with various policy changes, including categorical in-person interview requirements and lengthier forms.¹⁶ And DHS has conceded that diminished case completions per hour “limit our ability to reduce the current overall backlog.”¹⁷

Below is a non-exhaustive description of inefficient USCIS policies and practices in recent years that have resulted in the unnecessary allocation of agency resources and/or promoted a lack of accountability for USCIS’s operational failures. At a minimum, the fee rule should fully address these measures and attendant costs.

- (1) **Sweeping and unnecessary in-person interview requirements that USCIS began implementing in October 2017 for all individuals seeking green cards through their employers (employment-based I-485s) as well as certain relatives seeking family reunification with asylees and refugees (I-730s).**¹⁸ Under prior policy, USCIS officers had discretion to require such interviews on a case-by-case basis, where, for example, applications presented fraud or national security concerns. The new policy mandates those interviews indiscriminately, despite no meaningful evidence of this requirement’s utility. Unneeded, time-intensive interviews drain adjudicative resources—resources that the agency could otherwise direct toward backlog reduction. In an April 2019 letter to 86 Members of the House, USCIS conceded that this policy contributes to processing delays, noting that the in-person interview requirements “are reducing the completions per hour because of the additional time required for interviews, which is contributing to increased cycle times and the backlog.”¹⁹
- (2) **USCIS’s October 2017 rescission of longstanding guidance under which adjudicators deferred to prior approvals of temporary benefits when processing requests to extend those benefits absent error or a material change in circumstances.**²⁰ USCIS personnel must now effectively re-adjudicate many previously processed petitions. This needless duplication of efforts squanders resources, drives delays, and creates inconsistency in adjudications.
- (3) **Spikes in unnecessary Requests for Evidence (RFEs) from the agency that delay and freeze case processing.** For example, in the first quarter of FY 2019, USCIS issued RFEs in

response to 60% of H-1B petitions, dramatically higher than the 20.8% H-1B RFE rate in FY 2016.²¹ Often these RFEs seek irrelevant or previously furnished information or reflect policy changes of which the agency failed to provide adequate notice to the public.

- (4) **The institution of “extreme vetting” of immigration cases beginning in 2017, despite USCIS’s failure to demonstrate that prior vetting procedures were inadequate or that the new procedures advance security interests.**²² Indeed, USCIS has not explained how “extreme vetting” actually differs from previous vetting policies, or to what extent the proposed rule’s reference to “more national security vetting and screening”²³ reflects “extreme vetting” implementation.
- (5) **The lengthy suspension of longstanding “premium processing” services for certain lines of USCIS applications and petitions**²⁴ without proper justification.
- (6) **The diversion of hundreds of USCIS personnel to ICE and CPB enforcement functions, despite USCIS’s claim that it lacks sufficient resources to timely perform its own work.** On October 16, 2019, USCIS stated that during Fiscal Year 2019, 233 “employee volunteers...were deployed directly to the nation’s southern border...in support of [CBP],” in addition to other USCIS volunteers assigned to ICE.²⁵
- (7) **USCIS’s weakening of its own standards for case processing timeliness.** During a July 16, 2019 congressional hearing, USCIS outlined various prongs of its backlog reduction plan, one of which is to “Redefine Processing Time Goals to Better Reflect True Cycle Times”—in effect, to change goals to accommodate underperformance rather than to change performance to meet goals.²⁶ In a subsequent letter, USCIS confirmed that it had “updated processing time goals to better reflect operational realities,” though the agency has not publicly disclosed the new benchmarks.²⁷ Given that USCIS calculates its “net backlog” based principally on the number of cases pending outside of processing time goals, laxer standards could send the net backlog into freefall, projecting a misleading impression of improved agency performance that masks continued deterioration of USCIS services.
- (8) **A Notice to Appear policy announced in June 2018 that dramatically expands the circumstances under which USCIS can place denied applicants and petitioners into deportation proceedings.**²⁸ This policy threatens to significantly divert resources from case processing to the issuance of Notices to Appear. Despite a July 31, 2019 Congressional letter to USCIS on this issue, the agency has failed to publicly share any meaningful information concerning the policy’s implementation to date.

As noted, the evidence indicates that these and other USCIS policy changes are responsible for a considerable portion of the overall expenses claimed in the proposed rule. In key respects, then, the proposed fee increases would transfer to the public the costs of the agency’s own inefficiencies. No less concerning, the proposed rule suggests that the agency could expand implementation of at least some of these misguided measures. For instance, the proposed rule states that its “new framework” with respect to vetting and screening could entail “more in-person interviews of applicants for certain immigration benefits.”²⁹

It is therefore unsurprising that the proposed rule fails to provide any meaningful evidence that the changes it proposes would relieve case processing delays or otherwise improve agency performance. In fact, the proposed rule assumes that lengthy delays will persist, thereby requiring customers to pay sharply higher fees for diminished services. Rather than raise prices to support the continued administration of backlog-expanding policies, the agency should end those policies.

III. The Proposed Rule Would Undermine the Sustainability and Competitiveness of American Businesses.

The proposed rule proposes an array of changes to employment-based immigration forms and fees, as well as other agency policies that would hinder the ability of American businesses to fill critical workforce gaps and maintain profitability. The proposed rule would apply the Public Law 114-113 fee to certain employers every time they file a petition on behalf of an employee, a shift prohibitively costly to some affected businesses and that would violate congressional intent as unambiguously stated in the law. The proposed rule would also escalate fees for various employment-based nonimmigrant classifications to levels unaffordable to many companies throughout the nation, without providing adequate justification for the cost estimates underlying the proposed increases. Furthermore, by relaxing the premium processing deadline from 15 calendar days to 15 business days, the proposed rule would create uncertainty and unpredictability for businesses with time-sensitive hiring needs.

A. The proposed changes to Public Law 114-113 would impose extraordinary costs on impacted employers and violate unambiguous law

AILA and the Council strongly oppose DHS's proposal to apply the Public Law 114-113 fee to certain employers every time they file a petition on behalf of an employee, as this change will cause significant harm to certain U.S. employers and is contrary to the unambiguous statutory language.

In its proposal, DHS is proposing to change its interpretation regarding when the Public Law 114-113 fee for H-1B and L-1 petitions is required. This additional fee of \$4,000 for H-1B petitions and \$4,500 for L-1 petitions is imposed when the petitioner employs more than 50 workers in the United States and that workforce is comprised of more than 50 percent H-1B or L-1 workers. DHS has long taken the position—in accordance with the plain statutory language of Public Law 114-113—that this fee was required only when the fraud prevention and detection fee under INA section 214(c)(12) is also required. In short, this means that an employer must pay this fee upon the initial H-1B or L-1 petition for a new employee, but not for extension of stay petitions filed for the same employee. However, under DHS's revised interpretation, an affected H-1B or L-1 employer will now have to pay this fee *every time* it seeks to extend an employee's status. This provision significantly harms U.S. employers, particularly given recent changes to USCIS policies that allow petitions to be approved for less than one year, and in certain cases for as little as one day, requiring employers to file petitions on behalf of the same employee multiple times. The impact is even more dire on those employers who employ H-1B nonimmigrants from certain countries, like India, where the wait for an immigrant visa number spans decades and forces

employers to file H-1B extension petition after extension petition until the worker becomes a permanent resident.

This statutory fee was first established in 2010 pursuant to Public Law 111-230 and was subsequently amended in 2015 by Public Law 114-113 to increase the fees, extend the sunset date and clarify the ambiguous applicability of the fee. Specifically, in 2015, Congress added the phrase “. . . the **combined** filing fee and fraud prevention and detection fee required to be submitted with an application for admission [as an H-1B or L], **including an application for an extension of such status**, shall be increased.” (Emphasis added). The amended language directly responded to two questions DHS wrestled with when initially implementing the fee under PL 111-230: (1) whether the fee only applied when the fraud prevention and detection fee was paid and (2) whether the term “application for admission” included petitions requesting an extension of stay. By adding the term “combined,” Congress answered the first question, ensuring that the fee only applied when it was submitted with a fraud prevention and detection fee. With its second addition, Congress clarified, and eliminated any ambiguity, that “for admission” included extension of stay applications. Consistent with the plain statutory language of PL 114-113, USCIS only collected the fee when a petition included a fraud prevention and detection fee, including when an H-1B beneficiary was applying to extend his or her stay with a new employer.

When Congress amended the statutory fee in 2018 by enacting Public Law 115-123, Congress made no change other than to extend the sunset date of the fee, because Congress had unambiguously stated in Public Law 114-113 when the fee was to be collected and USCIS was correctly applying the law. As amended in 2015, the statutory language very clearly ties together the Public Law 114-113 fee with the fraud prevention and detection fee. Section 411 of Public Law 114-113 consistently refers to “the combined filing fee and fraud prevention and detection fee” and does not contemplate this fee being charged separately. It is a basic principle of statutory construction that Congress does not add words to a statute that do not have meaning. Congress would not have referred to this as a “combined” filing fee and fraud prevention and detection fee had it intended the Public Law 114-113 fee to be charged separately. The degree to which this is clear is illustrated by DHS’s strained logic at 84 Fed. Reg. 62323 asserting that the term “combined” makes sense in the context of the “combined fee” being the Public Law 114-113 fee “plus \$0.” If this is the case, why are all fees not listed as combined fees? Why isn’t the current filing fee for an I-29 listed on the USCIS website as “\$460 plus \$0”? The reason is that such a description is not consistent with plain English, much less normal rules of statutory construction. Instead, this proposed change is an effort to thwart the plain instruction of Public Law 114-113.

The proposal further evidences its *ultra vires* overreach, when DHS attempts to justify its effort to implement a fee that Congress did not authorize by explaining that “various policy reasons support this change.” 84 Fed. Reg. 62323. According to DHS, the fee is supposed to be used for a biometric entry-exit system and for deficit reduction, and that “collections have fallen well short of projections.” This is not a basis on which DHS can simply change the instructions it has received from Congress. If the statutory language as enacted by Congress in Public Law 114-113 is not

raising enough funds, the solution is for Congress to change the law to generate more funds or identify another funding source as it did in 2015. DHS has no authority to point to “policy reasons” as a basis to change plain statutory language. That authority rests with Congress—not with DHS.

Furthermore, in its projected annual revenue for H-1B and L-1 petitions listed at 84 Fed. Reg. 62326, DHS massively underestimates the additional costs that this changed interpretation would have on H-1B and L-1 petitioners. DHS describes the fee increase for H-1B petitioners only by referencing the proposed \$100 (22%) increase and the \$355 (77%) increase of the base filing fee. Nowhere does DHS provide an estimate of the costs to employers subject to the Public Law 114-113 fees with this proposed change. In adjudicating H-1B and L-1 petitions for employers who place such employees at a third-party worksite, USCIS now routinely limits the expiration date of the I-797 Approval Notice to the end date of the specific contract with the end client for which the project is being performed, often resulting in exceptionally short approval periods. For instance, if a professional consulting firm is engaged in a multi-year project for a manufacturing company to improve the way that costs are tracked in order to reduce waste but the current Statement of Work for the project is valid only for the next 4 months, USCIS in most cases will not approve an H-1B or L-1 petition for a worker deployed to the manufacturing company’s worksite for longer than that four month period even when presented with assurances from the manufacturing company that it routinely extends and renews such a Statement of Work. The result is that the professional consulting company is forced to file another extension petition once the Statement of Work is renewed, incurring new filing and legal fees. As a result of this adjudication practice, it is not uncommon for an employer to need to file three or more extension petitions in a year for the same H-1B or L-1 beneficiary. With the proposed change to when the Public Law 114-113 fee would be required, this employer would suddenly be required to pay an additional \$12,000 in fees each year for an employee to maintain H-1B or L-1 status. This is not a 22% fee increase – it is a 2,508% increase in filing fees that is not estimated anywhere by DHS in its fee proposal.

When Congress enacted Public Law 114-113, it provided clear and unambiguous language instructing DHS that the additional fee was to be “combined” with the fraud prevention and detection fee. The proposed change to when the Public Law 114-113 fee would be paid causes significant harm to certain U.S. employers and is *ultra vires* because it is contrary to this specific statutory language. And, even if the statutory language were to be found to be ambiguous, the revised interpretation by DHS is not reasonable when it is read in plain English and viewed in the context that when Congress has amended the fee again in 2018 it chose not to amend the applicability of the fee because DHS was already fulfilling the intent of its directive. We therefore urge DHS to eliminate this section of the proposed rule and instead allow Congress’ clear statement regarding the applicability of this fee to continue to be implemented as USCIS has done for many years.

B. The proposed changes to premium processing create uncertainty for American businesses and weaken USCIS accountability.

DHS proposes to make several key changes to the regulations governing requests for premium processing including: (1) changing the fees for premium processing via form instruction revisions, rather than through rulemaking; (2) increasing the time USCIS has to process a premium processing request by changing long-standing precedent of using calendar days; and (3) eliminating assurance that USCIS will adjudicate cases quickly and efficiently by enabling the agency to add 15 more days simply by asking for more information. AILA and the Council oppose these changes because they create more uncertainty for applicants paying significant fees for premium processing and fail to hold USCIS accountable to acting in a timely and efficient manner. Moreover, the proposed changes fail to provide transparency in the process and will not reap the anticipated benefits for the public or the government.

First, AILA and the Council oppose the proposal to allow USCIS to adjust the premium processing fee for inflation via revisions to the form instructions and by notice on its public website rather than through its current process of rulemaking because it eliminates transparency into the fee-setting process. Although Congress has given DHS the authority to adjust the premium processing fee annually for inflationary increases, the public should be given full notice into how the agency determines the inflationary increases and how they will be applied to adjust the fees. The proposed rule does not detail the methodology DHS will use in determining the new fee, except to say that it will be based on the Consumer Price Index (CPI). It fails to specify whether it will measure inflation based on the Consumer Price Index for All Urban Consumers (CPI-U) or some other standard and what factors DHS will consider. Without full transparency into the process, the public will not be able to determine whether DHS is simply increasing the fee for inflation or adding additional fees to account for infrastructure improvements or for other unspecified reasons.

Although DHS claims that it needs “flexibility to change the fee amount without undue delay” to make such changes, clearly the current system of issuing a final rule that provides transparency to the public has not hampered the agency’s ability to increase the fee. In fact, DHS has been able to revise the premium processing fee three times in almost three years (increasing the fee to \$1,225 in October 2016, to \$1,410 in October 2018, to \$1,440 in December 2019).³⁰ Changing the fee more frequently creates inconsistency and confusion for paying customers. AILA and the Council recommend that DHS retain its current process of revising the premium processing fee by providing proper notice to the public by going through the rulemaking process.

Second, as the proposal to change the premium processing clock from calendar days to business days will create more uncertainty for stakeholders and inefficiency for the government, AILA and the Council object to finalizing this revision. At the outset, DHS fails to articulate its policy rationale or legal conclusion for determining that its prior interpretation of requiring completion within 15 calendar days was incorrect. Without more information, the public does not have sufficient opportunity to comment on the rationality of the proposal. Even if such change were legally justifiable, DHS is adopting an overly-broad definition of business days to include days “on which the Federal Government is open for business and does not include weekends, federally observed holidays, *or the days on which Federal Government offices are closed, such as for weather related or other reasons. The closure may be nationwide or in the region where the*

adjudication of the benefit for which premium processing is sought will take place.”³¹ (Emphasis added). The inclusion of regional or national closures for reasons such as weather emergencies creates uncertainty for businesses who are paying a premium for efficient and expedited processing, as the timeline for their adjudication could be extended without notice. A petitioner in Florida may not know that a blizzard in Vermont has disrupted the processing of their petition. In Table 24 of the proposed rule, DHS claims that one of the anticipated benefits of this change is “better business planning”, but in fact, the proposed change accomplishes the exact opposite and will harm U.S. employers with less predictability and more costs.

DHS further claims that this change will provide more time for USCIS to adjudicate cases and alleviate the likelihood that it will need to suspend premium processing entirely. However, the delays in case processing that would require USCIS more time overall or to suspend premium processing are a direct result of its own inefficient processes and policies that burden the public, such as readjudicating facts that were previously established in a prior approval. Rather than shifting the burden of its own inefficiencies to the public, USCIS should review its own internal procedures and policies to ensure more efficient adjudication. While AILA and the Council oppose this proposal in its entirety, at a minimum if DHS chooses to finalize a change to business days it should only exclude weekends and federal holidays to ensure consistency in adjudications across the country and predictability for stakeholders.

Finally, AILA and the Council object to DHS revising how the premium processing clock will be stopped and restarted as it fails to provide sufficient predictability and reliability for petitioners and relieves USCIS from the burden of efficiently and timely adjudicating cases by simply issuing requests for evidence. Through this proposal, the standards by which USCIS holds itself accountable have been significantly reduced. For example, to determine when USCIS will be required to refund a fee for failing to meet the deadline, it will be based on “notification of (but not necessarily receipt of) an approval, denial, or request for additional evidence. DHS fails to define what it means as “notification” as compared to “receipt.” This is particularly important because frequently USCIS fails to issue notice to the attorney of record or sends notice to the wrong address, leaving the designated recipient in the dark, in turn significantly hampering a business’ ability to plan for and meet its needs. AILA and the Council recommend that DHS define how notice will be provided and suggests that such notice be provided by electronic means to the individual named on the Form I-907. It is unclear whether USCIS will “continue to process the case” in an expedited manner once it fails to meet the premium processing deadline and is required to refund the fee, as is the agency’s past practice. Petitioners should not be delayed and suffer additional costs and burdens due to USCIS’s own inefficiencies.

Most importantly, AILA and the Council are gravely concerned that codifying in the regulations that the premium processing clock will stop and restart any time a RFE or Notice of Intent to Deny (NOID) is issued will only exacerbate the crisis-level case processing delays and generate more unnecessary, duplicative, and frivolous demands for evidence just so USCIS does not have to refund the premium processing fee. Without any mechanism to ensure that USCIS only issues requests for additional evidence when necessary, this proposal fails to hold USCIS accountable for fair and efficient adjudications. By not maintaining strict deadlines within which USCIS must adjudicate premium processing cases or including a mechanism to ensure accountability on the

part of USCIS, codifying this proposal allows adjudicators to just issue RFEs or NOIDs and reduces incentives for USCIS to adjudicate in a timely and efficient manner by eliminating any possible repercussion for failing to timely adjudicate. Rather than restarting the clock with a new 15-day period, AILA and the Council recommend that USCIS toll the 15-day clock, such that if an RFE is issued on Day 6, when the response is received by USCIS, it will have an additional 9 days to take final adjudicative action. This will promote efficiency and accountability in USCIS adjudications and give true effect to Congress' intent in legislating a premium processing fee.

To ensure predictable, consistent and efficient adjudications, AILA and the Council oppose DHS's three proposed revisions to the premium processing program.

C. The proposed rule would make it cost-prohibitive to hire necessary employees by hiking fees by more than 50% for an array of nonimmigrant employment-based petition types, yet DHS fails to properly explain the reasons underlying these price increases.

DHS is proposing to separate Form I-129 into several different form types, while charging new and often dramatically higher fees. For example, the fee for filing an L-1 petition could increase by as much as 77 percent, an H-2A named worker petition by as much 87 percent, and an O-1 petition by as much as 55 percent. Such increases would threaten the sustainability of many employers by making their hiring of essential workers cost prohibitive.

In particular, DHS indicates that the proposed fees “are calculated “to better reflect the costs associated with processing the benefit request for various categories of nonimmigrant worker.”³² DHS also indicates that the proposed fees include the costs associated with the estimated adjudication hours for each of the new petitions being proposed. By splitting the form and proposing several different fees, DHS believes it will simplify or consolidate the information requirements for petitioners and applicants, as well as better reflect the cost to adjudicate each specific nonimmigrant classification.

AILA and the Council are concerned about USCIS's justification for these proposed fee increases, as it fails to provide sufficient data and evidence to support these exorbitant increases. Specifically, USCIS indicates that the proposed fees would result in the cost of Administrative Site Visit and Verification Program (ASVVP) being covered by the fees paid by the petitioners in proportion to the extent to which ASVVP is being used for that benefit request,³³ However, USCIS has not provided any data, evidence, or information in its proposed rule regarding the costs associated with conducting site visits through the ASVVP. In addition, USCIS has failed to articulate in the proposed rule how these site visit costs are not already covered by the \$500 Fraud Prevention and Detection Fee and other related fees submitted by petitioners for certain categories of nonimmigrant workers, such as for certain H-1B and L workers. USCIS must disclose this data so that the public can fully evaluate whether the increased fees that USCIS is proposing accurately encompass the ASVVP costs associated with adjudicating certain categories of nonimmigrant workers.

DHS is also proposing that, where any new Form I-129 is filed for a named worker who is present in the United States, the petitioner must provide USCIS with a valid domestic address for the named worker(s) when submitting the form. USCIS has failed to articulate in its proposed rule why this new question is necessary. Given that USCIS already conducts a background check for each named beneficiary listed on Form I-129, AILA and the Council recommend that USCIS eliminate this question as duplicative.

Overall, AILA and the Council appreciate USCIS' efforts to create separate forms for the various nonimmigrant worker classifications to make the petitioning process more streamlined and provide for more clarity to petitioners. Specific concerns regarding each form will be noted in the respective section below; however, AILA and the Council highly recommend that when implementing these new forms, USCIS adopt a timeline that allows for a sufficient grace period and does not conflict with high-volume filing seasons. At a minimum, USCIS should allow for a six-month grace period before the new forms are mandatory for submission to allow the public to become familiar with the new forms and update their systems and practices to accommodate the new forms. Additionally, AILA and the Council recommend that USCIS ensure that when determining the effective date of the new forms it consider when petitioners are preparing months in advance of high-volume filing seasons, such as the H-1B cap season (April 1 – July 1) and the H-2B cap filing seasons (October and April) and that refusing to accept a prior version of a form during that time could cause undue burden on the public.

Additionally, AILA and the Council are concerned about the inclusion of E-Verify questions on each of the new forms, even when participation in E-Verify is not mandated for participation in that nonimmigrant program, as it could be used inappropriately to target employers for enforcement action. As such, AILA and the Council recommend the removal of the E-Verify-related questions on forms where participation is not mandated. In the alternative, AILA and the Council recommend that the related form instructions note that the answers to these questions are optional and are not outcome determinative, such that if a petitioner leaves the information blank it will not result in a rejection. Finally, AILA and the Council note that some of the questions related to E-Verify include a typographical error.³⁴

1. Form I-129H1, Petition for Nonimmigrant Worker: H-1 Classifications

AILA and the Council oppose DHS's proposal to charge a \$560 fee, a 22% increase, for a new Form I-129H-1, Petition for H-1B Nonimmigrant Worker or H-1B1 Free Trade Nonimmigrant Worker.³⁵

DHS indicates that the proposed fee "more accurately incorporates the direct cost of USCIS fraud prevention efforts for H-1B workers and other planned changes."³⁶ However, DHS has failed to provide any specific data, evidence, or information in its proposed rule regarding the direct cost of USCIS fraud prevention efforts, nor does it elaborate on its "other planned changes." Until DHS provides more data, evidence, or information on the direct cost of its fraud prevention efforts for H-1B workers and its other planned changes, the public is unable to properly assess the agency's fee increase proposal. In addition, DHS has failed to specifically articulate how the direct costs of

USCIS fraud prevention efforts for H-1B workers are not already covered by the \$500 Fraud Prevention and Detection Fee submitted for certain H-1B workers.

With respect to the new Form I-129H-1, AILA and the Council note that it appears that in Part 2. Information about this Petition, question 1, Item 1D repeats Item #1C. It appears it should read "Free Trade, Chile (H-1B1)." More importantly, AILA and the Council recommend that Part 5. Basic Information About the Proposed Employment and Employer, questions 9 and 10 be struck as they ask for information that is beyond what is required for eligibility for H-1B status.

2. Form I-129H2A and I-129H2B, Petitions for H-2A and H-2B Workers

DHS is proposing to create Form I-129H2A, Petition for Nonimmigrant Worker: H-2A Classification, and Form I-129H2B, Petition for Nonimmigrant Worker: H-2B Classification.³⁷ In addition to the creation of these new forms, USCIS is proposing several other changes to H-2A and H-2B petitions. USCIS's proposal would raise fees on H-2 petitions for named workers by at least 87% (H-2A) and 58% (H-2B) respectively. USCIS has not provided any justification for the significant increase in fees. In addition, USCIS is proposing to institute separate and distinct fees for named and unnamed H-2A (\$860 named, \$425 unnamed) and H-2B petitions (\$725 named, \$395 unnamed). No information or evidence has been provided in the proposed rule that would justify requiring significantly higher fees for H-2A and H-2B petitions.

USCIS' justification for the separation of fees for named and unnamed petitions appears valid given the disparity in resources required to adjudicate a petition for named workers, as opposed to one for unnamed workers. However, AILA and the Council are concerned that a significantly higher filing fee for petitions filed with named workers will incentivize the filing of unnamed worker petitions and subsequently consular processing, in turn requiring significantly more resources to be expended by the State Department in order for workers to obtain their visas. It would be helpful to know whether USCIS has been in discussions with the State Department concerning this possible consequence and whether the State Department anticipates being able to handle an influx in unnamed H-2 petitions.

USCIS proposes to limit the number of named workers listed on an H-2 petition to 25. AILA and the Council understand the need to limit the number of named workers on a petition considering the amount of work that is required to adjudicate petitions with a significant number of named workers. However, no reason has been given for how the agency ultimately decided upon the 25-worker limit. A limit as low as 25 named workers per petition can increase costs significantly for certain businesses, who, as USCIS claimed could request as many as 600 workers in one petition.³⁸ In that example, one employer would be required to now file 24 petitions for the same position, thereby increasing its costs by more than 4,500 percent. This would be cost-prohibitive for employers who need temporary workers to fill a need for which U.S. workers are not available and could cause businesses to fail. While this example is clearly not a common occurrence, it shows that even a smaller business who may need to employ 150 workers seasonally would be forced to pay much higher costs. As such, AILA and the Council recommend that the limit on named workers be increased to a minimum of 50. This change will still allow the agency to avoid

adjudicating petitions with a significant number of workers, while also facilitating the process for small businesses that require temporary and seasonal workers to fill critical workforce gaps.

Lastly, AILA and the Council seek assurances from USCIS that requiring a petitioner to file multiple petitions for the same position will not impact consistency in and efficiency of adjudications. We are concerned that related petitions will be divided among adjudicators, resulting in varying adjudication timeframes and results for essentially identical petitions. If USCIS plans to move forward with the proposed changes, it should commit to bundling the adjudication of petitions submitted by the same employer, for the same position and period of work, to ensure that the separation of petitions does not negatively impact U.S. businesses.

Regarding the creation of a new Form I-129 H-2A and Form I-129 H-2B and corresponding instructions, AILA and the Council appreciate that specific program requirements have been laid out in the instructions which will be helpful for newer employers, agents, and attorneys. However, each of the new forms implement additional requirements for each program that have not been previously required that are either burdensome or too broad. The H-2A Form asks questions that should be ascertained by USCIS through its own systems such as permanent residency filings and prior petition revocations, which could prove burdensome on employers. Moreover, Part 6. Petitioner and Employer Obligations, question 14, which requires the H-2A petitioner and each employer to consent to “allow Government access” to the H-2A worksite is overly broad and goes beyond 8 C.F.R. 214.2(h)(5)(vi) which only requires consent to “allow access to the site by DHS officers...”. The Form I-129 H-2B Instructions also require that the petitioner provide evidence of why substitution is necessary and that the requested number of workers has not exceeded the number of workers on the approved temporary labor certification, which can be burdensome on the petitioner and delay processing. AILA and the Council also suggest that USCIS review the two forms for consistency, as certain information that would be applicable to both classifications is included in one form, but not the other. For example, as it relates to counting a beneficiary’s prior time in H or L status, the Form I-129 H-2A includes a helpful note about what evidence to provide; but the Form I-129 H-2B does not.

3. Form I-129L, Petition for Nonimmigrant Worker: L Classification

AILA and the Council oppose DHS’s proposal to charge a \$815 fee, a 77% increase, for a new Form I-129L, Petition for Nonimmigrant Worker: L Classification.³⁹ DHS indicates that the proposed fee is based on the completion rate for the average of L-1 petitions and that the proposed fee “assign the direct costs of ASVVP site visits, currently used for certain H-1B, L, and all religious workers, to the specific form for the classification.”⁴⁰ USCIS has failed to provide any specific data, evidence, or information in its proposed regulation, however, regarding the direct cost of ASVVP site visits with respect to L workers. In addition, USCIS has failed to specifically articulate how much of the costs of these ASVVP site visits is already covered by the \$500 Fraud Prevention and Detection Fee and other related fees submitted for certain L-1 workers.

4. Form I-129O, Petition for Nonimmigrant Worker: O Classification

AILA and the Council oppose DHS's proposal to charge a \$715 fee, a 55% increase, for a new Form I-129O, Petition for Nonimmigrant Worker: O Classification.⁴¹ USCIS indicates that the proposed fee is "partly" based on its completion rates.⁴² USCIS fails to articulate what other factors the agency took into consideration to justify its fee increase for the Form I-129O. USCIS has failed to provide information regarding the specific amount of time and resources it takes to complete a background check for each named beneficiary. Without this information, the public cannot properly assess whether the agency's proposed fee increase is justified.

DHS is also proposing to limit each Form I-129O petition for O-2 workers to 25 named beneficiaries. In its proposed regulation, DHS indicates that "[b]ecause USCIS completes a background check for each named beneficiary, petitions with more named beneficiaries require more time and resources to adjudicate than petitions with fewer named beneficiaries. This means the cost of adjudicate a petition increases with each additional named beneficiary."⁴³ As noted for the similar proposal for H-2 named workers, AILA and the Council urge USCIS to increase the limit of named workers that can be included in a petition to at least 50 and to assure that these separated petitions be adjudicated as a bundle to ensure that the filing of O nonimmigrant petitions do not become cost-prohibitive or result in inconsistent adjudications for petitions filed by the same employer for the same position.

5. Form I-129E&TN, Application for Nonimmigrant Worker: E and TN Classification

AILA and the Council oppose DHS's proposal to charge a \$705 fee, a 53% increase, for a new Form I-129E&TN, Application for Nonimmigrant Worker: E and TN Classification.⁴⁴ USCIS has failed to provide any data, evidence, or information in its proposed rule to justify this substantial fee increase. USCIS also failed to address the differences in adjudication times between TN and E applications. The adjudication times for TN applications and E-3 applications are generally substantially less than E-1 or E-2 applications as the latter applications are generally far more complex. Yet, this fee structure would make the filing fee identical for all E and TN applicants. This structure therefore appears to make TN and E-3 applicants subsidize the costs of E-1 and E-2 petitioners/applicants. Stakeholders and the public cannot assess this proposal when DHS offers only a single unsubstantiated fee.

6. Form I-129MISC, Petition for Nonimmigrant Worker: H-3, P, Q, or R Classification.

AILA and the Council oppose DHS' proposal to charge a \$705 fee, a 53% increase, for a new form for the remaining nonimmigrant worker classifications, called Form I-129MISC, Petition for Nonimmigrant Worker: H-3, P, Q, or R classification.⁴⁵ USCIS indicates that the cost used to determine the proposed fee for this form "aggregate[s] all identifiable costs associated with the adjudication of these different visa classifications, including the cost of administering site visits for R visa workers under the Administrative Site Visit and Verification Program."⁴⁶ However,

USCIS fails to provide any specific data, evidence, or information in its proposed rule regarding the specific costs associated with the adjudication of these different visa classifications, particularly the cost of administering site visits for the R visa program. With an identical fee proposed for each classification, DHS appears to be requiring the H-3, P, and Q petitioners to subsidize the cost of site visits for R visa workers.

7. Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker

AILA and the Council oppose DHS's proposal to increase by 53 percent the petition fee from \$460 to \$705 for transitional workers in the Commonwealth of the Northern Mariana Islands (CNMI). The \$245 fee increase will significantly impact many employers' ability to use the CW visa program and greatly affect the economic development in CNMI.⁴⁷ The CNMI economy has been heavily relying on CW workers since 2009. There are approximately 10,000 CW visas issued every year in a jurisdiction with only a population of 50,000. Many businesses in the CNMI have historically submitted a large number of petitions annually, either due to the nature of the business requiring a large number of positions, or due to the employer's practice of not grouping employees with the same job category into a single petition. Therefore, an increase of \$245 per petition may result in an increase of tens of thousands of dollars for some employers. This is in addition to the existing \$200 "CNMI Education Funding Fee" that employers are required to pay for each worker. DHS fails to provide the evidence supporting the need for this increase and take into account the negative impact the proposed increased fee will have on the CNMI economy and many employers.

IV. The Proposed Transfer of \$112 Million in Fees from USCIS to ICE Contravenes Congress's Intent to Separate Immigration Services from Immigration Enforcement.

The proposed rule proposes to transfer \$112 million from USCIS's Immigration and Examination Fees Account (IEFA) into ICE for reimbursement of ICE enforcement activities.⁴⁸ This transfer would contravene clear congressional directive to separate immigration services from immigration enforcement under the Homeland Security Act of 2002 (HSA) and is contrary to decades-long precedent that IEFA fees support adjudication activities, which were distinct from enforcement activities.

The HSA's separate subtitles for "Citizenship and Immigration Services" and "Immigration Enforcement Functions" illustrate that intent.⁴⁹ One subtitle of the Act established the Bureau of Citizenship and Immigration Services—now USCIS—to which it transferred legacy Immigration and Naturalization Service's (INS) adjudications functions. Under the other subtitle, the Act transferred legacy INS's enforcement functions to what ultimately became ICE and CBP. USCIS's website acknowledges this carefully drawn line between services and enforcement:

*The Homeland Security Act created USCIS to enhance the security and efficiency of national immigration services **by focusing exclusively on the administration of benefit applications**. The law also formed Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to oversee immigration enforcement and border security.⁵⁰*

DHS's proposed transfer of over \$100 million in USCIS customer fees to fund ICE's enforcement work—particularly at a time when USCIS is failing to provide those customers with the fair and efficient adjudications at the core of its statutory charge—breaks with statutory intent that the agency function as a services entity distinct from the missions of DHS's enforcement arms.

Unfortunately, the proposed transfer represents only the most recent example of USCIS's increasing prioritization of immigration enforcement over its own service-oriented mission. Below are other ways in which USCIS has defied its mandate in recent years:⁵¹

- (1) The removal of the phrase “nation of immigrants,” as well as the reference to applicants and petitioners as “customers,” from USCIS's mission statement.
- (2) The Notice to Appear policy announced in June 2018 that dramatically expands the circumstances under which USCIS can place denied applicants and petitioners into deportation proceedings.
- (3) USCIS's coordination of “deportation traps” in which ICE arrested spouses of U.S. citizens who lawfully appeared at USCIS offices for immigration benefit interviews.
- (4) Currently enjoined USCIS policy memorandum subjecting foreign students and exchange visitors who inadvertently commit even *de minimis* status violations to the risk of lengthy re-entry bars. PM-602-1060.1 (Aug. 9, 2018).
- (5) A USCIS policy memorandum authorizing adjudicators to deny certain cases without first allowing applicants or petitioners the opportunity to provide additional supporting evidence. PM 602-0163 (July 13, 2018).
- (6) The diversion of hundreds of USCIS personnel to ICE and CBP enforcement functions, despite USCIS's claim that it lacks sufficient resources to timely perform its own work.

By implementing the proposed transfer in addition to the measures listed, DHS would functionally erase the dividing line between services and enforcement that has served as a touchstone of our immigration system for nearly two decades.

The transfer would likewise violate HSA provisions segregating USCIS funding from DHS's enforcement agencies. Section 476 of the HSA requires that USCIS and ICE use distinct accounts to perform their distinct functions.⁵² By making the IEFA a significant source of USCIS *and* ICE funding for the next two fiscal years, the proposed rule would effectively transform the IEFA into a dual-agency account, violating Congress' specific instruction that “fees imposed for a particular service, application, or benefit shall be deposited into account established ...for the bureau with jurisdiction to the fee relates.”⁵³

Similarly, the proposed transfer would violate this section's general prohibition on the transfer of fees from USCIS into ICE.⁵⁴ The narrow exception to that bar—a transfer authorized under INA § 286(m)—is not met here. INA § 286(m) establishes that fees deposited into the Immigration Examination Fees Account are for “providing adjudication and naturalization services.” Since the enactment of the IEFA in 1988, when adjudications and enforcement activities were housed in one agency, the INS, user fees were only allocated to adjudication activities. The account was named “Immigration Examinations” based on the existing INS organizational structure, which at that time had distinct Examinations and Enforcement divisions. Given the history of the IEFA and the specific direction provided in the HSA, transferring fees to ICE is clearly prohibited.

A review of the ICE activities identified in the December 9 notice—most of which pertain to the investigation of fraud—does not reveal a list of adjudication and naturalization services, but rather of enforcement activities relating to services by varying, and sometimes remote, degree. To take one example, the notice states that the transferred IEFA funds would reimburse ICE's “costs associated with investigating relief of seizure when property had been seized as part of a fraud investigation in the context of adjudication and naturalization services.”⁵⁵ This strained connection to USCIS services shows the lengths to which DHS has gone to force ICE's enforcement work into the IEFA framework. To regard the investigation of property seizure as an adjudication and naturalization service, or to find that its attenuated relationship to an actual service satisfies the 286(m) exception to HSA Section 476, would, again, all but collapse Congress's pointed distinction between the functions of and funding for USCIS on the one hand, and the functions of and funding for DHS's enforcement arms on the other.

AILA and the Council strenuously object to the proposal to transfer USCIS fees to ICE and recommend that it be struck from the final rule.

V. Adjustment of Status Applications should Remain Bundled and Affordable.

DHS proposes to require separate fees when filing Form I-765, Application for Employment Authorization and Form I-131, Application for Travel Document, concurrently with a Form I-485, Application to Register Permanent Residence or Adjust Status, or after USCIS accepts the Form I-485 and while it is still pending. DHS states that it is proposing this change in order to reduce the proposed fee increases for Form I-485 and other forms. AILA and the Council oppose this proposal for several reasons.

First, most applicants for adjustment of status who will file Form I-485 will also request employment authorization and advance parole travel authorization so that they can work and travel outside the United States while their I-485 application is pending. These applicants will see at least a 75 percent increase in the total cost of filing Forms I-485, I-765, and I-131. That increase, in combination with the elimination of fee waivers for these form types, will make adjustment of status unattainable for many low-income and working-class individuals immigrating through a U.S. citizen or lawful permanent resident relative. A minimum-wage worker who is likely already living paycheck-to-paycheck would have to work an extra 134 hours just to cover the increase in the application fees. Raising the overall cost of adjustment of status would prevent many low-income individuals from becoming permanent residents and undermine family unity.

This proposal would also impact intending immigrants from certain countries who are stuck in the immigrant visa number backlog (e.g., India, China) to a greater degree than intending immigrants from other countries, as those stuck in the backlog may have to file multiple I-765 and I-131 renewal applications over the course of many years while they wait for immigrant visa numbers to become available.

VI. DHS Should Maintain Fee Waivers for All Current Categories.

USCIS proposes to eliminate fee waivers for all categories except those for which such waivers are statutorily required. This proposal would make essential immigration benefits such as citizenship, green cards, and employment authorization inaccessible for low-income immigrants. Fee waivers help families improve their stability, financially support themselves, and fully integrate, ultimately advantaging society and our economy as a whole. Indeed, because of the benefits of naturalization—one of the form types most frequently associated with fee waiver requests—Congress has called on USCIS to keep the pathway to citizenship affordable and accessible. USCIS' proposed elimination of filing fee waivers would therefore undermine congressional intent. Furthermore, the elimination of fee waivers for individuals who are trying to legally come and remain in the United States imposes a significant barrier to legal immigration and exacerbates the problem of individuals failing to maintain lawful immigration status.

VII. Naturalization Fees Should be Affordable.

By increasing the filing fee for naturalization by more than 80 percent, the proposed rule would make naturalization less accessible for low-income and working-class people. With approximately nine million lawful permanent residents who had not yet filed for naturalization as of 2015,⁵⁶ and given the significant benefits that immigrant integration brings to the United States, it is in our country's best interests to incentivize naturalization by maintaining an affordable application fee. Contrary to Congressional intent to keep the pathway to citizenship affordable and accessible, DHS says that as a matter of policy it will no longer keep costs of naturalization lower as it has done previously. More importantly, DHS has failed to provide any specific data, evidence, or information that the new fee of \$1,170, as compounded by the elimination of reduced fees and fee waivers, is justified. As such AILA and the Council strongly oppose the proposed naturalization fee increase that will become cost-prohibitive to eligible applicants.

VIII. DHS Should Withdraw the Proposed Fee for Affirmative Asylum Applications and for Asylum Seekers' Initial Application for Employment Authorization.

The proposed rule would impose, for the first time in our nation's history, a fee for affirmative asylum applications. The proposed fee could prove prohibitive for many individuals seeking protection. Children and families lacking financial recourse could be compelled to return to the countries they fled, only to face further persecution or even death. The proposed rule would also charge asylum seekers—who under current policy may apply for an initial employment authorization document without fee—\$490 for their initial employment authorization application. Thus, even if asylum seekers could afford the affirmative asylum application fee, they may be unable to apply for work authorization that is essential to supporting themselves and their families

while their asylum cases are pending. To ensure access to asylum and to protect the well-being of asylum seekers, DHS should withdraw these dual fees.

IX. DHS Should Withdraw the Proposed Increase for DACA Renewal Applications.

DHS proposes to increase the total cost for DACA renewal applications by as much as 50 percent. This spike would create a significant barrier to accessing protection from deportation as well as the work authorization needed for stability.

Most DACA requesters are, by definition, young people who often struggle to afford the existing DACA request fee. Maintaining current fee levels for the I-821D form allows these young people who came to the United States as children to continue their educational paths and to participate in the American economy. Increasing the fee for DACA renewal requests not only hinders current DACA recipients' abilities to earn a living for themselves and their families, but it also harms the U.S. economy by increasing the financial burden on its participants.

X. DHS Should Allow Applicants to Elect their Preferred USPS Delivery Method for their Secure Document.

In its proposed rule, DHS states that USCIS has decided to implement Signature Confirmation Restricted Delivery (SCRD) as **the sole method of delivery** of secure documents for USCIS.⁵⁷ Signature Confirmation Restricted Delivery is a delivery service offered by the U.S. Postal Service (USPS) which requires that applicants be physically present upon delivery, provide identification to USPS indicating that they are the designated recipient of the secure document, and sign for the secure document. On April 30, 2018, USCIS began phasing in the use of the Signature Confirmation Restricted Delivery service to re-mail Permanent Resident Cards, Employment Authorization Cards, and Travel Booklets returned by USPS as non-deliverable.⁵⁸

While AILA and the Council acknowledge that safeguards are needed to ensure that secure documents are delivered to the proper recipient, we are concerned that USCIS' adoption of SCR D as the sole method of delivery for all secure documents will result in many applicants failing to timely receive their secure documents from USCIS because of their inability to be physically present at the exact date and time the document is delivered by USPS. This in turn could result in an increase in inquiries that USCIS receives from approved applicants about missing secure documents as USPS will be required to send the card back to USCIS as undeliverable if the applicant is not physically present with identification to sign for the secure document on the date and time of the delivery. Furthermore, AILA and the Council are concerned that certain protected classes, such as asylees and refugees, may not have the necessary government identification required to receive the delivery from USPS via the SCR D method.

Moreover, DHS fails to provide justification in the proposed regulation as to why it is adopting SCR D as the sole method of delivery of secure documents as opposed to other secure delivery methods. The proposed rule cites to an April 10, 2018 Office of Inspector General (OIG) report, yet that OIG report recommends USCIS evaluate the costs and benefits of using Signature

Confirmation as an alternative secure method for delivering secure documents to applicants, **not** SCRD, which is a more restrictive delivery method.

Instead of requiring SCRD as the sole method of delivery for all secure documents, DHS should allow applicants to elect their preferred USPS delivery method for their secure document, such as either Signature Confirmation or the more restrictive SCRD. Alternatively, DHS should provide applicants with the option to opt-out of SCRD.

While AILA and the Council acknowledge that applicants receiving a document via SCRD have the ability to designate an agent to sign on their behalf by completing the Postal Service's PS Form 3801 or PS Form 3801-A or can arrange with USPS to hold the document for pickup, very few stakeholders are familiar with these alternative delivery methods. To the extent that DHS proceeds with implementing SCRD as the sole method of delivery of secure documents despite the concerns expressed by us and other stakeholders, we urge DHS to provide clear instructions and trainings about the various delivery options that can be elected via SCRD to better familiarize stakeholders with this delivery service and to ultimately minimize the number of secure documents that are sent back to USCIS by USPS as undeliverable due to the failure of applicants to be physically present at the time of delivery.

DHS also proposes to modify current regulations to require that in situations where persons who are represented by an attorney or accredited representative who have elected on Form G-28 to have USCIS send any secure identity documents to their attorney or accredited representative, **the attorney or accredited representative** will be required to provide identification and sign for receipt of the secure document.⁵⁹ We recommend instead that persons who are represented by an attorney or accredited representative who have elected on Form G-28 to have USCIS send any secure identity documents to their attorney or accredited representative have the ability to elect to have their secure document sent by **Signature Confirmation** so that any staff member associated with the designated attorney or the associated law firm (e.g., receptionist, paralegal, mailroom personnel) may sign for the secure document. This delivery mechanism aligns more closely with the current realities of many law firm operations where an attorney or several attorneys may be supported by a staff who handle the receipt and intake of mail.

DHS also proposes that USCIS may, at its discretion, require the use of SCRD for additional documents beyond Permanent Resident Cards, Employment Authorization Cards, and Travel Booklets (for example, certificates of naturalization and citizenship) in the future by updating the relevant form instructions.⁶⁰

It is unclear from the proposed rule whether the "relevant form instructions" to which DHS is referring are the DHS form instructions that contain a valid Office and Management Budget (OMB) control number, or whether DHS is referring to the general instructions for each form provided by the DHS component agencies directly on their websites. For example, USCIS typically provides general instructions for various forms directly on its website, including information such as where to file, filing fee, special instructions, etc.⁶¹

AILA and the Council request that DHS clarify and confirm that it intends to notify the public of the requirement to use SCRD for additional documents not only on its own website, but also in the *Federal Register*, and that DHS will provide the public with prior notice and a comment period each time it proposes to add SCRD for any additional document beyond Permanent Resident Cards, Employment Authorization Cards, and Travel Booklets.

To the extent that DHS only intends to update the websites of its component agencies, AILA and the Council urge DHS to also include a notice in the *Federal Register* and provide stakeholders with the opportunity to comment each time USCIS proposes to add SCRD to any additional document beyond Permanent Resident Cards, Employment Authorization Cards, and Travel Booklets. This will ensure that stakeholders are properly notified of the proposed change and have the opportunity to express concerns and offer feedback to DHS regarding the specific document impacted by the change, before USCIS proceeds with implementing SCRD for that additional document.

XI. DHS Should Withdraw the Proposed Fee Increase for Provisional Waivers

The creation of the provisional waiver was intended to encourage eligible individuals to complete the immigrant visa process abroad, promote family unity, and improve administrative efficiency. Having an approved provisional waiver helps facilitate immigrant visa issuance at the Department of State, streamlines both the waiver and the immigrant visa processes, and reduces the time that applicants are separated from their U.S. citizen or lawful permanent resident family members, thus promoting family unity.

Under the proposed rule, the filing fee for the Form I-601A Provisional Unlawful Presence Waiver would increase by approximately 50 percent. This steep increase and the elimination of fee waivers would discourage individuals from consular processing and undermine the purpose of the provisional waiver.

XII. DHS Provided an Insufficient Period for Comment on the Proposed Rule and Form Changes.

The comment period provided by DHS is insufficient for the public to have a meaningful opportunity to properly comment on a proposed rule of this length and complexity. Originally, DHS only provided a 30-day comment period, but increased it by 15 days after it needed to revise its analysis as it related to the transfer of fees to ICE, which significantly impacts all of the proposed fee increases. It is important to also note that the 15 additional days comes during the holiday season when the federal government is closed for two days and many in the public are on vacation. Executive Orders require that, under most circumstances, agencies furnish public comment periods of at least 60 days. Executive Order 12866 directs that agencies generally furnish “not less than 60 days” for public comment to “afford the public a meaningful opportunity to comment on any proposed regulation.” Executive Order 13563 states that “[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be

at least 60 days.” There is no evidence that in the present case 60 days is unfeasible or unlawful. Tellingly, neither the November 14 proposed rule nor the December 9 notice even attempts to justify DHS’s deviation from the clear standard set forth in these orders.

Forty-five days is particularly inadequate for a regulation of this size and intricacy. The proposed rule, which runs over 90 pages in the Federal Register, introduces far-reaching changes over and above dramatic shifts in the fee schedule, including new policies concerning fee waivers, the premium processing calendar, and ICE funding. Moreover, the proposed rule docket includes an astounding 151 supporting documents, which merit a thorough review by the public in order to provide meaningful comment. At minimum, the public would need 60 days to analyze and remark on proposals of this scope and consequence. The 2007 and 2016 proposed fee schedule rules—both of which allowed 60 days for comment—contained approximately 25,500 and 38,300 words, respectively. By comparison, the current rule is roughly 90,900 words—more than twice as many as its predecessors—yet provides a comment period 25 percent shorter. The proposed rule also presented 7 different possible fee scenarios for over 60 different form types, with three different contingencies affecting the eventual outcome, adding to the complexity of the proposed fee schedule.

Not only should DHS have provided a 60-day comment period in connection with the proposed rule, it should have reset that period in full upon publication of the December 9 notice. That notice decreased from \$207.6 million to about \$112 million the amount that DHS proposes to transfer from USCIS to ICE. While characterized as “supplementary information,” this decrease is unambiguously a substantive amendment, as it alters virtually the entire proposed fee schedule at the core of the proposed rule. The Department’s failure to initiate a new and proper comment period in connection with this change represents yet another procedural defect.

Even with 60 additional days, however, the public would have been unable to adequately comment. That is because the December 9 notice altered the fee schedule without disclosing the updated fees. DHS states in the notice only that the proposed increases lie somewhere between two of the seven scenarios outlined in the November 14 rule, forcing the public to guess as to the changes proposed. This clearly undermines the Administrative Procedures Act requirements that a federal agency must provide notice to the public in a way that they can meaningfully comment.

One of two circumstances likely accounts for the lack of specificity in the December 9 notice. First, DHS may not have calculated the updated fee schedule, a product of rushed and irresponsible rulemaking. Second, the Department may have performed that calculation but omitted it from the notice, withholding essential content from the public. Either way, a proposed fee schedule rule without a proposed fee schedule makes informed comment impossible.

Finally, the comment period for the form changes proposed in connection with the proposed rule is likewise insufficient. Under the Paperwork Reduction Act, agencies must generally provide a 60-day period for comment on a proposed information collection request.⁶² Here, DHS allows for only 45 days, which they only clarified after 26 days into the comment period. The Department does not assert that its proposals meet an exception to the 60-day requirement, nor present any evidence to that effect. The changes proposed, moreover, are sweeping in their totality—they would result in the revision and/or creation of scores of lengthy and detailed forms and

accompanying instructions. As both a legal and practical matter, then, the period afforded by DHS for comment on these forms is inadequate.

For all these reasons, AILA and the Council urge DHS to withdraw the proposed rule.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

THE AMERICAN IMMIGRATION COUNCIL

¹ 84. 62280.

² 84 Fed. Reg 67243.

³ 84 Fed. Reg 62280, 62282.

⁴ 84 Fed. Reg 62280, 62294.

⁵ *Id.*

⁶ *Id.* (emphasis added).

⁷ 84 Fed. Reg 62280, 62286.

⁸ 84 Fed. Reg 62280, 62304

⁹ AILA Policy Brief, “USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration” Jan. 30, 2019); <https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays>.

Congressional Research Service, “Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress” (Dec. 30, 2002);

https://www.everycrsreport.com/files/20021230_RL31388_3678de56f7aba9d7d612f19a020d1f0030db4d9c.pdf.

¹⁰ USCIS, “Immigration and Citizenship Data: All USCIS Application and Petition Form Types;”

https://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic_id=23035&field_native_doc_issue_date_value%255Bvalue%255D%255Bmonth%255D=&field_native_doc_issue_date_value_1%255Bvalue%255D%255Byear%255D=&combined=&items_per_page=10.

¹¹ See DHS, “Budget-in-Brief: Fiscal Year 2016;”

https://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf; USCIS, “Budget Overview, Fiscal Year 2020: Congressional Justification;”

https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Citizenship-Immigration-Services_0.pdf; USCIS, “2018 Annual Statistical Report” (May 31, 2019); <https://www.uscis.gov/news/news-releases/uscis-releases-2018-statistical-annual-report>.

¹² USCIS, “Immigration and Citizenship Data: All USCIS Application and Petition Form Types;” https://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic_id=23035&field_native_doc_issue_date_value%255Bvalue%255D%255Bmonth%255D=&field_native_doc_issue_date_value_1%255Bvalue%255D%255Byear%255D=&combined=&items_per_page=10.

¹³ 84 Fed. Reg. 62280, 62291.

¹⁴ USCIS, April 5, 2019 Response to February 12, 2019 letter from Congress, https://www.uscis.gov/sites/default/files/files/natedocuments/Processing_Delays_-_Representative_Garcia.pdf.

¹⁵ Jason Boyd, “USCIS Acknowledges That Its Own Policies Compound Case Processing Delays” *Think Immigration Blog* (Apr. 30, 2019); <https://thinkimmigration.org/blog/2019/04/30/uscis-acknowledges-that-its-own-policies-compound-case-processing-delays/>.

¹⁶ See DHS, “Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security” (Apr. 13, 2018); <https://www.uscis.gov/sites/default/files/reports-studies/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS.pdf>; USCIS, “USCIS Responds to Letter from 86 House Members Regarding Case Processing Delays” (Apr. 5, 2019); <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/uscis-responds-to-letter-from-86-house-members>.

¹⁷ See DHS, “Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security” (Apr. 13, 2018); <https://www.uscis.gov/sites/default/files/reports-studies/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS.pdf>.

¹⁸ USCIS Webpage, “USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants,” (Aug. 28, 2017); <https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants>.

¹⁹ USCIS, “USCIS Responds to Letter from 86 House Members Regarding Case Processing Delays,” (Apr. 5, 2019); <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/uscis-responds-to-letter-from-86-house-members>.

²⁰ See USCIS Policy Memorandum, “Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status” (Oct. 27, 2018); <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf>.

²¹ Fragomen, “Employers See More RFEs and Denials, USCIS Data Confirm” (Feb. 25, 2019); <https://www.fragomen.com/insights/alerts/employers-see-more-rfes-and-denials-uscis-data-confirm>.

²² See AILA, “Deconstructing the Invisible Wall: How Policy Changes by the Trump Administration Are Slowing and Restricting Legal Immigration” (Apr. 24, 2018); <http://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall>.

²³ 84 Fed. Reg. 62280, 62294.

²⁴ See, e.g., USCIS, “USCIS Extends and Expands Suspension of Premium Processing for H-1B Petitions to Reduce Delays” (Aug. 28, 2018); <https://www.uscis.gov/news/uscis-extends-and-expands-suspension-premium-processing-h-1b-petitions-reduce-delays>.

²⁵ USCIS, “Cuccinelli Announces USCIS’ FY 2019 Accomplishments and Efforts to Implement President Trump’s Goals;” (Oct. 16, 2019); <https://www.uscis.gov/news/news-releases/cuccinelli-announces-uscis-fy-2019-accomplishments-and-efforts-implement-president-trumps-goals>.

⁹ USCIS Written Testimony, “Hearing on Policy Changes and Processing Delays at USCIS before the House Committee on the Judiciary Subcommittee on Immigration And Citizenship on July 16, 2019;” <https://www.uscis.gov/tools/resources-congress/testimonies-and-speeches/hearing-policy-changes-and-processing-delays-uscis-house-committee-judiciary-subcommittee-immigration-and-citizenship-july-16-2019>.

²⁷ USCIS, Response to Letter from Harvard, (Sep. 19, 2019); https://www.uscis.gov/sites/default/files/files/natedocuments/Optional_Practical_Training_-_Bacow.pdf.

²⁸ USCIS Policy Memorandum, “Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens” (Jun. 28, 2018);

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

²⁹ 84 Fed. Reg. 62280, 62294.

³⁰ See [81 Fed. Reg. 73292](#) (Oct. 2016), [83 Fed. Reg. 44449](#) (Oct. 2018), 84 Fed. Reg. 58303 (Dec. 2019).

³¹ 84 Fed. Reg. 62280, 62311

³² See 84 Fed. Reg. 62280, 62307.

³³ *Id.*

³⁴ See, e.g., Form I-129H-1, Part 1., Question 11 A, which states “Are you a participate in the E-Verify program?”

³⁵ See 84 Fed. Reg. 62280, 62308.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 84 Fed. Reg. 62280, 62309.

³⁹ See 84 Fed. Reg. at 62309.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See 84 Fed. Reg. 62280, 62310.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ For detailed discussions of the impact of CW visas on the CNMI economy, please see reports from U.S. Government Accountability Office, specifically GAO-17-437, GAO-18-373T, and GAO-19-376T.

⁴⁸ It appears possible that DHS could deem this transfer unnecessary depending on the final FY 2020 appropriations package signed into law.

⁴⁹ Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2208, Title IV.

⁵⁰ USCIS Webpage, “Our History” available at <https://www.uscis.gov/history-and-genealogy/our-history> (last accessed December 23, 2019).

⁵¹ See AILA, “Policy Brief: Seven Ways USCIS Is Defying the Will of Congress” (Feb. 25, 2019); <https://www.aila.org/advo-media/aila-policy-briefs/seven-ways-uscis-is-defying-the-will-of-congress>; USCIS, “Cuccinelli Announces USCIS’ FY 2019 Accomplishments and Efforts to Implement President Trump’s Goals;” (Oct. 16, 2019); <https://www.uscis.gov/news/news-releases/cuccinelli-announces-uscis-fy-2019-accomplishments-and-efforts-implement-president-trumps-goals>.

⁵² See Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2208, Title IV, Sec. 476.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 84 Fed. Reg. 67243, 67244.

⁵⁶ Migration Policy Institute, Naturalization Trends in the United States, (July 11, 2019);

<https://www.migrationpolicy.org/article/naturalization-trends-united-states>.

⁵⁷ See 84 Fed. Reg. 62280, 62312 (emphasis added).

⁵⁸ USCIS to Begin Using More Secure Mail Delivery Service, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/news/news-releases/uscis-begin-using-more-secure-mail-delivery-service> (last updated Apr. 27, 2018).

⁵⁹ See 84 Fed. Reg. 62280, 62358 (emphasis added).

⁶⁰ See 84 Fed. Reg. 62280, 62312.

⁶¹ See e.g., *I-129, Petition for a Nonimmigrant Worker*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/i-129> (last updated Oct. 18, 2019); *I-290B, Notice of Appeal or Motion*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/i-290b> (last updated Dec. 2, 2019).

⁶² *The Paperwork Reduction Act* of 1980, Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501–3521.