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DEPARTMENT OF STATE

22 CFR Part 22

[Public Notice: 7706]

RIN: 1400-AC57

Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates

AGENCY: Bureau of Consular Affairs, State.

ACTION: Final Rule.

SUMMARY: This rule adopts without change the interim final rule published in the *Federal Register*, 75 FR 28188, on May 20, 2010 (Public Notice 7018). Specifically, the rule proposed changes to the Schedule of Fees for Consular Services (Schedule) for nonimmigrant visa and border crossing card application processing fees. This rulemaking adopts as final the change from \$131 to \$140 for the fee charged for the processing of an application for most non-petition-based nonimmigrant visas (Machine-Readable Visas or MRVs) and adult Border Crossing Cards (BCCs). The rule also provides new tiers of the application fee for certain categories of petition-

based nonimmigrant visas and treaty trader and investor visas. Finally, the rule adopts as final the increase in the BCC fee charged to Mexican citizens under age 15 who apply in Mexico, and whose parent or guardian already has a BCC or is applying for one, from \$13 to \$14. This latter change results from a congressionally mandated surcharge that went into effect in 2009.

The Department of State is adjusting the fees to ensure that sufficient resources are available to meet the costs of providing consular services in light of an independent cost of service study's findings that the U.S. Government is not fully covering its costs for the processing of these visas under the current cost structure. The Department endeavors to recover the cost of providing services that benefit specific individuals, as opposed to the general public. *See* OMB Circular A-25, section 6(a)(1), (a)(2)(a). For this reason, the Department has adjusted the Schedule.

EFFECTIVE DATE: This rule is effective [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Polly Hill, Office of the Comptroller, Bureau of Consular Affairs, Department of State; phone: 202-663-1301, telefax: 202-663-2599; e-mail: fees@state.gov.

SUPPLEMENTARY INFORMATION:

Background

For the complete explanation of the background of this rule, including the rationale for it, the Department's authority to make the fee changes in question, and an explanation of the CoSM that produced the fee amounts, consult the prior public notices: 75 FR 66076 (Dec. 14, 2009); 75 FR 14111 (Mar. 24, 2010); and 75 FR 28188 (May 20, 2010).

The Department published a proposed rule in the *Federal Register*, 74 FR 66076, on December 14, 2009, proposing to amend 22 C.F.R. § 22.1. Specifically, the rule proposed changes to the Schedule of Fees for Consular Services for nonimmigrant visa and border crossing card application processing fees, and provided 60 days for comments from the public. In response to requests by the public for more information and a further opportunity to submit comments, the Department published a supplementary notice in the *Federal Register*, 75 FR 14111, on March 24, 2010. The supplementary notice provided a more detailed explanation of the CoSM, the activity-based costing model that the Department used to determine the proposed fees for consular services, and reopened the comment period for an additional 15 days. During this and the previous 60-day comment period, 81 comments were received, either by email or through the submission process at www.regulations.gov. The Department analyzed these 81 comments in the interim final rule at 75 FR 28188, 28190–82, and does not reproduce that analysis here. Instead, the current notice addresses only the additional comments received in the further 60 days during which the comment period for this interim final rule was open. In total, the public has been given 135 days to comment on this change to the Schedule of Fees.

This rule establishes the following fees for these categories corresponding to projected cost figures for the visa category as determined by the CoSM. These fees incorporate the \$1 Wilberforce surcharge that must be added to all nonimmigrant MRVs, *see* Pub. L. 110-457, Title II, § 239(a):

- H, L, O, P, Q, and R: \$150;
- E: \$390; and
- K: \$350.

The Department rounded these fees to the nearest \$10 for the ease of converting to foreign currencies, which are most often used to pay the fee. The additional revenue resulting from this rounding will be used to cover the costs of Global Support Strategy (GSS) services.

Analysis of Comments

The proposed rule was published for comment on December 14, 2009. During the comment period, which initially closed February 12, 2010 and was subsequently extended until April 8, 2010, the Department received 81 comments. For an analysis of those comments, please see the interim final rule in the *Federal Register*, 75 FR 14111, published May 20, 2010 (Public Notice 7018).

The Department published the interim final rule on May 20, 2010, and reopened the comment period for an additional 60 days. During that comment period, which closed on July 19, 2010, the Department received an additional nine comments. The following analysis addresses these nine comments. Of the nine, three were in support of the increase. Reasons for support included endorsement of the fee changes as necessary to allow the Department to meet its budget.

Two comments criticized the increased K-category fiancé(e) visa fee, arguing that the increase in the K visa fee will make it more difficult for U.S. citizens to bring their loved ones to the United States. While the Department appreciates the financial difficulties that increased fees can create, it has determined that it must recover the cost of providing the service. The Department is adjusting the fee for K-category fiancé(e) visas from \$131 to \$350 specifically because adjudicating the K visa requires a review of extensive documentation and a more in-depth interview of the applicant than other categories of Machine Readable Visas (MRVs). Rather than setting a single MRV fee applicable to all MRVs regardless of category as was done in the past,

the Department has concluded that it will be more equitable to set the fee for each MRV category at a level commensurate with the average cost of producing that particular product. The more extensive K visa processing procedure requires pre-processing of the case at the National Visa Center, where the petition is received from the Department of Homeland Security (DHS), packaged, and assigned to the appropriate embassy or consulate. K visa processing also requires intake and review of materials not required by some other categories of nonimmigrant visas, such as the I-134 affidavit of support and the DS-2054 medical examination report. *See* 75 FR 14111, 14113 (discussing some of the extra steps needed to process a K visa).

The higher incidence of fraud in K visa applications also requires, in many cases, a more extensive fraud investigation than is necessary for some other types of visa. Indeed, the Department of State's processing of K visas is almost identical to that required for a family-based immigrant visa, so it follows that the costs of K visa processing are similar to those for immigrant visas. Spouses, children, and parents applying for immigrant visas to the United States currently pay the Department of State a \$330 application processing fee as well as a \$74 immigrant visa security surcharge, Items 32 and 36 on the Schedule of Fees.

The Department received three comments from the same commenter concerning instances in which specific subsets of E-category or H-category visas appear to the commenter to require simpler processing, and suggesting that those subsets should pay lower fees than standard E and H applicants. The Department decided to charge a higher fee for visa categories that require more complex processing, seeing this as a more equitable solution than spreading the additional cost to produce certain visa categories (H, L, O, P, Q, R, E, and K) across all visa categories. The commenter appears not to challenge this decision as concerns tiered fees for visa categories more broadly. He argued, however, that there is no reason to charge more than \$140—the base

MRV fee—to Singaporean and Chilean H-1B1 visa applicants; such applicants, if approved, qualify for non-petition-based visas to work in a specialty occupation under legislation implementing treaties between the United States and those countries. The commenter made a similar argument with respect to E-3 visas issued to Australian applicants pursuant to legislation that authorizes non-petition based visas for Australians to work in a specialty occupation; he argued that E-3s should cost the same as H-1B1 visas for Singaporean and Chilean applicants and thus have the same fee. Another commenter suggested that the costs of processing E visas for spouses and children must be less than for principal applicants, and that therefore these derivative applicants should be charged a lower fee.

Yet as the proposed and interim final rules explained, the CoSM showed that some categories of visa require more time and resources to process than others. On average, H-category visas require the Department to perform a number of additional tasks and processes beyond those that are necessary for producing a BCC or other MRV, including review of extensive documentation and a more in-depth interview of the applicant. E-category visas require considerably more tasks on average than H-category visas and most other MRV categories. The Department has previously explained that, because E-3 visas are not petition-based when issued overseas, they require the Department of State visa adjudicator to both determine whether the employment falls under the E-3 program (similar to the work DHS performs in adjudicating a petition), and assess the eligibility of the applicant; this process is more like that required for other E visas than the process for most H visas, for which DHS has already adjudicated a petition. *See* 75 FR 28188, 28191.

In addition, the fees established by this rule are based on unit costs—global average costs for service types as a whole. The most recent CoSM, on which the new Schedule of Fees is based,

improved substantially upon prior cost of service models by identifying unit costs not just for nonimmigrant visas as a whole, but for specific visa classes that involved more work (e.g., H, E, K, etc.). This CoSM did not, however, distinguish between subcategories of visas (e.g., E-1 versus E-3; H versus H-1B1). Instead, the cost model averaged together the cost of processing all subcategories of a particular type of visa. Admittedly, the amount of resources required to adjudicate individual applicants can vary significantly from case to case. As an example, a B1/B2 applicant could be a individual with a long history of good travel to the United States, and the adjudication could be made in just minutes; a different B1/B2 applicant could, however, be seeking to travel to the United States for extensive medical care over a period of years, which would require the officer to spend much more time considering the case before making a decision. The Department does not, however, charge these applicants different fees based on the time spent. The cost of the more time-consuming case and the cost of the less time-consuming case are both taken into account in determining an average unit cost for the visa category. In the same vein, the time spent adjudicating a principal applicant for an E-1 visa generally will take more time than that required to adjudicate that applicant's minor, accompanying children; the application fee charged to those applicants is based on a unit cost that takes into account both the higher-cost and the lower-cost processing. The Government Accountability Office (GAO) has noted that government agencies should define the classes of persons subject to their fees by the "smallest unit that is practical." GAO, 3 *Principles of Federal Appropriations Law* (3d ed. 2008) 12-161 (citing *Electronic Industries Ass'n v. FCC*, 554 F. 2d 1109, 1116 (D.C. Cir. 1976)). The Department determined that establishing four separate tiers of fees in this latest Schedule, based on visa category, was equitable and practical. The Department will explore the practicability of expanding in a future fee schedule the number of separate unit costs examined in the CoSM to

the visa subcategory level, while keeping in mind the need to balance the administrative burden with the potential benefit to applicants.

A comment submitted jointly by United Airlines, Inc., and the U.S. Travel Association expressed concerns about how the CoSM ensured that administrative support costs were correctly attributed to individual consular services, and urged that costs for positions not dedicated to fee-based consular activities be excluded from the CoSM. As previously stated, to address the sharing and allocation of administrative support costs at embassies and consulates, the Department uses the International Cooperative Administrative Support Services (ICASS). The CoSM includes not all Department of State ICASS costs, but rather only the share of those costs equal to the share of consular “desks” at all embassies and consulates. The consular share of ICASS costs was then assigned within the model to all overseas services. While the Department will continue to endeavor to assign and allocate costs in the most accurate manner possible, its CoSM includes all costs for consular services—whether a fee is charged for those services or not. The Department will review, and continuously seek to keep accurate, the calculations used for allocating ICASS costs to specific service types.

REGULATORY FINDINGS

Administrative Procedure Act

The provisions of 5 U.S.C. §§ 553 and 554 have been followed through the course of this rule making, and the Department cannot identify any adverse impact on the conduct of foreign affairs from the use of these procedures. This final rule is effective upon publication. This rule was previously published as an interim final rule on May 20, 2010, with an effective date 15 days

from the date of that publication (*i.e.*, on June 4, 2010). The Department provided “good cause” justification at that time under 5 U.S.C. §553(d)(3). *See* 75 F.R. at 28192-28193.

Regulatory Flexibility Act

This rulemaking is subject to the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*; however, no action is required under this Act. The Department has reviewed this rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities as defined in 5 U.S.C. § 601(6). This rule raises the application processing fee for nonimmigrant visas. Although the issuance of some of these visas is contingent upon approval by DHS of a petition filed by a U.S. company with DHS, and these companies pay a fee to DHS to cover the processing of the petition, the visa itself is sought and paid for by an individual foreign national overseas who seeks to come to the United States for a temporary stay. The amount of the petition fees that are paid by small entities to DHS is not controlled by the amount of the visa fees paid by individuals to the Department of State. While small entities may be required to cover or reimburse employees for application fees, the exact number of such entities that does so is unknown. Given that the increase in petition fees accounts for only 7 percent of the total percentage of visa fee increases, the modest 15 percent increase in the application fee for employment-based nonimmigrant visas is not likely to have a significant economic impact on the small entities that choose to reimburse the applicant for the visa fee.

Unfunded Mandates 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 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, 2 U.S.C. §§ 1501–1504.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. § 804(2). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Executive Order 12866

OMB considers this rule to be a “significant regulatory action” under Executive Order 12866, section 3(f), *Regulatory Planning and Review*, September 30, 1993. Accordingly, this rule was submitted to OMB for review. This rule is necessary in light of the Department of State’s CoSM finding that the cost of processing nonimmigrant visas has increased since the fee was last set in 2007. The Department is setting the nonimmigrant visa fees in accordance with 31 U.S.C. § 9701 and other applicable legal authority, as described in detail in other notices associated with this rulemaking (RIN 1400-AC57). *See, e.g.*, 31 U.S.C. § 9701(b)(2)(A) (agency head may prescribe regulations establishing charge for service or thing of value provided by agency based on, *inter alia*, costs to Government). This regulation sets the fees for nonimmigrant visas at the amount required to recover the costs associated with providing this service to foreign nationals.

Executive Order 13563

The Department of State has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Executive Orders 12372 and 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, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on federal programs and activities do not apply to this rule.

Executive Order 13175

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of section 5 of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rule does not impose any new or modify any existing reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 22

Consular services, fees, passports and visas.

Accordingly, for the reasons stated in the preamble, 22 CFR part 22 is amended as follows:

PART 22--[AMENDED]

1. The authority citation for part 22 is revised to read as follows:

AUTHORITY: 8 U.S.C. 1101 note, 1153 note, 1183a note, 1351, 1351 note, 1713, 1714, 1714 note; 10 U.S.C. 2602(c); 11 U.S.C. 1157 note; 22 U.S.C. 214, 214 note, 1475e, 2504(a), 4201, 4206, 4215, 4219, 6551; 31 U.S.C. 9701; Exec. Order 10,718, 22 FR 4632 (1957); Exec. Order 11,295, 31 FR 10603 (1966).

2. Revise § 22.1 Item 21 to read as follows:

§ 22.1 Schedule of fees.

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SCHEDULE OF FEES FOR CONSULAR SERVICES

Item No.	Fee
* * * * *	
Nonimmigrant Visa Services	
21. Nonimmigrant visa and border crossing card application processing fees (per person):	
(a) Non-petition-based nonimmigrant visa (except E category)	\$140
(b) H, L, O, P, Q and R category nonimmigrant visa	\$150
(c) E category nonimmigrant visa	\$390
(d) K category nonimmigrant visa	\$350
(e) Border crossing card – age 15 and over (valid 10 years)	\$140
(f) Border crossing card – under age 15; for Mexican citizens if parent or guardian has or is applying for a border crossing card (valid 10 years or until the applicant reaches age 15, whichever is sooner)	\$14
* * * * *	

August 9, 2011
(Date)

Patrick F. Kennedy,
Under Secretary of State for Management,
Department of State.

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