DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 103

[CIS No. 2233–02]

RIN 1615–AA84

Adjustment of the Immigration Benefit Application Fee Schedule

AGENCY: Department of Homeland Security, Bureau of Citizenship and Immigration Services.

ACTION: Final rule and confirmation of interim rules.

SUMMARY: This rule adjusts the fee schedule of the Immigration Examinations Fee Account (IEFA) for immigration benefit applications and petitions, as well as the fee for capturing biometric information of applicants or petitioners who apply for certain immigration benefits. Fees collected from persons filing immigration benefit applications are deposited into the IEFA and used to fund the full cost of providing immigration benefits; the full cost of providing similar benefits to asylum and refugee applicants; and the full cost of similar benefits provided to other immigrants, as specified in the regulation, at no charge. This rule adjusts the immigration benefit application fees by approximately $55 per application, and increases the biometric fee by $20, in order to ensure sufficient funding to process incoming applications. In addition, on January 24, 2003, and February 27, 2003, the former Immigration and Naturalization Service (INS) published two interim rules that first adjusted fees lower based on section 457 of the Homeland Security Act of 2002, and then readjusted the fees to preexisting levels, based upon the repeal of section 457. Accordingly, this final rule will adopt the two interim rules as final without change, and will adopt the fee structure that was proposed on February 3, 2004.

DATES: This final rule is effective April 30, 2004. Applications or petitions mailed, postmarked, or otherwise filed, on or after this date require the new fee.

FOR FURTHER INFORMATION CONTACT: Paul L. Schlesinger, Acting Budget Director, Office of Budget, U.S. Citizenship and Immigration Services, 425 I Street, NW., Room 5307, Washington, DC 20536, telephone (202) 514–3206.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Bureau of Citizenship and Immigration Services (BCIS) published a proposed rule in the **Federal Register** on February 3, 2004, at 69 FR 5088, to adjust the application fee schedule of the IEFA. The proposed rule was published with a 30-day comment period, which closed on March 4, 2004. The BCIS received 278 comments pertaining to the adjustment of the immigration benefit application fee schedule. This final rule implements the fee structure as outlined in the proposed rule, without change except for several nonsubstantive technical changes (described further below) to update references in light of the Homeland Security Act and revise references to fees that relate to Department of Justice (DOJ) proceedings in light of DOJ fee regulations at 8 CFR parts 1003 and 1103. Any applications or petitions mailed, postmarked, or otherwise filed, on or after April 30, 2004, will require the new fee.

Comments were received from a broad spectrum of individuals and organizations, including 1 caucus of members of Congress, 16 refugee and immigrant service organizations, 15 public policy and advocacy groups, 8 educational institutions, 8 attorney organizations, 2 public corporations, 37 past and present adopting parents, 2 municipalities, and 189 other concerned individuals. Many commenters addressed multiple issues in their comments, and as a result, the number of comments discussed below in reference to specific issues exceeds the total number of comments received. All of the comments were carefully considered before preparing this final rule.

In addition, on January 24, 2003 (at 68 FR 3798), and February 27, 2003 (at 68 FR 8989), the former INS published interim rules first adjusting fees lower, and then readjusting them to the preexisting levels, based upon section 457 of the Homeland Security Act of 2002, Public Law 107–296, and the subsequent repeal of section 457 in section 107 of the Homeland Security Act Amendments of 2003, Div. L. of Public Law 108–7. The former INS received five comments on the January 24 rule and one comment on the February 27 rule. Comments included urging the BCIS to seek appropriated funding to pay for asylum and refugee services instead of application fees, and contending that the high fees are putting the benefit of naturalization beyond the reach of many of our nation's immigrants. In creating the Immigration Examinations Fee Account, Congress intended that the activities supported by this account be self-sustaining, and not be funded by tax dollars (Pub. L. 100–459), with the exception of appropriated funds dedicated specifically towards backlog reduction. The BCIS has been managing this account consistent with federal law and congressional direction. Additionally, the BCIS does have the ability to waive fees on a case-by-case basis. Any applicant or petitioner who has an "inability to pay'' the fees may request a fee waiver. This final rule adopts the fee structure proposed on February 3, 2004, but, in so doing, the BCIS has reviewed and considered the comments made in response to the January 24, 2003, and February 27, 2003, interim rules.

The following is a discussion of the comments received for the February 3, 2004, proposed rule and the BCIS' response.

II. Summary of Comments

A. Form I–600/600A, Petition to Classify an Orphan as an Immediate Relative/ Application for Advance Processing of Orphan Petitions

Forty-two comments were received expressing dissatisfaction with the fee increases associated with Forms I–600 and I–600A, Petition to Classify an Orphan as an Immediate Relative, and the Application for Advance Processing of Orphan Petition, respectively. The combined cost of the Form I–600 and Form I–600A ($525) necessarily reflects the fact that the Form I–600 and Form I–600A consist of two separate, highly labor-intensive adjudications.

Adjudication of the Forms I–600 and I–600A "orphan petitions'' has been, and continues to be, a priority as evidenced by the commitment established in the regulations at 8 CFR 204.3(a)(2). Specifically, orphan petitions are filed at district offices and adjudicated by experienced District Adjudication Officers. This is due to both the complexity of the international adoption process in general and the adjudication process required by statute and regulation. In addition, because of the importance the BCIS places on international adoptions, handling these cases in district offices by experienced officers allows for personalized customer service. District Adjudication Officers may be in constant contact with the petitioner throughout the process of a U.S. citizen's effort to adopt a child from abroad. The earliest contact may be a request for information and forms, followed by the filing of the Form I–600A and the home study. The adjudication of the Form I–600A petition requires knowledge of State law requirements regarding adoptions, including pre-adoption requirements such as counseling in certain States. Each petition must be accompanied by a home study, for which there are State requirements as well as Federal

requirements. Since there is no single national standard, it makes sense to assign these petitions to adjudication officers located in district offices that are better able to stay on top of ever-changing State requirements and establish effective local liaisons.

The home study process is complex and often the adjudication officer must request that additional information be provided in the home study. When the child to be adopted is identified, further information and contact may ensue. To accommodate prospective adoptive parents, the BCIS allows petitioners to submit supporting evidence after initial filing of a Form I–600A. Thus, documentation is usually added to the petition as the adoption process progresses. It is not unusual for a case to be with the BCIS for several months, demanding an intense and protracted level of customer service. There may be frequent communications in person, telephonically, and in writing, between the BCIS, adoption agencies, social workers, and prospective adoptive parents.

The home study review makes this petition particularly labor-intensive. The adjudication officer is tasked with the careful review of the home study, perhaps 10–20 pages long, addressing a number of issues including any history of abuse or arrests. This information is carefully compared against Federal Bureau of Investigation (FBI) fingerprint checks. If necessary, the officer must request and review the arrest dispositions of petitioners with criminal records. When there are discrepancies, the home study must be revised or supplemented to include the new information and consider the impact it has on the placement.

The Form I–600 petition establishes eligibility of a child as an orphan. Adjudication of these petitions requires the BCIS to determine if the child meets the regulatory definition of an orphan. Accordingly, the adjudication officer must develop and maintain a level of expertise in the laws and processes governing adoption in countries from which children are adopted. This assessment may require working with the Department of State or BCIS offices overseas to verify the validity of documents and interpret laws regarding international adoptions in countries other than the United States.

Finally, the Form I–600 adjudication also includes a Form I–604 investigation. The Form I–604, *Request for and Report on Overseas Orphan Investigation,* is used to document the investigations that must be completed in every orphan case before the Form I–600 can be approved. It includes: The child's birth name; date and place of birth; where the child lives; and if the child lives at an orphanage or with someone other than the biological parent(s), how and why that placement occurred; the child's physical and mental condition, and information about any known physical or mental illnesses (*e.g.*, is the child a special needs child); if the child has siblings, and if so, if the child lives with the brothers or sisters; information concerning the child's biological parents and the determination that the child is an orphan because he or she has a ''sole parent'' or ''surviving parent'' (as defined in the regulations); and any other pertinent facts that the investigation uncovers. The purpose of the investigation is to verify that the child is an orphan, address specific concerns articulated by the adjudicating officer or consular officer that can only be resolved by an investigation, and resolve significant differences between the facts presented in the advanced processing application (Form I–600A) or advanced processing of the application (a Form I–600 approved by a BCIS office in the United States) and evidence available at later stages of processing. The investigation is conducted at the overseas visa-issuing post by the BCIS, or by the Department of State if there is no BCIS office at that U.S. Embassy or Consulate. A Form I–604 investigation may require a field investigation entailing travel to a remote location to establish whether or not a child is actually an orphan.

Since the BCIS relies on fees to recover the full cost of processing immigration and naturalization benefits, the increase in fees for the Forms I–600 and I–600A to $525 is necessary to recover the full costs associated with processing orphan petitions, including security enhancements instituted post September 11, 2001. Accordingly, the BCIS will charge a fee of $525 for processing Forms I–600 and I–600A.

B. How Will the BCIS Improve Service?

One hundred and eighty-one comments were received opposing the increase in the fees given the current level of services provided by the BCIS. Many people noted the lengthy waiting times to process their benefit applications as well as the need to improve overall customer service.

The BCIS has made progress in many areas of customer service such as eliminating the lines at a number of its offices (including New York and Miami), introducing on-line options for certain application filing and case status updates, and establishing a bilingual, toll-free customer help-line. Nonetheless, the BCIS is committed to taking further steps to fundamentally transform the administration of citizenship and immigration services. Over the coming year, the BCIS will prioritize customer service and improve application processing times, in addition to security. The agency has already begun implementing significant information technology and process improvements including electronic filing for certain immigration benefit applications. In FY 2002, the President launched a multi-year initiative to eliminate the application backlog and ensure a six-month processing time standard for all immigration benefit applications. The FY 2005 Budget provides an additional $60 million in appropriated funds to support this effort for a total of $160 million in funds available for the backlog efforts. The BCIS plans to achieve the President's goal by FY 2006.

A number of commenters also suggested that the high fees are putting immigration benefits beyond the reach of many of our nation's immigrants. The BCIS does have the ability to waive fees on a case-by-case basis. Any applicant or petitioner who has an ''inability to pay'' the fees may request a fee waiver. However, it should be noted that the biometric fee cannot be waived.

A number of commenters also made specific service improvement ideas, including extending validity periods for Employment Authorizations and Advance Parole documents beyond the current one year, issuing fewer Requests for Evidence, and using SEVIS (Student and Exchange Visitor Information System) information more broadly for other adjudication purposes. The BCIS welcomes public input in this area and will consider it as it moves forward to improve customer service. To the extent processing improvements can be adopted in the future that further increase efficiency or reduce costs, they will be taken into account in any future fee adjustments.

Lastly, a number of commenters mentioned the recent General Accounting Office (GAO) Report on *Immigration Application Fees: Current Fees Are Not Sufficient to Fund U.S. Citizenship and Immigration Services' Operations.* Comments noted that the BCIS does not have a system to track the status of each application as it moves through the process. While such a system undoubtedly would provide additional information on the cost to process pending applications, it is not necessary in order to identify the cost elements that have led to shortfalls in the IEFA, will continue to be incurred, and must be recovered for the BCIS to

process applications. Those costs, as discussed in the proposed and this final rule, are the basis for these fee adjustments. Furthermore, the GAO also concluded that the existing fee schedule is not sufficient to fully fund the BCIS's operations, that the current fee schedule is based on a fee study that did not include all costs of the BCIS's operations, and that costs have increased due to additional processing requirements and other actions not covered by current fees.

Several commenters noted the significant percentage increase in the application fees over the last several years. The vast majority of this increase is attributed to an exhaustive fee review completed in FY 1997, employing an activity-based costing (ABC) methodology to more accurately capture the direct and indirect costs of providing immigration and naturalization services. The ABC methodology represented a significantly improved methodology over previous ones employed by the former INS. This methodology involved time and motion studies to capture the cycle times of individual form types, and allowed the former INS to identify the individual costs of activities involved in the processing of each application and petition. The methodology also allowed for the recovery of costs of services provided to other immigrants at no charge, including services to refugees and asylum applicants. This improved methodology was the basis for the significant fee increases in FY 1999. A General Accounting Office report in September 1998, entitled "INS User Fee Revisions,'' reviewed this methodology and concluded that "On the basis of our discussions with OMB staff and our review of INS' efforts to identify the costs associated with processing applications, we believe that INS complied, to the extent it was able, with available OMB guidance that requires agencies to recover the full costs of providing services.'' The fee adjustments in this rule are based on an incremental increase in application costs of this established methodology.

C. Fee Increases are Necessary

Fifty-six comments were received in favor of the fee increases. In general, these can be divided into two groups: those who supported the proposed fee increases as long as they are accompanied with actual significant improvements in processing times and other customer service, and those whose support for increased fees was not coupled with any stated concern about BCIS customer service. A few commenters stated that the fee increases should be higher. Several others suggested expanding the premium processing fee to the Form I–485 or other BCIS applications, while still others supported sharp increases in EB–5 fees to support the regional center program. Although the reasons provided for supporting the fee increases, or for supporting higher fees, varied substantially from general concerns about immigration levels or the Federal deficit to more specific points about immigration benefit processing, several of the more frequently stated rationales included:

(1) Current fees are too low in relation to the value of the benefit received (U.S. citizenship, for example);

(2) Taxpayers should not pay for the increasing costs of providing immigration and naturalization benefits;

(3) Fee increases are necessary to enhance security;

(4) Fee increases are justified given the increasing demand for immigration and naturalization benefits over the last several years; and

(5) Fee increases are necessary in order to increase the current level of services.

The BCIS believes that the proposed fee increases will lead to and support improved services as previously stated, and disagrees with those commenters who stated that the increases are too small. The BCIS also notes that the $1,000 premium processing fee is a statutory authorization (section 286(u) of the Immigration and Nationality Act) specifically limited to employment-based applications and petitions, and does not seek in this final rule to expand the premium processing service.

D. Why Is BCIS Raising the Fees Instead of Seeking Additional Sources of Funding?

Seventeen commenters urged BCIS to seek additional appropriated funds to cover the costs of military naturalizations, the Refugee Corps, and other immigration benefit services, especially those that the commenters perceived as not directly related to the actual adjudication of the specific application for which the fee was paid. In creating the Immigration Examinations Fee Account, Congress intended that the activities supported by this account be self-sustaining, and not be funded by tax dollars (Pub. L. 100–459), with the exception of appropriated funds dedicated specifically towards backlog reduction. The BCIS has been managing this account consistent with Federal law and congressional direction.

Some of the individual cost elements are discussed more specifically below. With respect to all of the challenged elements, however, the costs are either: (1) Part of the full direct and indirect costs of providing the adjudication to the applicant under the principles of Office of Management and Budget (OMB) Circular A–25, which allocate costs to include, but not be limited to, an appropriate share of direct and indirect personnel costs, physical overhead, consulting, other indirect costs, and management and supervisory costs; or (2) are part of the full costs of providing services to immigrants other than the applicant, as authorized by section 286(m) of the Act; or both.

In a variant on these comments, at least one commenter suggested that because security checks and some other aspects of immigration services funded by these fees provide a public rather than a purely personal benefit, the increases are unwarranted and beyond the scope of the authorizing statutes. Security checks are an integral part of determining the applicant's eligibility for a benefit and are appropriately an item that may be fully recovered through the applicable fee under the OMB Circular A–25 guidance. In addition, the fact that a process benefits the public interest as well as a private party does not mean that it cannot be funded by a user fee paid by the private party. Rather, when the service enables the beneficiary to obtain more immediate or substantial gains or values than those that accrue to the general public, a user fee is appropriate. The entire legal immigration and citizenship process—with respect both to grants of benefits and to denials for national security or other reasons—is one that benefits the public as well as private interests, but its focus on the adjudication of eligibility for individual benefits, as confirmed by section 286(m) of the Act and other broadly-based fee authorizing provisions, makes the fee-based structure entirely lawful and appropriate even when the public as a whole benefits as a result. As OMB Circular A–25 states at paragraph 6.a.3, "when the public obtains benefits as a necessary consequence of an agency's provision of special benefits to an identifiable recipient (*i.e.*, the public benefits are not independent of, but merely incidental to, the special benefits), an agency need not allocate any costs to the public and should seek to recover from the identifiable recipient either the full cost to the Federal Government of providing the special benefit or the market price, whichever applies.'' Furthermore, under the authority of section 286(m) of the Act, user fees may be used—and are used now—not only for the benefit of the user

who paid them and any collateral benefit resulting to the public, but also to benefit the interests of certain others, such as asylum applicants, who do not pay fees.

Some of these commenters suggested, in effect, that fees should be funding of last recourse for immigration services; that is, that the BCIS should be required to have exhausted all possible means of seeking appropriated funds before imposing fee increases. The BCIS disagrees with this characterization. The Immigration and Nationality Act authorizes the recovery of the full costs of providing immigration and naturalization services, including services provided free of charge to many applicants, through application fees. It does not require the BCIS either to seek or to obtain other sources of funding for this purpose, although the President has requested, and Congress to date has provided, appropriations to supplement fee revenues in the area of backlog reduction.

One commenter expressed surprise that the proposed rule had not cited 8 U.S.C. 1573 and other indicia of Congress's strong interest in backlog reduction and directive to the BCIS to achieve this goal. The proposed rule discussed those legal authorities most directly relevant to fee-setting authority. The BCIS agrees with the commenter that Congress desires it to reduce backlogs, and seeks in this rule to obtain a level of resources that will prevent existing backlogs actually from increasing.

E. Litigation Settlements

Six commenters strongly objected to the inclusion of litigation costs as an element in the fee adjustment calculation. As one commenter correctly stated, "The Equal Access to Justice Act ('EAJA') mandates that government agencies pay certain costs when they take a substantially unjustified position in litigation.'' What the commenter describes as "certain costs'' are, more specifically, attorneys' fee awards, which must be paid from agency budgets rather than from the Judgment Fund. *See* 28 U.S.C. 2412(d).

The commenters' assumption that these payments necessarily result from "lost'' cases and EAJA awards by courts, though, is mistaken. Most attorneys'' fee payments arise from settlements in which the government admits neither legal liability under EAJA or any other statute, nor that its position was unjustified—and in fact maintains that its course of conduct was legally correct—but in which the posture of the case, risk management concerns, and the public interest support settling the case and putting the litigation to rest. These are cases in which settlement mutually benefits both parties, otherwise it would not happen. It is not accurate to state or imply that when the United States settles civil litigation with an agreement that includes payment of attorneys' fees it necessarily has "lost'' the case or has by the fact of settlement and payment in any way conceded that its conduct was unlawful or its legal position unjustified.

The comments also fail to recognize that most attorneys' fee payments are currently paid out of fee receipts. That is the way a fee-funded agency, without appropriated funds designated for that purpose, is able to pay them. Accounting for these costs in fee-setting is not a new imposition on the fee-paying public. In other words, this fee increase only changes the form in which the fee-paying public bears the cost of attorneys' fee payments from reduced service on the back end to a very slightly higher fee payment up front.

The BCIS seeks to minimize its litigation exposure by seeking to take responsible legal positions both with respect to setting policies in the first place and the merits of lawsuits against it. The BCIS would greatly prefer not to have to pay attorneys' fees from its budget as opposed to what it would view as more productive uses of resources, but it recognizes its potential obligations under the EAJA statute. It also recognizes that it cannot avoid a measure of litigation exposure as a cost of doing the public's business, and it would not be responsible to pretend that these costs do not exist or that they have no financial effect on the agency's fee-funded operations.

Instead, the BCIS believes that the more appropriate and responsible course of action is to account for attorneys' fee awards, based on actual experience with these costs as an unavoidable element of providing immigration services. It does this so that the provision of adjudication services to fee-paying and other BCIS customers will not be negatively affected by them. To do so does not encourage taking unjustified positions in litigation.

F. Competitive Sourcing Study

Six commenters objected to the inclusion of the cost of a competitive sourcing study. The BCIS needs to be open to new methods of providing immigration and naturalization services that may in time save the fee-paying public both time and money, and this openness from time to time requires up-front investment. Whether that is the case with outsourcing immigration information officers remains to be seen; that is the purpose of the study. Some of the comments appear to be based upon objection to outsourcing this or other functions. While the BCIS respects that view, it disagrees that it is an appropriate basis not to continue with or to fund the study to determine whether it is a substantially valid view in this instance.

G. Nicaraguan Adjustment and Central American Relief Act (NACARA) fees

One commenter objected to increasing fees for NACARA-related applications, primarily on the ground that as an established program with known standards for adjudication, the cost of processing should be declining. In response, the BCIS notes that the fee adjustments relate to costs, including security enhancements conducted since July 2002, that affect NACARA applicants as much as any others. In addition, the premise of the comment that experience with a particular program necessarily results in reduced processing costs is incorrect. The basic nature of a NACARA adjudication—reviewing the evidence in the application and case file (which may be voluminous) in light of relevant legal standards and conducting security and other necessary record checks—is the same now as it was when the program began.

H. Refugee Corps

Eleven commenters objected to funding refugee processing with fee revenues. Although the commenters supported free refugee services, in their view appropriated funds should be used pay for them. This subject has frequently been discussed in former INS rule making publications relating to fees. In repealing section 457 of the Homeland Security Act of 2002 in Public Law 108–7, and thereby restoring the authority of the BCIS to set fees at a level that will recover the costs of refugee and asylum processing, fee waivers, and other free services, Congress reaffirmed its expectation that such services be paid for through the fee account, after a brief period during which it had withdrawn that authority.

I. Inflation Adjustment

Several commenters expressed concern about the provision for inflation adjustments through future notice in the **Federal Register**, including a contention that the phrase "inflation rate enacted by Congress'' was not clear or specific. This provision will permit the BCIS to adjust on a timely basis for regular, fixed increases in costs based on Federal civilian pay increases and non-pay inflationary increases. The BCIS agrees

that the phrase should be clarified to more specifically refer to Federal civilian salary and benefits costs and non-pay costs and therefore has revised the regulation to reference the pay and non-pay inflation adjustments that the Office of Management and Budget (OMB) issues annually for agency use in implementing OMB Circular A–76, Performance of Commercial Activities. In other words, the regulation will enable BCIS to adjust its fees and charges on an annual basis using the inflationary adjustments that the Federal government already uses under Circular A–76 to reflect the impact of inflation on agency costs. If Congress enacts a Federal civilian pay inflation factor that is different than the factor issued by OMB for Circular A–76, BCIS may adjust for these costs during the current year or in a following year.

III. Fee Adjustments

The fee adjustments, as adopted in this rule, are shown as follows:

NEW APPLICATION AND PETITION FEES

Form No.	Description	Fee
I–90	Application to Replace Permanent Resident Card	$185
I–102	Application for Replacement/Initial Nonimmigrant Arrival/Departure Record	155
I–129	Petition for a Nonimmigrant Worker	185
I–129F	Petition for Alien Fiancé(e)	165
I–130	Petition for Alien Relative	185
I–131	Application for Travel Document	165
I–140	Immigrant Petition for Alien Worker	190
I–191	Application for Permission to Return to an Unrelinquished Domicile	250
I–192	Application for Advance Permission to Enter as a Nonimmigrant	250
I–193	Application for Waiver of Passport and/or Visa	250
I–212	Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	250
I–360	Petition for Amerasian, Widow(er), or Special Immigrant	185
I–485	Application to Register Permanent Residence or to Adjust Status	315
I–526	Immigrant Petition by Alien Entrepreneur	465
I–539	Application to Extend/Change Nonimmigrant Status	195
I–600/600A	Petition to Classify Orphan as an Immediate Relative/Application for Advance Processing or Orphan Petition	525
I–601	Application for Waiver of Grounds of Excludability	250
I–612	Application for Waiver of the Foreign Residence Requirement	250
I–687	For Filing Application for Status as a Temporary Resident	240
I–690	Application for Waiver of Excludability	90
I–694	Notice of Appeal of Decision	105
I–695	Application for Replacement Employment Authorization or Temporary Residence Card	65
I–698	Application to Adjust Status from Temporary to Permanent Resident	175
I–751	Petition to Remove the Conditions on Residence	200
I–765	Application for Employment Authorization	175
I–817	Application for Family Unity Benefits	195
I–824	Application for Action on an Approved Application or Petition	195
I–829	Petition by Entrepreneur to Remove Conditions	455
I–881	NACARA—Suspension of Deportation or Application for Special Rule Cancellation of Removal for adjudication by the Department of Homeland Security.	275
I–881	NACARA—Suspension of Deportation or Application for Special Rule Cancellation of Removal for adjudication by the Immigration Court.	155
I–914	Application for T Nonimmigrant Status	255
N–300	Application to File Declaration of Intention	115
N–336	Request for Hearing on a Decision in Naturalization Procedures	250
N–400	Application for Naturalization	320
N–470	Application to Preserve Residence for Naturalization Purposes	150
N–565	Application for Replacement Naturalization Citizenship Document	210
N–600	Application for Certification of Citizenship	240
N–600K	Application for Citizenship and Issuance of Certificate under Section 322	240
	For Capturing Biometric Information	70

IV. Technical Improvements

This final rule also makes several minor, nonsubstantive changes to 8 CFR 103.7 that were not included in the proposed rule. In particular, these changes replace references to the former INS with reference to the Department of Homeland Security (DHS). In so doing, they conform the published text of the regulations with the changes already in fact made to them by the ''deeming'' provision (section 1512(d)) of the Homeland Security Act. The changes also remove references to Department of Justice forms and procedures now covered by 8 CFR part 1003. The reference to the discontinued Form I–290A, which was replaced in 1996 by Forms EOIR–26 and EOIR–29, has also been removed.

The Department of Justice intends to make similar updates and improvements to its regulations in 8 CFR parts 1003 and 1103. Until conforming changes are promulgated, the fee adjustments made by this final rule shall supersede any fee amounts stated in 8 CFR 1103.7(b) with respect to any fee paid to the Department of Homeland Security by any person, including any alien in proceedings before the Executive Office for Immigration Review, to the extent there are any inconsistencies between the fees as stated in the two regulations.

Good Cause Exception

Although this rule falls under the category of major rule as that term is defined in 5 U.S.C. 804(2)(A), the DHS finds that under 5 U.S.C. 808(2) and 5 U.S.C. 553(d)(3) good cause exists to make the rule take effect 15 days from the date of publication in the **Federal Register**, for the following reasons: the

BCIS must collect fee funds to provide immigration and naturalization benefits, but absent prompt change in the fee schedule, the BCIS will not have sufficient resources to process immigration benefit applications and adequately perform its mission. In particular, the security enhancements funded by the increased fees are important to the national security interests of the United States. To continue performing comprehensive security enhancements to fully meet homeland security needs, it is essential that the BCIS recover the costs of this workload as promptly as possible. In addition, implementing this rule at the earliest feasible date will assist the BCIS in enhancing its services and reducing processing times, which is to the benefit of BCIS customers and the public interest. In particular, the vast majority of customers who do not present a danger to the national security or public safety will benefit from the increased resources available in this fiscal year through more rapid implementation. Accordingly, the DHS finds that it would be contrary to the public interest for this rule to go into effect 60 days after its publication, and that there is good cause for the rule to go into effect 15 days from its publication. In order to assist the public and mitigate any potential harmful effect on customers as a result of this implementation schedule, the BCIS plans an aggressive outreach and informational campaign involving the internet and other media resources.

Regulatory Flexibility Act

This rule has been reviewed in accordance with 5 U.S.C. 605(b), and the Department of Homeland Security certifies that this rule will not have a significant economic impact on a substantial number of small entities. The majority of applications and petitions are submitted by individuals and not small entities as that term is defined in 5 U.S.C. 601(6).

BCIS acknowledges, however, that a number of small entities, particularly those filing business-related applications and petitions, such as Form I–140, Immigrant Petition for Alien Worker; Form I–526, Immigrant Petition by Alien Entrepreneur; and Form I–829, Petition by Entrepreneur to Remove Conditions, may be affected by this rule. For the FY 2004/2005 biennial time period, BCIS projects that approximately 190,000 Forms I–140, 435 Forms I–526, and 508 Forms I–829 will be filed. This volume represents petitions filed by a variety of businesses, ranging from large multinational corporations to small domestic businesses. However, even if all of the employers applying for benefits met the definition of small businesses, the resulting degree of economic impact would not require a Regulatory Flexibility Analysis to be performed. None of the public comments indicated that the rule would have a significant economic impact on small entities.

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 a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will result in an annual effect on the economy of more than $100 million, in order to generate the revenue necessary to fully fund the increased cost associated with the processing of immigration benefit applications and associated support benefits; the full cost of providing similar benefits to asylum and refugee applicants; and the full cost of similar benefits provided to other immigrants, as specified in the regulation, at no charge. The increased costs will be recovered through the fees charged for various immigration benefit applications.

Executive Order 12866

This rule is considered by the Department of Homeland Security to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. The implementation of this final rule would provide BCIS with an additional $232 million in FY 2004 and $394 million in FY 2005 in annual fee revenue, based on a projected annual fee-paying volume of 6.8 million applications and petitions, over the fee revenue that would be collected under the current fee structure. This increase in revenue will be used pursuant to subsections 286(m) and (n) of the Immigration and Nationality Act (Act) to fund the full costs of processing immigration benefit applications and associated support benefits; the full cost of providing similar benefits to asylum and refugee applicants; and the full cost of similar benefits provided to other immigrants at no charge. Activities not directly comprising the processing of fee paid-applications are discussed elsewhere in the preamble, such as the section of the summary of the comments entitled ''Refugee Corps'' and ''Why is BCIS Raising the Fees Instead of Seeking Additional Sources of Funding?''. If the BCIS 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 BCIS' costs and projected volumes that were available at the time of the rule. Accordingly, this rule has been submitted to the Office of Management and Budget for clearance.

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, the Department of Homeland Security 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.

However, it should be noted that BCIS solicited public comments on the change of fees in the proposed rule which was published in the **Federal Register** on February 3, 2004. It should also be noted that the changes to the fees will require changes to the application/petition forms to reflect the new fees. OMB has approved changes to the appropriate forms, consistent with the provisions in this final rule.

List of Subjects in 8 CFR Part 103

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

■ Accordingly, the interim rules amending 8 CFR part 103 which were published at 68 FR 3798 on January 24, 2003, and 68 FR 8989 on February 27, 2003, are adopted as a final rule without change. In addition, part 103 of chapter I of title 8 of the Code of Federal Regulations is 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, 552(a); 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. Section 103.7 is amended by:
■ a. Revising paragraph (a);
■ b. In paragraph (b), by removing the entry ''For fingerprinting by the Service'' and adding the entry ''For capturing biometric information'' in its place, and by revising the entries for the forms set forth below, except for Form N–600K;
■ c. Adding the entry for ''Form N–600K'' and revising the entry for ''Motion'' the second time it appears in paragraph (b)(1);
■ d. Removing the entries ''Form EOIR–40'', ''Form EOIR–42'', ''Form I–290A'', ''Form N–643'', and ''Motion'' the first time it appears in paragraph (b)(1);
■ e. Revising paragraph (b)(2);
■ f. Adding new paragraphs (b)(3) and (b)(4); and by
■ g. Revising paragraph (c).

The revisions and additions read as follows:

§ 103.7 Fees.

(a) *Remittances.*

(1) Fees shall be submitted with any formal application or petition prescribed in this chapter in the amount prescribed by law or regulation. Except for fees remitted directly to the Board of Immigration Appeals pursuant to the provisions of 8 CFR 1003.8, or as the Attorney General otherwise may provide by regulation, any fee relating to any Department of Justice Executive Office for Immigration Review proceeding shall be paid to, and accepted by, any BCIS office authorized to accept fees. The immigration court does not collect fees. Payment of any fee under this section does not constitute filing of the document with the Board of Immigration Appeals or with the Immigration Court. The Department of Homeland Security shall return to the payer, at the time of payment, a receipt for any fee paid. The BCIS shall also return to the payer any documents, submitted with the fee, relating to any Immigration Court proceeding.

(2) Remittances must be drawn on a bank or other institution located in the United States and be payable in United States currency. Fees in the form of postage stamps shall not be accepted. Remittances to the Department of Homeland Security shall be made payable to the ''Department of Homeland Security'' except that in case of applicants residing in the Virgin Islands of the United States, the remittances shall be made payable to the ''Commissioner of Finance of the Virgin Islands'' and, in the case of applicants residing in Guam, the remittances shall be made payable to the ''Treasurer, Guam.'' If an application to the Department of Homeland Security is submitted from outside the United States, remittance may be made by bank international money order or foreign draft drawn on a financial institution in the United States and payable to the Department of Homeland Security. Remittances to the Board of Immigration Appeals shall be made payable to the ''United States Department of Justice,'' in accordance with 8 CFR 1003.8. A charge of $30.00 will be imposed if a check in payment of a fee or any other matter is not honored by the bank or financial institution on which it is drawn. A receipt issued by a Department of Homeland Security officer for any remittance shall not be binding upon the Department of Homeland Security if the remittance is found uncollectible. Furthermore, legal and statutory deadlines will not be deemed to have been met if payment is not made within 10 business days after notification by the Department of Homeland Security of the dishonored check.

(b) * * *

(1) * * *

* * * * *

For capturing biometric information. A service fee of $70 will be charged for any individual who is required to have biometric information captured in connection with an application or petition for certain immigration and naturalization benefits (other than asylum), and whose residence is in the United States.

* * * * *

Form I–90. For filing an application for a Permanent Resident Card (Form I–551) in lieu of an obsolete card or in lieu of one lost, mutilated, or destroyed, or for a change in name—$185.

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Form I–102. For filing a petition for an application (Form I–102) for Arrival/Departure Record (Form I–94) or Crewman's Landing (Form I–95), in lieu of one lost, mutilated, or destroyed—$155.

Form I–129. For filing a petition for a nonimmigrant worker—$185.

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Form I–129F. For filing a petition to classify a nonimmigrant as a fiancée or fiancé under section 214(d) of the Act—$165.

Form I–130. For filing a petition to classify status of an alien relative for issuance of an immigrant visa under section 204(a) of the Act—$185.

Form I–131. For filing an application for travel documents—$165.

Form I–140. For filing a petition to classify preference status of an alien on the basis of profession or occupation under section 204(a) of the Act—$190.

Form I–191. For filing an application for discretionary relief under section 212(c) of the Act—$250.

Form I–192. For filing an application for discretionary relief under section 212(d)(3) of the Act, except in an emergency case, or where the approval of the application is in the interest of the United States Government—$250.

Form I–193. For filing an application for waiver of passport and/or visa—$250.

Form I–212. For filing an application for permission to reapply for an excluded, deported or removed alien, an alien who has fallen into distress, an alien who has been removed as an alien enemy, or an alien who has been removed at government expense in lieu of deportation—$250.

* * * * *

Form I–360. For filing a petition for an Amerasian, Widow(er), or Special Immigrant—$185, except there is no fee for a petition seeking classification as an Amerasian.

Form I–485. For filing an application for permanent resident status or creation of a record of lawful permanent residence—$315 for an applicant 14 years of age or older; $215 for an applicant under the age of 14 years; no fee for an applicant filing as a refugee under section 209(a) of the Act.

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Form I–526. For filing a petition for an alien entrepreneur—$465.

Form I–539. For filing an application to extend or change nonimmigrant status—$195.

* * * * *

Form I–600. For filing a petition to classify an orphan as an immediate relative for issuance of an immigrant visa under section 204(a) of the Act. (When more than one petition is submitted by the same petitioner on behalf of orphans who are brothers or sisters, only one fee will be required.)—$525.

Form I–600A. For filing an application for advance processing of orphan petition. (When more than one petition is submitted by the same petitioner on behalf of orphans who are brothers or sisters, only one fee will be required.)—$525.

Form I–601. For filing an application for waiver of ground of inadmissibility under section 212(h) or (i) of the Act. (Only a single application and fee shall be required when the alien is applying simultaneously for a waiver under both those subsections.)—$250.

Form I–612. For filing an application for waiver of the foreign-residence requirement under section 212(e) of the Act—$250.

Form I–687. For filing an application for status as a temporary resident under section

245A(a) of the Act. A fee of $240 for each application or $105 for each application for a minor child (under 18 years of age) is required at the time of filing with the Department of Homeland Security. The maximum amount payable by a family (husband, wife, and any minor children) shall be $585.

Form I–690. For filing an application for waiver of a ground of inadmissibility under section 212(a) of the Act as amended, in conjunction with the application under sections 210 or 245A of the Act, or a petition under section 210A of the Act—$90.

Form I–694. For appealing the denial of an application under sections 210 or 245A of the Act, or a petition under section 210A of the Act—$105.

Form I–695. For filing an application for replacement of temporary resident card (Form I–688)—$65.

Form I–698. For filing an application for adjustment from temporary resident status to that of lawful permanent resident under section 245A(b)(1) of the Act. For applicants filing within 31 months from the date of adjustment to temporary resident status, a fee of $135 for each application is required at the time of filing with the Department of Homeland Security. The maximum amount payable by a family (husband, wife, and any minor children (under 18 years of age living at home)) shall be $405. For applicants filing after 31 months from the date of approval of temporary resident status, who file their applications on or after July 9, 1991, a fee of $175 (a maximum of $525 per family) is required. The adjustment date is the date of filing of the application for permanent residence or the applicant's eligibility date, whichever is later.

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Form I–751. For filing a petition to remove the conditions on residence, based on marriage—$200.

Form I–765. For filing an application for employment authorization pursuant to 8 CFR 274a.13—$175.

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Form I–817. For filing an application for voluntary departure under the Family Unity Program—$195.

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Form I–824. For filing for action on an approved application or petition—$195.

Form I–829. For filing a petition by entrepreneur to remove conditions—$455.

Form I–881. For filing an application for suspension of deportation or special rule cancellation of removal (pursuant to section 203 of Public Law 105–100):

— $275 for adjudication by the Department of Homeland Security, except that the maximum amount payable by family members (related as husband, wife, unmarried child under 21, unmarried son, or unmarried daughter) who submit applications at the same time shall be $550.

— $155 for adjudication by the Immigration Court (a single fee of $155 will be charged whenever applications are filed by two or more aliens in the same proceedings). The $155 fee is not required if the Form I–881 is referred to the Immigration Court by the Department of Homeland Security.

* * * * *

Form I–914. For filing an application to classify an alien as a nonimmigrant under section 101(a)(15)(T) of the Act (victims of a severe form of trafficking in persons and their immediate family members)—$255. For each immediate family member included on the same application, an additional fee of $105 per person, up to a maximum amount payable per application of $510.

Form N–300. For filing an application for declaration of intention—$115.

Form N–336. For filing a request for hearing on a decision in naturalization proceedings under section 336 of the Act—$250.

Form N–400. For filing an application for naturalization—$320. (There is no fee charged for an application filed on or after October 1, 2004, by an applicant who meets the requirements of sections 328 or 329 of the Act with respect to military service.)

* * * * *

Form N–470. For filing an application for benefits under section 316(b) or 317 of the Act—$150.

Form N–565. For filing an application for a certificate of naturalization or declaration of intention in lieu of a certificate or declaration alleged to have been lost, mutilated, or destroyed; for a certificate of citizenship in a changed name under section 343(c) of the Act; or for a special certificate of naturalization to obtain recognition as a citizen of the United States by a foreign state under section 343(b) of the Act—$210.

Form N–600. For filing an application for a certificate of citizenship under section 309(c) or section 341 of the Act—$240, for applications filed on behalf of a biological child and $200 for applications filed on behalf of an adopted child.

Form N–600K. For filing an application for citizenship and issuance of certificate under section 322 of the Act—$240, for an application filed on behalf of a biological child and $200 for an application filed on behalf of an adopted child.

* * * * *

Motion. For filing a motion to reopen or reconsider any decision under the immigration laws in any type of proceeding over which the Executive Office for Immigration Review does not have jurisdiction. No fee shall be charged for a motion to reopen or reconsider a decision on an application for relief for which no fee is chargeable or for any motion to reopen or reconsider made concurrently with any initial application for relief under the immigration laws for which no fee is chargeable. (The fee of $110 shall be charged whenever an appeal or motion is filed by or on behalf of two or more aliens and all such aliens are covered by one decision. When a motion to reopen or reconsider is made concurrently with any application for relief under the immigration laws for which a fee is chargeable, the motion is filed and, if the motion is granted, the requisite fee for filing the application for relief will be charged and must be paid within the time specified in order to complete the application.)—$110.

* * * * *

(2) Fees for production or disclosure of records under 5 U.S.C. 552 shall be charged in accordance with the regulations of the Department of Homeland Security at 6 CFR 5.11.

(3) The fees prescribed in paragraph (b)(1) of this section shall be adjusted annually on or after October 1, 2005, by publication of an inflation adjustment. The inflation adjustment will be announced by notice in the **Federal Register**, and the adjustment shall be a composite of the Federal civilian pay raise assumption and non-pay inflation factor for that fiscal year issued by the Office of Management and Budget for agency use in implementing OMB Circular A–76, weighted by pay and non-pay proportions of total funding for that fiscal year. If Congress enacts a different Federal civilian pay raise percentage than the percentage issued by OMB for Circular A–76, the Department of Homeland Security may adjust the fees, during the current year or a following year to reflect the enacted level. The prescribed fee or charge shall be the amount prescribed in paragraph (b)(1) of this section, plus the latest inflation adjustment, rounded to the nearest $5 increment.

(4) For the schedule of fees relating to proceedings before the immigration judges and the Board of Immigration Appeals, *see* 8 CFR 1103.7.

(c) *Waiver of fees.* (1) Except as otherwise provided in this paragraph (c), any of the fees prescribed in paragraph (b) of this section relating to applications, petitions, appeals, motions, or requests may be waived by the Department of Homeland Security in any case under its jurisdiction in which the alien or other party affected is able to substantiate that he or she is unable to pay the prescribed fee. The person seeking a fee waiver must file his or her affidavit, or unsworn declaration made pursuant to 28 U.S.C. 1746, asking for permission to prosecute without payment of fee of the application, petition, appeal, motion, or request, and stating his or her belief that he or she is entitled to or deserving of the benefit requested and the reasons for his or her inability to pay. The officer of the Department of Homeland Security having jurisdiction to render a decision on the application, petition, appeal, motion, or request may, in his or her discretion, grant the waiver of fee. Fees for "Passenger Travel Reports via Sea and Air'' and for special statistical tabulations may not be waived. The payment of the additional sum prescribed by section 245(i) of the Act

when applying for adjustment of status under section 245 of the Act may not be waived. The fee for Form I–907, Request for Premium Processing Services, may not be waived. For provisions relating to the authority of the immigration judges or the Board to waive fees prescribed in paragraph (b) of this section in cases under their jurisdiction, *see* 8 CFR 1003.24 and 1003.8.

(2) Fees under the Freedom of Information Act, as amended, may be waived or reduced where the Department of Homeland Security determines such action would be in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(3) When the prescribed fee is for services to be performed by the clerk of court under section 344(a) of the Act, the affidavit for waiver of the fee shall be filed with the district director or officer in charge of the BCIS having administrative jurisdiction over the place in which the court is located at least 7 days prior to the date the fee is required to be paid. If the waiver is granted, there shall be delivered to the clerk of court by a BCIS representative on or before the date the fee is required to be paid, a notice prepared on BCIS letterhead and signed by the officer granting the waiver, that the fee has been waived pursuant to this paragraph.

(4) Fees for applications for Temporary Protected Status may be waived pursuant to 8 CFR 244.20.

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Dated: April 13, 2004.

Tom Ridge,

Secretary of Homeland Security.

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